

# **Human Rights and Jurisdiction: General Observations and Impact on the Doctrines of *Forum Non Conveniens* and *Forum Conveniens***

Pascal Grolimund\*

## **Part I: Art. 6(1) ECHR – An Additional Approach on the Way to a Uniform European Civil Procedure Law?**

### ***A. Introduction***

On 7 and 8 June 2001, a number of experts of international civil procedure law attended an international symposium on the future of international civil procedure law in Basel. They had come, in particular, to discuss the latest developments and the prospects of European Civil Procedure Law. A brief look at the various topics which were considered at the symposium<sup>1</sup> reveals the scope and the meaning of the term ‘European Civil Procedure Law’. It consists of the common procedural rules which apply in the Member States of the European Union (EU) with respect to private law cases. The core of these common procedural rules has, from the outset, been the provisions of the Brussels Convention, now transformed into the shape of a Regulation under European Community law.<sup>2</sup> This Regulation is surrounded by other – new – Community legislation in the field of international civil procedure law, for example, a regulation concerned with the jurisdiction and the enforcement of foreign

---

\* I am grateful to the Swiss National Science Foundation and the Janggen-Pöhn-Stiftung for their generous financial support of my research, as well as to my friends, Ms Qianlan Wu, Mr Olivier Blanc and Mr André Wenker, for helping me to prepare my speech for the symposium in Basel.

<sup>1</sup> See the other contributions contained in this issue of the European Journal of Law Reform.

<sup>2</sup> Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters has been adopted in December 2000, OJ 2001 L 12/1.

judgments in matrimonial matters and a regulation which applies to the service of judicial and extra-judicial documents in the Member States of the EU.<sup>3</sup>

Not included in these common procedural rules and, accordingly, excluded from the scope of 'European Civil Procedure Law' are, at least in a customary understanding and with regard to the provisions on international jurisdiction, the procedural rights which derive from Article 6(1) of the European Convention for the Protection of Human Rights (ECHR). This exclusion is justified by the fact that the relationship between Article 6(1) ECHR and the provisions on international jurisdiction has not yet been completely explored. At the present stage, no one really knows if and how Article 6(1) ECHR might (or even should?) influence the provisions on international jurisdiction.

Despite this fact, several attempts have already been made by academics<sup>4</sup> and by parties to international litigation<sup>5</sup> to prompt the civil courts to scrutinise their jurisdictional basis also in light of Article 6(1) ECHR. The purpose of this paper is to take up and promote this discussion. The author will describe how the use of human rights principles could affect the provisions on international jurisdiction and discuss and analyse some of the criticism which has been voiced against such

---

<sup>3</sup> Council Regulation (EC) No. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ 2000 L 160/19; Council Regulation (EC) No. 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters, OJ 2000 L 160/37.

<sup>4</sup> Concerning the relationship between Article 6(1) ECHR and the provisions on international jurisdiction see (with the author's translation of titles of German articles appear in brackets) Matscher, 'Die Verfahrensgarantien der EMRK in Zivilsachen' (The Procedural Guarantees of the ECHR in Civil Matters) (1980) ZöR 1, 19; Matscher, 'IPR und IZVR vor den Organen der EMRK – eine Skizze' (Private International Law and International Civil Procedure Law and the Institutions of the ECHR – a Sketch) in *Festschrift Neumayer* (1985) 459, 462; Matscher, 'Die Einwirkung der EMRK auf das Internationale Privat- und zivilprozessuale Verfahrensrecht' (The Impact of the ECHR on Private International Law and International Civil Procedure Law) in *Festschrift Schwind* (1993) 79; Schlosser, 'Jurisdiction in International Litigation – the Issue of Human Rights in Relation to National Law and to the Brussels Convention' (1991) RDI 5, 16; Cohen, 'La Convention européenne des droits de l'homme et le droit international privé français' (1989) *Rev. crit. dr. internat. privé*, 451, 454; Geimer, 'Menschenrechte im internationalen Zivilverfahrensrecht' (Human Rights and International Civil Procedure Law) in *Berichte der Deutschen Gesellschaft für Völkerrecht* (1994) 213, 225; Grolimund, *Drittstaatenproblematik des Europäischen Zivilverfahrensrechts* (European Civil Procedure Law and Third States) (2000) 243–274, with further references at note 178.

<sup>5</sup> See Commission decision n 6200/73 (13 May 1976; decision of the European Commission of Human Rights, unpublished, reported by Peukert, 'Die Garantie des "fair trial" in der Strassburger Rechtsprechung' (Fair Trial in the Case Law of Strasbourg's Institutions) (1980) *EuGRZ* 247, 253; Commission decision n 10000/82 – H v. B – DR 33, 247. See also Case C-7/98, *Dieter Krombach v. André Bamberski*, judgement of the European Court of Justice of 28 March 2000 (discussed further below).

an approach.<sup>6</sup> It will then be for the future to decide whether 'European Civil Procedure Law' should include Article 6(1) ECHR, or, in other words, whether Article 6(1) ECHR provides an additional approach on the way to a uniform European Civil Procedure Law.

However, before commencing with the substantive analysis, reference should be made to a recent judgment of the European Court of Justice (ECJ). This judgment clarifies, *inter alia*, the extent to which a relationship between Article 6(1) ECHR and the provisions on international jurisdiction is recognised at present.

### ***B. The Impact of Art. 6(1) ECHR on the Provisions on International Jurisdiction – Status Quo***

The European Court of Justice recently had the opportunity to explore the relationship between Article 6(1) ECHR and the provisions on international jurisdiction. In *Krombach v. Bamberski*, the Court of Justice was asked, *inter alia*, whether the provisions on jurisdiction may form part of the public policy within the meaning of Article 27(1) of the Brussels Convention.<sup>7</sup> This question arose in proceedings between Mr Bamberski, domiciled in France, and Mr Krombach, domiciled in Germany. The latter had negligently caused the death of Mr Bamberski's daughter while she was staying with him in Germany. Thereafter criminal and civil proceedings were instituted in Paris where Mr Krombach was condemned to pay FRF 350,000 relief to Mr Bamberski.

When Mr Bamberski subsequently went to Germany in order to enforce his French judgment, the German authorities were reluctant to recognize it. A recognition of the French decision would, so the German *Bundesgerichtshof*,<sup>8</sup> conflict with *German public policy* since jurisdiction of the French courts had been – primarily – based on the French nationality of Mr Bamberski's daughter.<sup>9</sup>

Referring to the opinion of Professor Peter Schlosser,<sup>10</sup> the German *Bundesgerichtshof* also voiced doubts about the *conformity* of recognition of the French title with the ECHR. According to this opinion, recognition and enforcement has to be refused if the foreign court has exercised its jurisdiction on grounds which infringe Article 6(1) ECHR. A violation of this provision should be assumed, according to

---

<sup>6</sup> It is not and cannot be the purpose of this article to give a comprehensive account of the impact of Article 6 ECHR on the provisions on international jurisdiction. The academic discourse on this subject has just been initiated and many questions remain unanswered (this is especially true in respect of part II of this article which deals with the relationship between Article 6(1) ECHR and the doctrines of *forum non conveniens* and *forum conveniens*). The scope of this paper is therefore confined to general considerations. However, it is hoped that this article contributes to a broader discussion of the topic.

<sup>7</sup> For the reference see above not 5.

<sup>8</sup> See the reference for a preliminary ruling of the German *Bundesgerichtshof*, 4 December 1997, reproduced in (1998) IPRax 205.

<sup>9</sup> In connection with Article 5(4) of the Brussels Convention.

<sup>10</sup> Schlosser, *EuGVÜ* (1996), Article 27–29 para. 30.

the opinion of Professor Schlosser, if a court has exercised its jurisdiction on a basis which is of an excessive or exorbitant nature. Hence, the *Bundesgerichtshof* submitted the case to the European Court of Justice according to Article 293 of the European Community Treaty (EC Treaty) and the Protocol of 3 June 1971 on the interpretation of the Brussels Convention by the ECJ.

However, in its judgment, the European Court of Justice avoided elaborate analysis of the relationship between Article 6(1) ECHR and the provisions on international jurisdiction.<sup>11</sup> The Court confirmed its practice according to which fundamental rights form an integral part of the general principles of Community law and recognised that, as a general principle of Community law, everyone is entitled to fair legal process.<sup>12</sup> Nevertheless, when the Court went on to examine whether the German authorities were entitled to deny recognition of the French judgment for lack of justified jurisdiction, no reference was made to the above-mentioned principle of fair legal process. The Court merely underlined the significance of the free movement of judgments for the maintenance of the internal market of the European Community, cited Article 28(3) of the Brussels Convention, according to which ‘the test of public policy [...] may not apply to the rules relating to jurisdiction’ and concluded that this rule must even apply where a convention state wrongfully founded its jurisdiction on a provision which has recourse to a criterion of nationality.<sup>13</sup>

That the Court of Justice did not even consider the possibility of a relationship between the principle of fair legal process and the provisions on international jurisdiction fairly well corresponds to the fact that such a connection is hardly recognised at present.<sup>14</sup> Furthermore, the silence of the Court of Justice might be interpreted in support of the assertion that the Court of Justice has ruled out any possible relationship. Such a contention would agree with the opinion of those academic scholars who – from the outset – have rejected any influence of human rights principles on the provisions on international jurisdiction.<sup>15</sup> The reasons for their negative attitude towards such an approach are various, including arguments of legal certainty, the fear that the application of Article 6(1) ECHR could lead to the elimination of exorbitant jurisdictions<sup>16</sup> and would unduly diminish the legal protection of domestic claimants, as well as the concern that the bargaining power of Europe in the ongoing negotiations for a worldwide convention on mutual recognition and enforcement of judgments might be weakened.

---

<sup>11</sup> See the criticism of Pielenbrock, ‘Kann der Ausschluss des *ordre public* in Art. 28 Abs. 3 EuGVÜ ausnahmslos gelten?’ (May the public policy exclusion in Article 28 (3) of the Brussels Convention be applied without exception?) 2000 IPRax 364.

<sup>12</sup> *Krombach v. Bamberski*, above note 5, para. 25–28.

<sup>13</sup> *Ibid.*, para. 29–34. Concerning the weight of the last-mentioned argument see Pielenbrock, above note 11, 364.

<sup>14</sup> See the references, above note 4.

