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Forum Shopping in European Insurance Litigation: A Comparison Between Jurisdictional Rules in the European Union and the United States

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International forum shopping is hardly a new topic.¹ As long as the jurisdictional rules of different countries are different, litigants (in most cases, plaintiffs) will likely try to take advantage of more favorable forums when bringing a lawsuit. It is the same in both Europe and in the United States. However, since the European Union's ("EU") 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Convention"),² different conflict of laws rules among EU member states have harmonized. Currently, Council Regulation (EC) 44/2001 (the "Judgment Regulation") supersedes the Brussels Convention. One of the desirable effects of the Judgment Regulation is that it eliminates forum shopping by standardizing the way that a court in a member state can acquire jurisdiction.³ While this intended goal is arguably a success in

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1. For a general introduction, see Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559 (2002); see also Emil Petrossian, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257 (2007).

2. Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice, ¶ 136, 1979 O.J. (C 59) 71, 112 [hereinafter Schlosser Report].

3. Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, ¶¶ 69-89, O.J. (L 012) 1 (EC).

general, the same may not be said in relation to litigation involving the insurance industry, which falls under a special regulatory regime of the Judgment Regulation.⁴ On the other hand, the United States has always played a big part in both the insurance industry and international forum shopping discussions. The United States has been the darling for international litigation for years because of its broad jurisdictional and favorable procedural rules.

An analysis of the interactions between these two systems, in terms of insurance litigation, raises interesting issues in both general international litigation and forum shopping in insurance litigation. In particular, this article is an attempt to highlight certain ways that a European policyholder can gain sometimes unjustified advantages over a U.S. insurance company. The EU hoped it would be able to negate any unjustified advantages against insurance companies while preserving a legitimate goal of protecting underprivileged litigants involved in lawsuits with an insurance company. In this article, each major jurisdictional rule on the Judgment Regulation's insurance matters will be compared with its U.S. counterpart. Part I introduces *New Hampshire Insurance Company v. Strabag Bau A.G.* (the "New Hampshire case"), a case decided in 1991 by an English court of appeal.⁵ Part II gives a brief description of the Judgment Regulation and compares its special jurisdictional rules governing insurance matters with those of the U.S. Part III introduces the U.S. jurisdictional rules and their application to the New Hampshire case. Part IV criticizes the unsatisfactory aspects of the Judgment Regulation. Finally, Part V proposes certain measures that might alleviate the various issues.

I. THE NEW HAMPSHIRE CASE

The defendants in the New Hampshire case, Strabag Bau A. G. and Bilfinger and Berger A.G., both German companies, and Universale Hoch and Tief Bauaktiengesellschaft, an Austrian company (together, the "Construction Companies"), formed a joint venture and entered into a contract for the construction of Basrah International Airport in Iraq.⁶ In 1981, the Construction

4. *Id.*

5. *New Hampshire Ins. Co. v. Strabag Bau A.G.*, [1992] 1 Lloyd's Rep. 361 (U.K.).

6. *Id.* at 361.

Companies took out an insurance policy through their brokers in London ("London Brokers") against certain risks associated with the project.⁷ Their brokers placed this insurance policy in accordance