<sup>15</sup> See, for example, Schack, ‘Vermögenszuständigkeit als Zuständigkeitsgrund’ (Assets as Basis for Jurisdiction) (1994) ZZP 46, 60; Bertele, *Souveränität und Verfahrensrecht* (Sovereignty and Procedural Law) (1998) 203, 208.

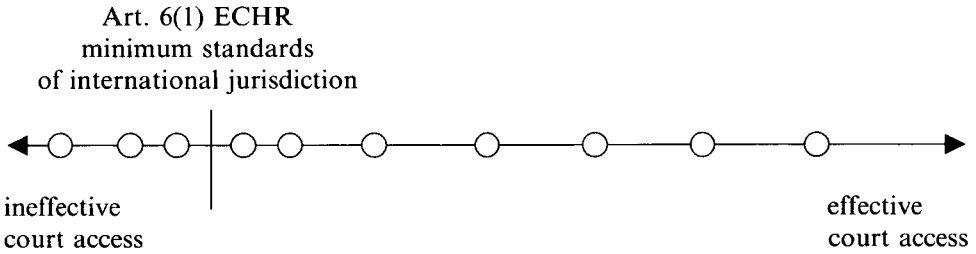
<sup>16</sup> Concerning the terminology, see note 66.

Some of these objections will be considered in the course of this paper. However, there will first be a brief look at the legal concept which underlies a possible relationship between Article 6(1) ECHR and the provisions on international jurisdiction.<sup>17</sup>

**C. The Impact of Art. 6(1) ECHR on the Provisions on International Jurisdiction – The Underlying Concept**

The legal justification for a connection between Article 6(1) ECHR and the provisions on international jurisdiction seems – at first sight – rather obvious and simple. There is, on the one hand, Article 6(1) ECHR, a provision of constitutional nature, which confers upon each individual the right to effective and fair access to the courts.<sup>18</sup> And there are, on the other hand, the provisions on international jurisdiction which determine in each case the courts where the claimant may bring his or her action and – as a reflection – the courts before which the defendant might be faced with the onus of civil proceedings. But why should Article 6(1) ECHR have an impact on the provisions on international jurisdiction? This view is based on the assumption (fact?) that the effectiveness of court access also depends on the place where civil proceedings take place.<sup>19</sup> If such a connection is acknowledged, then a link between the effectiveness of court access and the provisions on international jurisdiction cannot be denied, since the latter, as mentioned above, determine in each case the place where civil proceedings might take place.

With this concept in mind, the following diagram can be drawn:



The line with arrows represents the continuum between effective and ineffective court access; the circles stand for various provisions on international jurisdiction. If

<sup>17</sup> See also Grolimund, above note 4, 222–274.

<sup>18</sup> See the Human Rights Court in *Golder* (A. 18; 1975 EuGRZ 91, 97) and *Airey v. Ireland*, (A. 32; 1979 EuGRZ 626).

<sup>19</sup> This may be illustrated by a simple example. The defendant is domiciled in France, the claimant in England. The dispute is connected to both jurisdictions. Accordingly, access to the French or the English courts appears to be effective and fair. How about access to the German or the Swiss courts? Or – more drastically – what if the parties were obliged to proceed before the courts of South Korea?

all existing rules on jurisdiction are placed in the diagram, they will be spread out over it from the middle to both extremes. Some rules on jurisdiction provide for more effective access to the courts, some provide for less effective access to the courts.

This is where Article 6(1) ECHR comes into play. Article 6(1) ECHR guarantees a minimum standard of procedural rights and, accordingly, guarantees a minimum standard of effective access to the courts.<sup>20</sup> Again, if a link between the effectiveness of court access and the provisions on international jurisdiction is acknowledged, then, as a logical consequence, Article 6(1) ECHR can be seen as the line between those rules on jurisdiction which should be considered as sufficient in order to satisfy minimum standards of access to court and those which should not. Consequently, only those rules on jurisdiction which are on the right side of the dividing line are provisions which conform to the minimum standards of jurisdiction set up by the Human Rights Convention. And all those rules on jurisdiction which are on the left side of the dividing line are provisions which do not comply with the minimum requirements of the Human Rights Convention and are therefore prohibited under Article 6(1) ECHR.

This all seems perfectly logical, at least in theory. However, difficult issues arise from such a concept. In particular, the following questions must be answered:

1. When is court access effective? Or more precisely, and in the context of jurisdictional provisions: How can we evaluate the effectiveness of court access provided by a particular rule on jurisdiction?
2. Article 6(1) ECHR guarantees a minimum standard of procedural rights. Can minimum standards of jurisdiction be ascertained?
3. May minimum standards of jurisdiction be established without depriving one of the parties (i.e. the claimant) of its right to effective legal protection?
4. Can minimum standards of jurisdiction be set up without falling into a trap of legal uncertainty?
5. Are legal remedies available which allow a uniform interpretation and implementation of minimum standards of jurisdiction throughout Europe?

When proposing Article 6(1) ECHR as an additional approach on the way to a uniform European Civil Procedure Law, there exists a presupposition that satisfactory answers to these five questions can be found.

#### ***D. Evaluation of Effectiveness of Court Access***

The first question asks for a test to measure the effectiveness of court access provided by a particular rule on jurisdiction. There is only one, as far as the author is aware, (more or less) recognized test which allows such an evaluation. This test refers to the jurisdictional interests which are embodied in rules on

---

<sup>20</sup> See the references, above note 5.

jurisdiction;<sup>21</sup> in particular, it asks whether a procedural order as such or a certain jurisdictional provision duly takes account of the jurisdictional interests of both parties in international disputes. For the sake of such an analysis a distinction has been made between:

- Person-related jurisdictional interests of the parties,
- Dispute-related jurisdictional interests of the parties, and
- Enforcement-related jurisdictional interests of the parties.

What lies behind this test of interests is the assumption that procedural orders which sufficiently safeguard the jurisdictional interests of both parties of international disputes will improve the effectiveness of court access (and, as a result, the legal protection in international disputes). The test of interests has to be carried out in two stages: In the first stage, the parties' preferences (i.e. the parties' interests) must be identified. It must be clarified where the parties of international disputes in general, that is, on an abstract rather than on a case by case basis, seek to institute their civil proceedings. Such surveys have already been made and they show, for example, that:<sup>22</sup>

- both parties wish to proceed before their domestic courts;
- both parties welcome the opportunity to conclude an agreement on choice of court;
- both parties accept proceedings before dispute-related courts;
- exorbitant jurisdictions primarily protect the jurisdictional interests of the claimant.

Having ascertained the parties' preferences (i.e. the parties' interests), in the second stage the question of whether the existing jurisdictional orders may satisfy the needs of both parties of international disputes must be examined. However, it is not the purpose of the present article to provide such a comprehensive analysis. For the present context it is sufficient to show that there is indeed a test for the evaluation of the effectiveness of court access provided by a particular jurisdictional provision. The first question which asked for the existence of such a test may therefore be answered in the affirmative.

### ***E. Availability of Minimum Standards of Jurisdiction***

This leads to the second question which asks whether minimum standards of

---

<sup>21</sup> See Schröder, *Internationale Zuständigkeit* (International Jurisdiction) (1971); Heldrich, 'Die Interessen bei der Regelung der internationalen Zuständigkeit' (The Interests Embodied in Provisions on International Jurisdictions) in *Festschrift Ficker* (1967) 205; Pfeiffer, *Internationale Zuständigkeit und prozessuale Gerechtigkeit* (International Jurisdiction and Procedural Justice) (1995) 168; Schack, *Internationales Zivilverfahrensrecht* (International Civil Procedural Law) (1996) para. 200.

<sup>22</sup> *Ibid.*

jurisdiction under the Human Rights Convention can be ascertained. The concept on which such minimum standards must be based follows from the foregoing explanations: To guarantee effective and fair access to the courts implies jurisdictional orders which, at a minimum, protect the jurisdictional interests of both parties of international disputes. In other words: Article 6(1) ECHR guarantees that a person's jurisdictional interests, whether he or she is the claimant or the defendant in an international dispute, are sufficiently safeguarded by the applicable procedural order. But what does this mean in practice? In order to answer this question, a distinction must be made between the rights of the claimant and the rights of the defendant.

### *I. Rights of the Claimant*

Considering the rights of the claimant one might, at first sight, assume that some of the well-known jurisdictions – for example, jurisdiction based on the place of performance of the contract – represent the minimum standards of jurisdiction set up by the Human Rights Convention.<sup>23</sup> Pursuant to such an understanding the Human Rights Convention would establish a core of 'European jurisdictions', mandatory jurisdictions which all member States party to the Human Rights Convention would have to implement in their legal order. However, it is doubtful whether Article 6(1) ECHR has the power to create such a core of 'European jurisdictions'. Such an assumption would presuppose that jurisdictions can be ascertained which – on an abstract level – embody a particularly strong interest of the claimant. It is quite certain that no one is capable of determining such jurisdictions since all jurisdictions are, to some extent, substitutable.<sup>24</sup> There is, from the point of view of the claimant's interests, only a minor difference between, for example, jurisdiction based on the place of performance of the contract and jurisdiction based on the place where the contract was made. Furthermore, how should the place of the performance of the contract be ascertained for jurisdictional purposes? Or, under which conditions should an agreement on choice of court be valid?

Article 6(1) ECHR does not give answers to these questions. What Article 6(1) therefore implies is not a core of 'European jurisdictions', but rather the ban of procedural orders which do not duly take account of the jurisdictional interests of the claimant.<sup>25</sup> The focus must therefore be on those provisions which primarily protect the jurisdictional interests of the defendant and this leads directly to one of the most prominent principles of international civil procedure law according to which the claimant must bring his or her action before the courts of the defendant. Most civil procedure orders are based on this principle, backed up by a number of

---

<sup>23</sup> See Geimer, 'Verfassungsrechtliche Vorgaben bei der Normierung der internationalen Zuständigkeit' (Constitutional Requirements which Apply to the Provisions on International Jurisdiction) in *Festschrift Schwind* (1993) 17, 37.

<sup>24</sup> See also Grolimund, above note 4, para. 706.

<sup>25</sup> *Ibid.*, para. 709–716.



alternative, mostly dispute-related jurisdictions. However, access to dispute-related courts will often be restricted.<sup>26</sup> This has been justified with the argument that dispute-related court access deprives the defendant of his or her natural right to be sued before his or her domestic courts.<sup>27</sup>

However, it must be borne in mind that a defendant forum primarily protects the jurisdictional interests of the defendant. Like a claimant forum which has been held to be exorbitant from the point of view of the defendant, a *sole* defendant forum can be exorbitant from the point of view of the claimant.<sup>28</sup> Consequently, to guarantee effective and fair access to the courts requires not simply to refer the claimant to the courts of the defendant but to give him or her the opportunity, if factual relations exist, to proceed before dispute-related courts.

This is the contribution Article 6(1) ECHR can make. It requires the Member States to abstain from the natural forum of the defendant as an overarching principle and to broadly accept the claimant's right to proceed before dispute-related courts. The procedural orders of the Member States of the ECHR must therefore comprise a set of alternative, dispute-related jurisdictions which appropriately take account of the jurisdictional interests of the claimant.

This result seems sensible. However, this solution is not without weaknesses. The following deserves at least to be mentioned: What does it mean to provide a set of alternative, dispute-related jurisdictions which appropriately safeguard the jurisdictional interests of the claimant? Where are the limits of discretion? And who enforces the duty of the member states?

## II. Rights of the Defendant

These questions must be left unanswered for the moment and attention now be turned to the rights of the defendant. The starting point of the analysis is once again the underlying concept according to which the Human Rights Convention, at a minimum, protects the jurisdictional interests of both parties of international disputes, including the jurisdictional interests of the defendant. Accordingly, the jurisdictions that are permissible under the H.R.C. also take account of the defendant's interests. Impermissible jurisdictions, on the other hand, are those that only protect the jurisdictional interests of the claimant and thereby neglect the interests of the defendant. Consequently, the application of Article 6(1) ECHR

---

<sup>26</sup> See, for example, Article 2(1) of the Brussels Convention (and of the new Regulation) and the corresponding case law of the Court of Justice: Case 133/81, *Ivenel v. Schwab* [1982] ECR 1891, at 1899; Case 21/76, *Bier v. Mines de Potasse d'Alsace* [1976] ECR 1735, 1746; Case C-68/93 *Shevill v. Presse Alliance* [1995] ECR I-415, 459; Case 32/88 *Six Constructions v. Humbert* [1989] ECR 341, 364; critical Geimer/Schütze, *Europäisches Zivilverfahrensrecht* (European Civil Procedure Law) (1997) Article 5 para. 1, with further references.

<sup>27</sup> Critical Schröder, above note 21, 235.

<sup>28</sup> See Grolimund, above note 4, para. 709.

would lead to the elimination (or at least limit the application) of many of the well-known exorbitant jurisdictions.<sup>29</sup> Jurisdictions based on the nationality or the presence of the claimant, jurisdictions related to the merely transient presence of the defendant and jurisdictions related to the presence of assets of the defendant would all be in danger. This consequence of a strict interpretation of Article 6(1) ECHR is well known and considered problematic by many.<sup>30</sup>

For the present discussion there is no need to go into greater detail. It is sufficient that minimum standards of jurisdiction can be ascertained (at least partly). The second question which asked for the availability of such minimum standards may therefore also be answered in the affirmative.

### ***F. Legal Protection of the Claimant***

The third question deals with the legal and factual consequences of an elimination of exorbitant jurisdictions. It follows from the preceding explanations that many of the well-known exorbitant jurisdictions are incompatible with minimum standards of jurisdiction. However, it has been objected that the elimination of these exorbitant jurisdictions would unduly diminish the legal protection of domestic claimants.<sup>31</sup> This objection must be taken seriously and it is clear that effectiveness and fairness of court access cannot simply be achieved by setting aside all exorbitant jurisdictions. Exorbitant jurisdictions have an important function in many procedural orders. They fill the gaps which result from the fact that not all foreign judgments can be recognised and enforced. The legal protection of the claimant could be generally denied if, in a particular case, a state neither opens its own jurisdiction nor recognizes and enforces a foreign judgment.

Nevertheless, it would be wrong now to conclude that due to these concerns exorbitant jurisdictions cannot be abolished. It is not the exorbitant jurisdictions which have to be maintained but rather the provisions on recognition and enforcement of foreign judgments which must be revised. Ultimately, the following should be achieved:

- The Member States of the Human Rights Convention should be obliged to recognize and enforce foreign judgments which are based on a dispute-related jurisdiction. Or more precisely: The fact that a foreign judgment is based on a dispute-related jurisdiction must not justify the refusal of recognition and enforcement.
- As indicated above, the Member States should themselves provide a set of alternative, dispute-related jurisdictions which appropriately takes account of the jurisdictional interests of the claimant.
- The procedural orders of the member States should furthermore provide for an

---

<sup>29</sup> Concerning the terminology see note 66.

<sup>30</sup> For further details and references see Grolimund, above note 4, para. 717–720.

<sup>31</sup> See Schack, above note 15, 48; Schack, above note 21, para. 196.

exceptional jurisdiction which applies whenever the claimant can prove that dispute-related court access is not available or will not lead to an enforceable title.

If these guidelines are observed, exorbitant jurisdictions can be abolished without depriving the claimant of his or her right to effective legal protection. The third question which asked for the existence of such a model of a procedural order may therefore also be answered in the affirmative.

### ***G. Legal Certainty***

The fourth question relates to aspects of legal certainty. Legal certainty is without any doubt one of the most important principles of procedural legislation in Civil law countries. The provisions on international jurisdiction should be formulated as simply and distinctly as possible. The parties to a legal relationship should always be able to foresee which courts would be competent to entertain any future disputes. Jurisdictional minimum standards seem to contradict this concept. A test of interests would be established; jurisdictions would then be assessed in light of jurisdictional interests. Furthermore, the application of Article 6(1) ECHR would introduce a new legal source in the field of international civil procedure law and complicate work in this area of law.

However, the negative effects of minimum standards of jurisdiction on the principle of legal certainty are limited. The abolition of exorbitant jurisdictions and the extension of dispute-related jurisdictions would not diminish legal certainty. Furthermore, the identification of those jurisdictions which infringe Article 6(1) ECHR seems practicable. It is perfectly possible to assess whether a jurisdiction is, objectively, based on the jurisdictional interests of both parties.

Finally, it is important to note that Article 6(1) ECHR does not prevent the Member States from determining their jurisdiction in general and abstract terms. Statutory provisions which embody their commonly existing jurisdictional interests of the parties conform with Article 6(1) ECHR.<sup>32</sup>

Thus, it is the author's opinion that the principle of legal certainty does not preclude the application of Article 6(1) ECHR in the field of international jurisdiction. Minimum standards of jurisdiction can be set up without falling into the trap of legal uncertainty.

### ***H. Legal Remedies***

The fifth and final question deals with legal remedies. To propose Article 6(1) ECHR as an additional approach on the way to a *uniform* European Civil Procedure Law obviously presupposes access to supranational courts. Only supranational courts can secure that minimum standards of jurisdiction are uniformly interpreted and implemented throughout Europe. Two legal remedies are available in that respect:

---

<sup>32</sup> For further details see Grolimund, above note 4, para. 702–703.

First, there is the possibility to appeal to the European Court of Human Rights in Strasbourg. Exorbitant jurisdictions are, primarily, a disease of national legislation. However, the latter is subject to review before the Strasbourg Court. A defendant against whom an action has been brought on the basis of an exorbitant jurisdiction may, as a final resort, appeal to the Strasbourg Court.<sup>33</sup> The latter is then entitled to shape uniform minimum standards of jurisdiction, and these standards can be implemented in accordance with the devices provided by the Human Rights Convention<sup>34</sup> and by national legislation.<sup>35</sup>

Secondly, there is the preliminary ruling procedure before the European Court of Justice.<sup>36</sup> The Court of Justice can become involved in questions of minimum standards of jurisdiction whenever a judgment based on an exorbitant jurisdiction should be enforced in an EU Member State in accordance with the provisions of the Brussels Convention, now the Brussels Regulation.<sup>37</sup> When a request for a preliminary ruling is made by a national court, it is possible for the Court of Justice to demonstrate minimum standards of jurisdiction. However, as the *Krombach* case has shown,<sup>38</sup> the Court is not yet prepared to stipulate such minimum standards of jurisdiction.

One might wonder whether the Court of Justice will change its mind in light of the new Charter of Fundamental Rights.<sup>39</sup> In Article 47(1) the Charter expressly guarantees the right to effective access to the courts.<sup>40</sup> Article 47(1) might thus serve as a basis for minimum standards of jurisdiction within the European Community.

## I. Conclusion

The aim of the first part of this paper was to outline the relationship between Article 6(1) ECHR and the provisions on international jurisdiction. In the introduction to this paper the question was raised whether Article 6(1) ECHR is, could, or should be a part of European Civil Procedure Law. This can be answered as follows:

A connection between Article 6(1) ECHR and the provisions on international jurisdiction is not yet recognized. At present, Article 6(1) ECHR is not a part of European Civil Procedure Law.

---

<sup>33</sup> Article 34 ECHR.

<sup>34</sup> Article 41 ECHR.

<sup>35</sup> See, for example, the UK Human Rights Act 1998, and below part II (C).

<sup>36</sup> See Articles 234 and 68 ECT and the Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Luxembourg on 3 June 1971, OJ 1975 L204/28; for a consolidated version see OJ 1998 C27/28.

<sup>37</sup> Article 28(3) of the Brussels Convention, Article 35(3) of the 'Brussels Regulation'.

<sup>38</sup> See above, part I (B).

<sup>39</sup> Proclaimed on 8 December 2000 at the Nice summit.

<sup>40</sup> See the wording of Article 47(1): 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal (...)'.

The difficulties which would follow from the application of human rights principles in the field of international jurisdiction must be taken seriously. However they are, in the author's opinion, not prohibitive. It is submitted that Article 6(1) ECHR could be part of European Civil Procedure Law.

This leads to the final question of my first part: Should Article 6(1) ECHR become part of European Civil Procedure Law? This question must be answered in light of another question: Does the effectiveness of court access also depend on the place where civil proceedings take place? It is argued that the answer to that question can only be in the affirmative.

## **Part II: Art. 6(1) ECHR and the Doctrines of *forum non conveniens* and *forum conveniens***

### ***A. Introduction***

Part I of this paper considered the general concept which underlies the relationship between Article 6(1) ECHR and the provisions on international jurisdiction. Having outlined the main principles which result from an application of Article 6(1) ECHR to jurisdictional rules, the second part, must look in greater detail at the practical consequences of such an approach. Many questions arise, as for example: How will Article 6(1) ECHR affect the jurisdiction of national courts in different fields of law, for example, family law, property law, the law of succession, the law of obligations, or company law? How can minimum standards of jurisdiction be reconciled with other policies such as the protection of the rights of the child or the protection of consumer interests? And, since there is a desire to shape uniform minimum standards of jurisdiction, might Article 6(1) ECHR similarly apply to Civil law and Common law jurisdictions? The latter question will be considered in turn.

Article 6(1) ECHR – that is, the aim of establishing uniform minimum standards of jurisdiction in Europe – faces one particular problem: the legal differences which exist between the procedural orders of Civil law and Common law countries.<sup>41</sup> In fact, in Civil law countries the jurisdictional provisions are typically drafted in general and abstract terms. The courts must accept (or reject) their jurisdiction if, in a particular case, the conditions set up by statute are fulfilled (or not fulfilled). By way of contrast, the courts in Common law countries ordinarily enjoy a certain discretion. Even where the preconditions for the exercise of jurisdiction are met, the courts may – on the basis of the facts of the particular case – refuse their jurisdiction or stay the proceedings (doctrines of *forum conveniens* and *forum non*

---

<sup>41</sup> Illustrative Fawcett, 'General Report' in *Declining Jurisdiction in Private International Law* (1995) 1, 10.

*conveniens*<sup>42</sup>). It is evident that this fundamental difference between Civil law and Common law jurisdictions must be taken into account by those who seek to establish minimum standards of jurisdiction. A survey on the impact of Article 6(1) ECHR on Civil law jurisdictions has already appeared in an earlier publication.<sup>43</sup> Part II of the present paper is therefore focussed on the impact of Article 6(1) ECHR on Common law jurisdictions. This analysis is divided into three parts. In the first part, England's traditional rules of jurisdiction, that is, the application of the doctrines of *forum non conveniens* and *forum conveniens* by the English courts, will be described (B *infra*). England has been selected as the basis for this analysis because English private international law is richly documented. Furthermore, the doctrine of *forum non conveniens* as applied by the English courts reflects the past, present and future of the concept. It is founded on the Scottish doctrine of *forum non conveniens*,<sup>44</sup> the root of the principle, and has, although with some deviations, been adopted in numerous other Common law jurisdictions.<sup>45</sup> After providing an outline of the main features of the doctrines of *forum non conveniens* and *forum conveniens*, the second part will analyse how Article 6(1) ECHR might alter the application of these doctrines. It is predicted that minimum standards of jurisdiction would seriously affect the use of the two doctrines (C *infra*). Finally, it follows from the explanations in the first part of this paper that the implementation of minimum standards of jurisdiction must be accompanied by appropriate amendments of the provisions on recognition and enforcement of foreign judgments. The limitation of the territorial scope of State court jurisdiction – that is, the elimination of exorbitant jurisdictions – requires the extension of the possibilities of recognition and enforcement. Accordingly, the last part of this survey must be concerned with the (potential) impact of Article 6(1) ECHR on England's system of recognition and enforcement of foreign judgments (D *infra*).

## **B. Forum Non Conveniens/Forum Conveniens Under English Law**

### *I. The Relationship Between Common Law Rules on Jurisdiction and the Rules in the Brussels and Lugano Conventions*

Jurisdiction of English courts over international disputes derives from different legal

---

<sup>42</sup> The doctrine of *forum non conveniens* applies to stay proceedings. The doctrine of *forum conveniens* applies to proceedings concerning the leave of service on the defendant abroad. The former doctrine may thus be described as a negative doctrine and the latter as a positive doctrine; see Fawcett, above note 41, 5 et seq. However, the principles which govern the application of these doctrines are similar; see hereafter B. III.

<sup>43</sup> Grolimund, above note 4.

<sup>44</sup> See Lord Diplock in *The Abidin Daver* [1984] 1 All ER, 470 at 476; see also Lord Goff in *Spliada*, note 71), 474, with further references to Scottish case law; Collins, note 52 at 389.

<sup>45</sup> New Zealand, Canada, Hong Kong, Brunei, Singapore, Gibraltar and Ireland, but not Australia. See the references in North/Fawcett, *Cheshire and North's Private International Law* (13, ed., 1999) 335. Concerning the British lead, see also Fawcett, above note 41, at p. 11 et seq.

sources, including the Brussels and the Lugano Conventions and the Common law rules of jurisdiction. The United Kingdom signed the Brussels Convention when it acceded to the European Community in 1973.<sup>46</sup> The Brussels Convention has been incorporated into UK law by the Civil Jurisdiction and Judgments Act 1982. The Brussels Convention supersedes the Common Law rules of jurisdiction in scope and, since the Convention follows the course of civil law countries (i.e., determines jurisdiction of the courts in general and abstract terms) eliminates the application of the doctrines of *forum non conveniens* and *forum conveniens* in respect to intra-Community cases.<sup>47</sup> The same is true for cases to which the Lugano Convention applies, since the UK is party to the Lugano Convention.<sup>48</sup> The latter has been implemented into UK law by the Civil Jurisdiction and Judgments Act 1991. Thus, in practice, England's traditional rules of jurisdiction and, accordingly, the doctrines of *forum non conveniens* and *forum conveniens* apply only where a case does not fall within the scope of the Brussels and the Lugano Conventions, for example, where the defendant is not domiciled in one of the member States party to the Conventions.<sup>49</sup>

## II. Jurisdiction of the English Courts Under Common Law

### 1. GENERAL REMARKS

Where neither the Brussels nor the Lugano Convention is applicable, the English courts will determine their jurisdiction in accordance with Common law rules of jurisdiction.<sup>50</sup> Following the principle of sovereignty,<sup>51</sup> the jurisdiction of the English courts under Common law depends on the presence of the defendant in England.<sup>52</sup> A person becomes subject to English jurisdiction whenever he or she is present in England, that is, whenever the person has, during a period of presence, been properly

---

<sup>46</sup> See OJ 1987 L 304/1.

<sup>47</sup> See Fawcett, above note 41, 11–12.

<sup>48</sup> See OJ 1988 L319/9.

<sup>49</sup> See Article 4(1) of the Brussels and the Lugano Convention. The new 'Brussels Regulation' will not entail substantive changes.

<sup>50</sup> See the outline in Briggs/Rees, *Civil Jurisdiction and Judgments* (2nd ed., 1997) 188 et seq. See also the Civil Procedure Rules 1998 (and the respective amendments), introduced on 26th April 1999; [http://www.lcd.gov.uk/civil/procrules\\_fin/crulesfr.htm](http://www.lcd.gov.uk/civil/procrules_fin/crulesfr.htm). The Civil Procedural Rules 1998 are described as being the most fundamental change to the civil justice system in England and Wales in over 100 years. They introduced a unified code of civil procedure applicable to all civil courts, ending unnecessary distinctions of practice and procedure between the High Court and the county courts; see the foreword of the Lord Chancellor to the Civil Procedural Rules 1998.

<sup>51</sup> For further explanations see Grolimund, *supra* note 4, para. 645 et seq.

<sup>52</sup> The present account deals with actions *in personam*. Excluded from the survey are actions *in rem*. For details concerning actions *in rem* see North/Fawcett, *supra* note 45, 325 et seq.; Collins, *Dicey and Morris on Conflicts of Laws* (13th ed., 2000) Chapter 11 and Chapter 13.

served with a claim form. This concept of jurisdiction is broad and narrow at the same time.<sup>53</sup> It is, on the one hand, broad because it covers cases which bear little relation to England, including jurisdiction based on the merely transient presence of the defendant in England (for example if a defendant is on holiday in London).<sup>54</sup> It is on the other hand narrow because it does not cover disputes which are tightly connected with England unless the defendant can be served with a claim form in England. This even embraces cases in which the defendant is domiciled but not physically present in England. This deficiency was recognised many years ago and is currently resolved by paragraph 6.20 of the Civil Procedural Rules (CPR) (former Order 11 of the Rules of the Supreme Court<sup>55</sup>) which allows the service of a claim form on the defendant abroad in a number of cases.<sup>56</sup>

## 2. SERVICE OF THE CLAIM FORM WITHIN THE JURISDICTION<sup>57</sup>

The English courts have jurisdiction over a defendant whenever the defendant has been successfully served with a claim form in England. Once the form has been served, the claimant has the right to proceed before English courts.<sup>58</sup> The defendant cannot challenge the existence of jurisdiction and his or her only defence against proceedings before English courts is to ask for a stay of proceedings.

Thus the presence of the defendant in England is decisive for the jurisdiction of the English courts.<sup>59</sup> Accordingly, the definition of what constitutes presence within the English jurisdiction is of crucial importance. A distinction must be made between natural and legal persons.<sup>60</sup> As regards the former, any kind of presence, including a merely transient presence, is sufficient.<sup>61</sup> In respect of the latter, registration is decisive. Every company registered in England – which in turn is determined by the Companies Act 1985<sup>62</sup> – is regarded as present in England. Furthermore, foreign companies with a branch in England and foreign companies with a place of business in England are present as well. With respect to the former, it is important to note

<sup>53</sup> See North/Fawcett, *supra* note 45, 286 et seq.

<sup>54</sup> For practical examples see *Colt Industries Inc v. Sarlie* [1966] 1 All ER 673; *HRH Maharane Seethaderi Gaekwar of Baroda v. Wildenstein* [1972] 2 WLR 1077. See also Collins, *supra* note 52, 293.

<sup>55</sup> Repealed by The Civil Procedure (Amendments) Rules 2000 (SI 2000/221). The latter introduced para. 6.17 CPR et seq. See now McClean, *Morris: The Conflict of Laws* (5th ed., 2000) 78–79 and the 2001 supplement to Collins, *Dicey and Morris on Conflicts of Laws* (13th ed., 2000).

<sup>56</sup> North/Fawcett, *supra* note 45, 286.

<sup>57</sup> North/Fawcett, *supra* note 45, 286 et seq.; Briggs/Rees, *supra* note 50, 191 et seq.

<sup>58</sup> Lord Goff in *Spiliada*, hereafter note 71, 474, 477, concerning the effects of this concept; see also Collins, *supra* note 52, 307.

<sup>59</sup> For details concerning the service of the claim form, see CPR, part 6.

<sup>60</sup> Briggs/Rees, *supra* note 50, 249–255; North/Fawcett, *supra* note 45, 286–295; Collins, *supra* note 52, 292 et seq.

<sup>61</sup> See the references, *supra* note 54.

<sup>62</sup> *Halsbury's Statutes* (4th ed., 1999) vol. 8, 88 et seq.



that jurisdiction of English courts over branches of foreign companies presupposes, additionally, a connection between the dispute and the business carried out by the branch.<sup>63</sup> By contrast, where a foreign company has a place of business in England which is not considered a branch, jurisdiction of the English courts is comprehensive and includes disputes which are not connected with the carrying on of the business of the established place of business.<sup>64</sup>

### 3. SERVICE OF THE CLAIM FORM OUTSIDE OF THE JURISDICTION<sup>65</sup>

If the defendant is not present in England, jurisdiction of the English courts follows paragraph 6.20 CPR.<sup>66</sup> A claimant who wishes to litigate before English courts must ask for leave of service on the defendant abroad. The English courts may grant leave if the conditions of one of the sub-rules of paragraph 6.20 CPR are fulfilled. Paragraph 6.20 CPR provides for service on the defendant abroad namely in the following cases:

#### *General Grounds*

- (1) a claim is made for a remedy against a *person domiciled* within the jurisdiction.
- (2) a claim is made for an injunction ordering<sup>(GL)</sup> the defendant *to do or refrain from doing an act within the jurisdiction*.
- (3) a claim is made against someone on whom the claim form has been or will be served and
  - there is between the claimant and that person a *real issue* which it is reasonable for the court to try; and
  - the claimant wishes to serve the claim form on another person who is a *necessary or proper party* to that claim.

[...]

<sup>63</sup> See North/Fawcett, *supra* note 45, 291.

<sup>64</sup> Briggs/Rees, *supra* note 50, 5.09; North/Fawcett, *supra* note 45, 292.

<sup>65</sup> North/Fawcett, *supra* note 45, 296 et seq.; Briggs/Rees, *supra* note 50, 218 et seq.; Morris, *supra* note 55, 78 et seq.; see also *re Harrods (Buenos Aires) Ltd (No 2)* [1991] 4 All ER 348.

<sup>66</sup> Para 6.20 CPR jurisdiction is sometimes described as being exorbitant; see Lord Goff's account in *Spiliada*, *supra* note 71, 478 et seq.; illustrative North/Fawcett, *supra* note 45, 318 et seq. Thus, there exists a different understanding of 'exorbitance' in civil law and common law jurisdictions. It suffices to compare the jurisdictions listed in Article 3(2) of the Brussels and Lugano Convention (see also annex I to the 'Brussels Regulation') with those provided by para. 6.20 CPR to see the difference. Many of the para. 6.20 CPR jurisdictions are not exorbitant from the point of view of civil law countries; see also North/Fawcett, *ibid.*, 319. On the other hand, jurisdiction based on the merely transient presence of the defendant in the English jurisdiction is, from the point of view of civil law countries, exorbitant. In the present article the civil law terminology is used. Accordingly, para. 6.20 CPR jurisdiction is, in general, not exorbitant whereas the service of a claim form within the English jurisdiction may constitute an exorbitant jurisdiction; see also Lord Goff in *Connelly v. RTZ Corp'n plc.* [1997] 4 All ER 335, who describes jurisdiction based on a brief visit to England as 'extravagant'; Collins, *supra* note 52, 291 et seq.

*Claims for interim remedies*

- (4) a claim is made for an interim remedy under section 25 (1) of the 1982 Act (12).

*Claims in relation to contracts*

- (5) a claim is made in respect of a contract where the contract
- was *made* within the jurisdiction;
  - was made by or through an *agent trading or residing* within the jurisdiction;
  - is *governed by English law*; or
  - contains a *term* to the effect that the *court shall have jurisdiction* to determine any claim in respect of the contract.
- (6) a claim is made in respect of a *breach of contract committed* within the jurisdiction.
- (7) a claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (5).

*Claims in tort*

- (8) a claim is made in tort where
- damage was *sustained* within the jurisdiction; or
  - the damage sustained resulted from an *act committed* within the jurisdiction.

*Enforcement*

- (9) a claim is made to enforce any judgment or arbitral award.

*Claims about property within the jurisdiction*

- (10) the whole subject matter of a claim relates to *property located* within the jurisdiction.
- (11)–(18) omitted.

The claimant must *prove*<sup>67</sup> that the conditions of one of the sub-rules of paragraph 6.20 CPR are met and that there is a serious issue to be tried on the merits.<sup>68</sup> However, this alone will not suffice. The claimant must also demonstrate that his or her claim is one which should be allowed for service abroad, that is, that England is clearly the most appropriate forum to meet the interest of the parties and the ends of justice (para. 6.21(2A); doctrine of *forum conveniens*).<sup>69</sup> Once served with the claim form, the defendant may challenge jurisdiction of the English courts in accordance with CPR part 15. The burden of proof remains on the claimant.<sup>70</sup>

<sup>67</sup> For the standard of proof see Briggs/Rees, *supra* note 50, 237–238.

<sup>68</sup> CPR, para. 6.21(1).

<sup>69</sup> See Collins, *supra* note 52, 308.

<sup>70</sup> Briggs/Rees, *supra* note 50, 219.

### III. Application of the Doctrines of Forum Non Conveniens/Forum Conveniens

The preceding paragraphs show that jurisdiction of the English courts is not purely determined in general and abstract terms. Considerations of appropriateness may, on the basis of the particular case, prompt the courts to stay the proceedings although the claim form has been duly served within the jurisdiction or may justify the refusal of service on the defendant abroad even though the conditions of one of the sub-rules of paragraph 6.20 CPR are met. The relevant decisions of the English courts are governed by the doctrines of *forum non conveniens* and *forum conveniens*. The doctrines were spelled out by the House of Lords in its landmark judgment *Spiliada Maritime Corp'n v. Cansulex Ltd.*<sup>71</sup> The *Spiliada* judgment is important for several reasons. First, it serves as an illustration and precedence concerning the application of the doctrines of *forum non conveniens* and *forum conveniens*. Furthermore, it clarifies that cases involving a stay of proceedings and cases involving the service of the claim form on the defendant abroad follow the same basic criteria<sup>72</sup> – availability of the foreign forum, appropriateness<sup>73</sup> of the foreign/English forum, injustice of sending the claimant to the foreign forum/of requiring the defendant to proceed before the English courts – that is, the aim of identifying the forum which seems the most appropriate to entertain the particular dispute to meet the interest of all the parties and the ends of justice.

#### (1) STAY OF PROCEEDINGS

Jurisdiction of the English courts is established, as mentioned above, if the claim form has been properly served in England. However, the defendant may seek a stay of proceedings. He or she can show that there is another available forum which is clearly more appropriate to entertain the dispute. If he or she succeeds, the court 'will ordinarily grant a stay unless there are circumstances by reasons of which justice requires that a stay should nevertheless not be granted'.<sup>74</sup> Thus, proceedings will be stayed if three conditions are met:<sup>75</sup> the foreign forum must be available, the foreign forum must clearly be more appropriate than the English forum and it must not be

<sup>71</sup> [1987] AC 460. For earlier judgments see *The Atlantic Star* [1973] 2 WLR 795; *MacShannon v. Rockware Glass Ltd* [1978] 1 All ER 625; *The Abidin Daver* [1984] 1 All ER 470. See also Collins, *supra* note 52, 389–390.

<sup>72</sup> See Lord Goff in *Spiliada*, *supra* note 71, 480; see also North/Fawcett, *supra* note 45, 313–314, 335; Collins, *supra* note 52, 308. Furthermore, *Connelly v. RTZ Corp'n plc.* [1997] 4 All ER 335, in which *Spiliada* was confirmed and further explained (see the opinion of Lord Goff).

<sup>73</sup> The term '*forum non conveniens*' has been criticised by Lord Goff in *Spiliada*, *supra* note 71, 474: 'For the question is not one of convenience, but of suitability or appropriateness of the relevant jurisdiction.'

<sup>74</sup> Lord Goff in *Spiliada*, *supra* note 71, 478.

<sup>75</sup> Normally referred to as the two stage inquiry. See North/Fawcett, *supra* note 45, 336.

unjust to send the claimant to the foreign forum. The burden of proof is shared. The defendant must prove the availability and the appropriateness of the foreign courts. The claimant must prove that it would be unjust to send him or her to the alternative forum.<sup>76</sup>

a. Availability of the foreign forum

Availability of the foreign forum first of all relates to jurisdiction.<sup>77</sup> The defendant must demonstrate that the foreign courts are competent to entertain the claimant's action. If, for example, the defendant asserts that the courts at his or her place of domicile or the courts at the place of the performance of the contractual obligation are the most appropriate for dealing with the particular claim, he or she must prove that the corresponding courts have jurisdiction.

Furthermore, the availability test includes aspects of substantive justice.<sup>78</sup> It may, for example, be an issue of availability if the particular remedy provided under English law is not available in the foreign forum (a particular company law<sup>79</sup> or tort action, time-bars, etc.), or if the principles of fair trial are not guaranteed abroad.<sup>80</sup> Accordingly, there exists a difficult dividing line between availability of the foreign forum (first test) and injustice to send the claimant to the foreign forum (third test in a stay proceeding).<sup>81</sup> This division may be crucial since, as mentioned above, the former condition must be proved by the defendant whereas concerning the latter, the burden of proof is imposed upon the claimant.

b. Appropriateness of the foreign forum

Having shown that the foreign forum is available, the defendant must prove that proceedings before the foreign courts would be clearly, and not only slightly, more appropriate than proceedings before the English courts, i.e. that the foreign courts bear the closest connection to the dispute.<sup>82</sup> The factors which constitute a connection between the forum and the dispute and, accordingly, the factors<sup>83</sup> which are taken into account by the English courts are:<sup>84</sup>

---

<sup>76</sup> Illustrative Lord Goff in *Spiliada*, *supra* note 71, 476; *Connelly*, *supra* note 72, 344; concerning agreements on choice of court see Briggs/Rees, *supra* note 50, 208 et seq.

<sup>77</sup> Collins, *supra* note 52, 396–397.

<sup>78</sup> North/Fawcett, *supra* note 45, 336; differing in opinion Collins, *supra* note 52, 397.

<sup>79</sup> Rejected in *re Harrods (Buenos Aires) Ltd* [1991] 4 All ER, 348 (see the opinion of Lord Stocker at 364–365).

<sup>80</sup> See Lord Evans in *Mohammed v. Bank of Kuwait and the Middle East KSC* [1996] WLR 1483, 1494–1497.

<sup>81</sup> See the criticism by North/Fawcett, *supra* note 45, 337.

<sup>82</sup> See *The Abedin Daver*, *supra* note 44, 478. A stay will not be granted where, as it may well be in international commercial transactions, a clearly appropriate forum does not exist. See Lord Goff in *Spiliada*, *supra* note 71, 477. For an example of a wholly international case see *European Asian Bank A.G. v Punjab and Sind Bak* [1982] 2 Lloyd's Rep. 356.

<sup>83</sup> The weight of the various factors depends on the particularities of the respective case.

<sup>84</sup> Briggs/Rees, *supra* note 50, 4.10; see also Collins, *supra* note 52, 397–398.

- Personal relationship of the parties to the litigation:<sup>85</sup> Presence and domicile of the parties in the forum state constitute a personal link to the forum State. Person-related factors may, namely, be decisive where both parties are domiciled in the same State. However, the defendant will, presumably, not succeed if he or she solely invokes that, as a natural right, he or she must be sued before his or her domestic courts.
- Factual connections between the dispute and the particular courts:<sup>86</sup> This factor relates to the place of evidence. Courts which are close to the evidence appear more appropriate to entertain a particular dispute. For example, in a dispute concerning a car accident it might be sensible to proceed before the courts at the place where the car accident has happened since evidence (witnesses, inspections etc) will be easily available at that place.
- The law which applies to the substance of the case:<sup>87</sup> It might be reasonable to proceed before a court which applies its own substantive law. This might further the quality of the judgment. It furthermore eliminates difficult divisions between substantive and procedural law.
- The possibility of there being a *lis alibi pendens*:<sup>88</sup> A stay of proceedings may be justified in order to prevent positive competence conflicts.
- The relevance of other disputes and other parties to the litigation: The *Spiliada* case illustrates this factor. A different claimant had already brought a similar action against the same defendant before the English courts. This amplified the appropriateness of the English courts to entertain the *Spiliada* dispute. The court and both parties could profit from the knowledge acquired in the previous proceedings.<sup>89</sup>

c. Injustice of sending the claimant to the available alternative forum

If the defendant shows that the foreign forum is available and clearly more appropriate, the court will stay proceedings unless the claimant can prove that it is unjust to send him or her to the alternative forum.<sup>90</sup> The mere fact that the proceedings before the foreign court might be detrimental for the claimant – that is, that disadvantageous substantive and/or procedural rules would apply – is not sufficient proof.<sup>91</sup> Furthermore, the courts should abstain from comparing the quality of justice.<sup>92</sup> Accordingly, only in cases in which the claimant can demonstrate

---

<sup>85</sup> Lord Goff in *Spiliada*, *supra* note 71, 478.

<sup>86</sup> Lord Goff in *Spiliada*, *supra* note 71, 478; Lord Stocker in *re Harrods*, *supra* note 79, 364.

<sup>87</sup> Lord Goff in *Spiliada*, *supra* note 71, 478.

<sup>88</sup> See Fawcett, *supra* note 41, 29 et seq.; *The Abidin Daver*, [1984] 1 All ER, 470.

<sup>89</sup> The so-called Cambridgeshire factor. See the *Spiliada* case, *supra* note 71, 484 et seq.

<sup>90</sup> See Collins, *supra* note 52, 398–400.

<sup>91</sup> See *Trendtex Trading Corporation v. Credit Suisse* [1981] 3 All ER 520; see also Lord Goff in *Spiliada*, *supra* note 71, 482 et seq.; *Connelly v. RTZ Corp'n plc.* [1997] 4 All ER 344, with further references.

<sup>92</sup> North/Fawcett, *supra* note 45, 344–345.

that the proceedings before the foreign court would contradict essential principles of fairness, should the request of the defendant for a stay of proceedings be rejected.<sup>93</sup>

## (2) LEAVE OF SERVICE ON THE DEFENDANT ABROAD

It has already been explained that a claimant who asks for leave of service on the defendant abroad must prove that the conditions of one of the sub-rules of paragraph 6.20 CPR are met. Furthermore, leave will only be granted if the claimant can show that England is the most appropriate forum to entertain the particular case (para. 6.21 CPR, *forum conveniens*). This test is similar to that of *forum non conveniens*. The claimant has to demonstrate that:<sup>94</sup>

- England is clearly the most appropriate forum. The principles outlined above at 1(b) apply.<sup>95</sup>
- If it remains questionable whether England is clearly the most appropriate forum, leave will not be granted unless the claimant can show that no alternative forum is available or that a fair trial cannot be expected abroad. The principles outlined above at 1(a)(c) apply.<sup>96</sup>

If the claimant proves that England is clearly the most appropriate forum, the defendant may show that it would be unjust to require him or her to defend his or her case before the English courts. Analogous considerations as above (1(c)) apply.<sup>97</sup>

## C. Art. 6(1) ECHR and the Doctrines of Forum Non Conveniens and Forum Conveniens

### I. Introduction

Having set out England's traditional rules of jurisdiction, it is now appropriate to examine the impact of minimum standards of jurisdiction on the English system of jurisdiction, that is, the (potential) influence of Article 6(1) ECHR on the doctrines of *forum non conveniens* and *forum conveniens*.

Any impact of the Human Rights Convention on the English system of jurisdiction first presupposes that the English courts are prepared to protect the rights enshrined in the Convention and to take account of the case-law of the European Court of Human Rights in Strasbourg.<sup>98</sup> This is now ensured by the

<sup>93</sup> See the balancing of arguments of Lord Goff in *Connelly v. RTZ Corp'n plc.* [1997] 4 All ER 346–347.

<sup>94</sup> See Lord Goff in *Spiliada*, *supra* note 71, 478 et seq.

<sup>95</sup> See also North/Fawcett, *supra* note 45, 314–316.

<sup>96</sup> North/Fawcett, *supra* note 45, 316–317.

<sup>97</sup> Briggs/Rees, *supra* note 50, para. 4.52.

<sup>98</sup> Concerning the application of the Human Rights Convention in England see Stramer, *European human rights law – The Human Rights Act 1998 and the European Convention on Human Rights* (1999).

Human Rights Act 1998 which entered into force in October 2000.<sup>99</sup> The Act incorporates the Human Rights Convention into the United Kingdom's internal legal system. According to section 2(1)(a) of the Act, the UK courts are obliged to take into account any judgment of the European Court of Human Rights. Furthermore, domestic legislation has to be construed in accordance with the Human Rights Convention (s. 3). The UK courts are furthermore empowered to declare primary legislation incompatible with the Convention. Unlike primary legislation, delegated (or subordinated) legislation can, in certain cases, even be struck down.<sup>100</sup> As regards Common law, section 6(1) of the Act applies. Subsection 1 states that 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right'. Courts and tribunals are expressly included in the term 'public authority' (s. 6(3)(a)). The legal consequences of this inclusion are illustrated by the vote of the Lord Chancellor in the debate during the Act's passage through the House of Lords.

'We also believe that it is right as a matter of principle for the courts to have the duty of acting compatible with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals. Why should they not?'<sup>101</sup>

In other words, the UK courts are obliged to apply and develop the Common law in accordance with the Human Rights Convention.

Jurisdiction of the English courts under the traditional rules is based on case-law and statutory instruments. In para. 19.4A the Civil Procedural Rules contain an express provision on the relation between the Human Rights Act 1998 and the CPR.<sup>102</sup> The courts may make a declaration of incompatibility in accordance with section 4 of the Human Rights Act, if 21 days' notice to the Crown has been given. Thus, when applying and developing the existing case-law or when construing the CPR, the English courts must account for Article 6(1) ECHR (s. 3 Human Rights Act 1998). If an interpretation of the CPR which is in conformity with the ECHR is

---

<sup>99</sup> *Halsbury's Statutes* (4th ed., 2000) vol. 7, 497 et seq.

<sup>100</sup> Stramer, *supra* note 98, 22–23.

<sup>101</sup> Cited in Stramer, *supra* note 98, 24.

<sup>102</sup> The CPR is based on s. 2 of the Civil Procedure Act 1997 (*see Halsbury's Statutes* (4th ed., 2000) vol. 11, 1472 et seq.). The Civil Procedure Rules are to be made by the Civil Procedure Rule Committee and thus constitute delegated legislation. The impact of the Human Rights Convention on delegated legislation is laid down in s. 3 of the Human Rights Act 1998. As mentioned before, delegated legislation can be struck down. However, in s. 3(2)(c) of the Human Rights Act 1998 it is stated that 'this section does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility'. According to the Civil Procedure Rule Committee this rule applies to the CPR (*see* para. 19.4A CPR and The Civil Procedure (Amendment No. 4) Rules 2000; for the definition of primary and subordinate legislation under the Human Rights Act 1998 see s. 21 of the respective Act).

not possible, the English courts will make a declaration of incompatibility in accordance with paragraph 19.4A CPR and section 4 of the Human Rights Act 1998. Accordingly, if, in future, the Strasbourg Court should set up minimum standards of jurisdiction, the latter will have to be observed by English courts. A deviation from Strasbourg case-law would seem permissible only in highly exceptional cases.<sup>103</sup>

## II. General Guidelines

Assuming that minimum standards of jurisdiction will be set up under Article 6(1) ECHR and that the limits of jurisdiction will follow the principles set out in the first part of this article, jurisdiction of the civil courts will be restricted by a test of jurisdictional interests. This entails, in brief:

- The right of the claimant to proceed before a dispute-related court, or more precisely, the insufficiency of a *sole* defendant forum.
- The obligation of the member states to provide a set of alternative, dispute-related jurisdictions which appropriately take account of the jurisdictional interests of the claimant, including an exceptional jurisdiction for cases which otherwise cannot be fairly tried anywhere, and the duty to recognise and enforce foreign judgments which are based on a dispute-related jurisdiction.
- The right of the defendant to stay away from exorbitant jurisdictions, that is, from jurisdictions which neglect his or her jurisdictional interests.
- The obligation of the member states to abolish exorbitant jurisdictions and to refuse the recognition and enforcement of foreign judgments which are based on an exorbitant jurisdiction.

Civil law countries, that is, countries which determine the international jurisdiction in general and abstract terms, must provide jurisdictions which, on a general and abstract level, sufficiently protect the jurisdictional interests of both parties of international law cases. Article 6(1) ECHR does not require a case-by-case analysis of the jurisdictional interests of the parties. Accordingly, exorbitant jurisdictions are prohibited even if, in the particular case, the connection to the forum state justifies jurisdiction of the courts in question.<sup>104</sup> And, conversely, dispute-related jurisdictions are lawful even if, in the particular case, the connection to the forum State is only loose.

The legal consequences might be different where the doctrines of *forum non conveniens* and *forum conveniens* apply. If successfully applied, the doctrines guarantee that the courts which have the closest connection to the parties and the dispute will entertain the case and one may safely infer that the jurisdiction of these

---

<sup>103</sup> Stramer, *supra* note 98, 26.

<sup>104</sup> It is not prohibited to provide exorbitant jurisdictions as long as the courts are obliged to examine if, in the particular case, further connections to the forum state exist (*see*, for example, § 23 of the German Civil Process Order). However, it is another question if such jurisdictions are politically desirable.



courts would hardly contravene the minimum standards of jurisdiction set up by Article 6(1) ECHR. Nevertheless, it will be shown that the doctrines of *forum non conveniens* and *forum conveniens* as applied by the English courts could be problematic in light of the concept of minimum standards of jurisdictions in various ways. The analysis is divided into two parts: Stay of proceedings/doctrine of *forum non conveniens* (III *infra*) and leave of service out of the jurisdiction/doctrine of *forum conveniens* (IV *infra*).

### III. Stay of Proceedings/Doctrine of Forum Non Conveniens

English courts have jurisdiction if the defendant has been successfully served with a claim form in England. Thereafter, the defendant's sole remedy against litigation before the English courts is to ask for a stay of proceedings. He or she must propose an alternative forum and prove that this forum is available and clearly more appropriate than the English forum. The point of departure for a stay in proceedings may vary. It may, for example, be the case that the claim form has been served on a person who is present and domiciled in England, or on a company which has its seat, a branch or a place of business in England. It may, however, also be the case that the claim form has been served on a person whose presence in England was of merely transient nature, or on a company which has a place of business in England in a dispute which is not connected with the carrying on of the business of the established place of business.<sup>105</sup> In the latter two cases, jurisdiction of the English courts is, if no further connections exist, of an exorbitant nature. In Civil law countries – that is, where the doctrine of *forum non conveniens* does not apply – such jurisdictions would infringe Article 6(1) ECHR. The application of the doctrine of *forum non conveniens* in these two cases must therefore be examined separately.

#### (1) STAY OF PROCEEDINGS WHERE THE JURISDICTION OF THE ENGLISH COURTS IS EXORBITANT<sup>106</sup>

##### a. Proof of additional connections to the English forum

Jurisdiction over a person whose presence in England was of merely transient nature or over a company which has a place of business in England in a dispute which is not connected with the carrying on of the business of the established place of business infringes Article 6(1) ECHR since it does not take account of the jurisdictional interests of the defendant. Jurisdiction of the English courts is therefore only justified if the defendant submits to the jurisdiction of the English courts or if further factual connections to the English forum exist. However, the burden of proof to show that such additional connections *do not* exist – and this is, *de facto*, part of the defendant's defence under the current system – must not be imposed on the defendant. To decide

<sup>105</sup> See *supra*, B(II)(2).

<sup>106</sup> Concerning the terminology see note 66.

otherwise would require the defendant to appear before the English courts (in order to contest the ECHR conformity of the English jurisdiction). This, however, is exactly what Article 6(1) ECHR, in effect, must prevent. Article 6(1) protects the defendant from being sued in a jurisdiction which offends his or her jurisdictional interests. Thus, the burden of proof to show that, in the particular case, the defendant's interests are sufficiently safeguarded, that is, that a connection to the English forum exists which justifies jurisdiction of the English courts, must be imposed on the claimant. The claimant will succeed if he or she can show that connections similar to those laid down in paragraph 6.20 CPR exist. However, the list of factors which can be invoked is not exhaustive. The situation may be compared with the test of appropriateness carried out by the English courts when applying the doctrine of *forum conveniens*.<sup>107</sup> Yet in the present context, the claimant does not have to show that the English forum is the most appropriate to entertain the case, but, conversely, that the English courts are not completely inappropriate to render a judgment on the merits of the dispute.

b. Additional connections are proved

If the claimant can show that *prima facie* the defendant's jurisdictional interests are safeguarded even before English courts, the burden of proof shifts to the defendant. The common principles of *forum non conveniens* apply, however, with two exceptions: First, the claimant's right to proceed before a dispute-related court requires that the jurisdiction of the foreign courts is not solely based on the person-related interests of the defendant (domicile or general presence of the defendant in the foreign jurisdiction). If the defendant's forum has been proposed, the defendant must demonstrate that further connections to his or her domestic courts exist. However, this requirement will hardly entail difficulties since, in practice, a stay of proceedings is only granted if the foreign forum is clearly more appropriate. The mere domicile/general presence of the defendant in the foreign jurisdiction hardly suffices.<sup>108</sup> Secondly, a judgment rendered in the foreign jurisdiction must be enforceable in England. If the claimant can show that this is not the case, a stay should not be granted. To decide otherwise would deprive the claimant of his or her right to proceed before a dispute-related court.

c. Additional connections are not proved

If the claimant cannot demonstrate that additional connections to England are given, the English courts must decline jurisdiction (and not solely stay proceedings).<sup>109</sup> Again, several exceptions must be considered. Jurisdiction of the English

---

<sup>107</sup> See *supra*, B(III)(2).

<sup>108</sup> See *supra*, B(III)(1)(b), personal relationship of the parties to the litigation.

<sup>109</sup> See in this context the U.S. Supreme Court in *Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct., 2105 et seq. In this judgment, the U.S. Supreme Court held that the transient jurisdiction does not infringe the right of due process provided in the U.S. constitution. If the jurisdictional interests of the parties are taken as the basis of minimum standards of jurisdiction (instead of aspects of sovereignty), such a judgment must be rejected.

courts may be justified where the claimant can show that a foreign forum is not available or that it would be unjust to send him or her to the foreign forum. However, only genuine cases of injustice can warrant jurisdiction of the English courts. This may, for example, be the case if the proceedings before the foreign courts would infringe another procedural right guaranteed by the Human Rights Convention. Finally, jurisdiction of the English courts may be justified where the claimant can prove that a foreign judgment which would be enforceable in England is not available. In this case, however, the claimant must demonstrate his or her interest in an enforceable judgment in England.

(2) STAY OF PROCEEDINGS WHERE THE JURISDICTION OF THE ENGLISH COURTS IS NOT EXORBITANT

In these cases the doctrine of *forum non conveniens* complies with the concept of minimum standards of jurisdiction (Art. 6(1) ECHR).<sup>110</sup> If the request for a stay of proceedings has been rejected, the English courts entertain the dispute. The jurisdictional interests of the defendant are observed since the English jurisdiction is, at least, based on the general presence or domicile of the defendant in England. The jurisdictional interests of the claimant are respected since he or she has submitted<sup>111</sup> to the English jurisdiction.

If a stay of proceedings has been granted, the foreign courts entertain the dispute. The jurisdictional interests of the defendant are observed. He or she wishes to proceed before the foreign courts, has submitted to the jurisdiction of the foreign courts. The jurisdictional interests of the claimant are also safeguarded. The English courts only grant a stay of proceedings if jurisdiction of the foreign courts is clearly more appropriate compared to jurisdiction of the English courts, that is, the foreign courts bear the closest relation to the dispute. Thus, it may be inferred that, under these circumstances, the jurisdiction of the foreign courts conforms to Article 6(1) ECHR.

*IV. Leave of Service out of Jurisdiction/Doctrine of Forum Conveniens*

Paragraph 6.20 CPR jurisdiction, in general, complies with the concept of minimum standards of jurisdiction. It presupposes that – on a general and abstract level (similar to Civil law jurisdictions) – factual connections between the defendant/dispute and the English forum exist (see the sub-rules of para. 6.20 CPR).<sup>112</sup> This is sufficient in respect to civil law countries. But what about Common Law jurisdictions? Are the respective courts obliged to carry out a case by case analysis

<sup>110</sup> Actually, this is one possibility of a successful proof of additional connections to the English forum (*see supra*, 1(b)). However, in this case the additional connection to the English forum is person (and not dispute) related. This must be taken into account in respect of the exceptions set out under 1(b).

<sup>111</sup> Although not technically.

<sup>112</sup> *See supra*, B(II)(3).

of the jurisdictional interests of the parties involved? This view has to be rejected. Otherwise Article 6(1) ECHR would impose stricter standards on Common Law jurisdictions. Thus, it is not open to the defendant to argue that, because of the facts of the particular case, the English forum is not sufficiently connected to the dispute, that is, does not sufficiently protect his or her jurisdictional interests.

Paragraph 6.20 CPR jurisdiction also suffices from the point of view of the claimant's rights. However, some minor modifications should be envisaged. The English courts should (instead of may) grant leave of service on the defendant abroad if no dispute-related alternative forum is available and, where a dispute-related alternative forum is available, if the foreign judgment cannot be enforced in England. However, in the latter case, the claimant should also have to demonstrate his or her interest in an enforceable judgment in England.

## ***D. Art. 6(1) ECHR and Recognition and Enforcement of Foreign Judgments in England***

### *I. Introduction*

It follows from the preceding paragraphs that minimum standards of jurisdiction would considerably affect jurisdiction of the English courts under the traditional rules. However, this is only one side of the coin as regards Article 6(1) ECHR. The other side concerns England's attitude towards foreign judgments. Minimum standards of jurisdiction not only affect jurisdictional provisions but also the rules on recognition and enforcement. The impact of Article 6(1) ECHR on the English system of recognition and enforcement of foreign judgments will be considered in turn.

The preconditions under which a foreign judgment can be recognised and enforced in England are laid down in different legal sources. Judgments rendered in a member State of the EU or the EFTA are enforced in accordance with the provisions of the Brussels or Lugano Convention.<sup>113</sup> Yet, what is of interest in the present article are the cases in which the two Conventions do not apply, that is, the recognition and enforcement of judgments made outside of the EU and the EFTA. Two types of enforcement must be distinguished in that respect: Recognition and enforcement under Common Law and enforcement by registration under statute.<sup>114</sup>

### *II. Recognition and Enforcement Under Common Law*<sup>115</sup>

A judgment creditor who seeks to enforce his or her foreign judgment in England

---

<sup>113</sup> See also the new 'Brussels Regulation'.

<sup>114</sup> See the Administration Act 1920 (*Halsbury's Statutes* (4th ed., 2000) vol. 22., 476 et seq.) and the Foreign Judgments (Reciprocal) Enforcement Act 1933 (*Halsbury's Statutes* (4th ed., 2000) vol. 22, 482 et seq.). See also CPR Schedule 1 – RSC Rules, RSC Order 71.

<sup>115</sup> North/Fawcett, *supra* note 45, 407 et seq.; Briggs/Rees, *supra* note 50, 333 et seq.

under Common law must bring an action against the judgment debtor before the English courts. The initial phase of such proceedings corresponds to that of substantive claims before the English courts. The judgment creditor must serve the judgment debtor with a claim form. The rules of service within or outside of the jurisdiction apply.<sup>116</sup>

The substantive conditions under which the foreign judgment can be recognised are similar to those which apply in Civil law countries: (indirect) jurisdiction of the foreign court, aspects of natural justice, public policy, prior judgments and so on. Only the first of these conditions is of interest in the present context, namely the (indirect) jurisdiction of the foreign courts. However, the rules are quite straightforward. Jurisdiction of the foreign court is only recognized in two cases: First, if the foreign court is within the jurisdiction where the defendant in the first court was present when proceedings were instituted<sup>117</sup> or, secondly, if the judgment debtor has submitted to the jurisdiction of the foreign court.<sup>118</sup> No other jurisdictions are recognized.<sup>119</sup>

### III. Enforcement Under Statute<sup>120</sup>

Enforcement under statute can be sought if the foreign judgment has been rendered in a state concerning which statutory enforcement is provided.<sup>121</sup> Where statutory enforcement applies, the foreign judgment can be directly enforced by registration under the provisions of the respective Act. Registration will be granted if the conditions for registration are met, namely if the foreign court was (indirectly) competent. This requires, with some slight differences under the two Acts, that the defendant in the first court had ordinary residence or carried out business in the forum state or that the judgment debtor has submitted to the jurisdiction of the foreign courts.<sup>122</sup> Again, no other jurisdictions are recognized.

### IV. Impact of Art. 6(1) ECHR

The concept of minimum standards of jurisdiction, as it has been outlined in the first part of this article, affects the provisions on recognition and enforcement of foreign judgments in two ways:

- First, recognition and enforcement must be refused if the foreign judgment is

<sup>116</sup> See in that respect para. 6.20(9) CPR. For details, see *supra* B(II).

<sup>117</sup> See *Adams v. Cape Industries plc* [1991] 1 All ER 929.

<sup>118</sup> North/Fawcett, *supra* note 45, 411 et seq.

<sup>119</sup> Briggs/Rees, *supra* note 50, 334.

<sup>120</sup> North/Fawcett, *supra* note 45, 462 et seq.; Briggs/Rees, *supra* note 50, 362 et seq.

<sup>121</sup> See *supra*, note 114. Namely judgments rendered in a Commonwealth country. For details see Briggs/Rees, *supra* note 50, para. 7.59 note 356 and para. 7.63 note 382.

<sup>122</sup> See s. 9 of the Administration Act 1920 and s. 4 of the Foreign Judgments (Reciprocal) Enforcement Act 1933.

based on a jurisdiction which contradicts Article 6(1) ECHR, that is neglects the jurisdictional interests of the defendant.

- Secondly, the fact that a foreign judgment is founded on a dispute-related jurisdiction may not justify the refusal of recognition and enforcement.

The impact of these principles on England's traditional rules of recognition and enforcement of foreign judgments is evident.<sup>123</sup> The Common law rule which allows recognition and enforcement where the defendant's presence in the forum State was of merely transient nature must be abolished, with the exception that the foreign courts respect the principles of stay proceedings which have been outlined above.<sup>124</sup> Nevertheless, the English courts can no longer refuse the recognition and enforcement of foreign judgments which are based on a dispute-related jurisdiction. The term 'dispute relation' is a legal term that must be interpreted by the courts (preferably by the European Court of Human Rights in Strasbourg). Reference can be made to the English system of evaluation of appropriateness of jurisdiction.<sup>125</sup> However, as regards judgments rendered in Civil law countries, dispute relation of general and abstract nature must suffice.

### Part III: Theses

The results of this paper can be summarized in the following theses:

1. The connection between Art. 6(1) ECHR and the provisions on international jurisdiction is not yet recognized. At present, Art. 6(1) ECHR is not part of European Civil Procedure Law.
2. There is a logical and mandatory connection between the right to effective court access and the provisions on international jurisdiction. The effectiveness of court access depends on, amongst other things, the place where civil proceedings take place. Art. 6(1) ECHR guarantees a minimum standard of effective court access and, accordingly, minimum standards of jurisdiction.
3. The European Court of Human Rights and the European Court of Justice could safeguard the uniform interpretation and implementation of minimum standards of jurisdiction in Europe.
4. A test of jurisdictional interests allows the evaluation of the effectiveness of court access provided by a particular jurisdictional provision. Jurisdictional orders which take account of the jurisdictional interests of both parties of international disputes improve the effectiveness of court access. Jurisdictional orders which

---

<sup>123</sup> Concerning the remedies under the Human Rights Act 1998 and their application to primary and delegated legislation and to common law *see supra*, C(1).

<sup>124</sup> *See supra*, C(III)(1)(b).

<sup>125</sup> *See supra*, B(III)(1)(b).

neglect the jurisdictional interests of one of the parties of an international dispute deprive this party of its right to effective access to the courts.

5. Art. 6(1) ECHR guarantees a minimum standard of effective court access, minimum standards of jurisdiction and, accordingly, a minimal protection of the jurisdictional interests of both parties of international law cases. What are the legal consequences? In order to answer this question a distinction must be drawn between the rights of the claimant and the rights of the defendant.
6. Art. 6(1) ECHR embraces the right of the claimant to proceed before a dispute-related court. A *sole* defendant forum, in principle, infringes Article 6(1) ECHR. Thus, the member States party to the Convention are obliged to provide a set of alternative, dispute-related jurisdictions which appropriately take account of the jurisdictional interests of the claimant. Furthermore, the member States must provide an exceptional jurisdiction and must recognize and enforce foreign judgments which are based on a dispute-related jurisdiction.
7. Art. 6(1) ECHR provides the right of the defendant to avoid exorbitant jurisdictions, that is, jurisdictions which neglect his or her jurisdictional interests. Thus, the member States are obliged to abolish exorbitant jurisdictions and to refuse the recognition and enforcement of foreign judgments which are based on an exorbitant jurisdiction.
8. Art. 6(1) ECHR – that is, the aim of creating uniform minimum standards of jurisdiction in Europe – faces one particular problem: the legal differences which exist between the procedural orders of Civil law and Common law countries. In fact, in Civil law countries the jurisdictional provisions are typically drafted in general and abstract terms. The courts must accept (or reject) jurisdiction if, in the particular case, the conditions set up by statute are fulfilled (or not fulfilled). By contrast, the courts in Common law countries ordinarily enjoy a certain discretion concerning their jurisdiction. Even where the preconditions for the exercise of jurisdiction are met, the courts may – on the basis of the facts of the particular case – refuse their jurisdiction/stay proceedings (doctrines of *forum conveniens* and *forum non conveniens*). It is evident that this fundamental difference between Civil law and Common law jurisdictions must be taken into consideration by those who seek to establish minimum standards of jurisdiction. The second part of this article considered the impact of Article 6(1) ECHR on the Common law jurisdictions, that is, the impact of minimum standards of jurisdiction on England's traditional rules of jurisdiction.
9. As regards the jurisdiction of the English courts under Common law, a distinction must be made between the service of the claim form within or outside of the English jurisdiction. In the former case, the claimant has a right to proceed before the English courts. The defendant can ask for a stay of proceedings. The doctrine of *forum non conveniens* applies. In the latter case, the claimant must ask for leave of service on the defendant abroad. The doctrine of *forum conveniens* applies.

10. Art. 6(1) ECHR considerably affects the application of the doctrines of *forum non conveniens* and *forum conveniens*. The discretion of the English courts is limited by mandatory requirements of Article 6(1) ECHR. The amendments in the following theses must be envisaged.
11. With regard to the doctrine of *forum non conveniens*: (A) Where jurisdiction of the English courts is exorbitant (namely where a claim form has been served on the defendant whose presence in England was of merely transient nature), jurisdiction in these cases infringes Art. 6(1) ECHR unless further connections to the English forum exist. The claimant must prove that such additional connections are given. If he or she succeeds, the common principles of *forum non conveniens* apply, with some minor exceptions. If he or she fails, jurisdiction is precluded by Art. 6(1) ECHR. Nevertheless, jurisdiction of the English courts may be justified in exceptional cases. (B) Where the jurisdiction of the English courts is not exorbitant (namely, where the defendant is domiciled in England). The doctrine of *forum non conveniens* as applied by the English courts complies with Art. 6(1) ECHR.
12. With regard to the doctrine of *forum conveniens*: Some minor modifications should be envisaged. The English courts should (instead of may) grant the leave of service on the defendant abroad if no dispute-related alternative forum is available and, where a dispute-related alternative forum is available, if the foreign judgment cannot be enforced in England. Yet, in the latter case the claimant should have to demonstrate his or her interest in an enforceable judgment in England.
13. Finally, Art. 6(1) ECHR also influences England's traditional rules of recognition and enforcement of foreign judgments. The Common Law rule which allows recognition and enforcement where the defendant's presence in the forum State was of a merely transient nature must be abolished, with the exception that the foreign courts respect the principles of stay proceedings which have been outlined in thesis 11. Nevertheless, the English courts can no longer refuse the recognition and enforcement of foreign judgments which are based on a dispute-related jurisdiction.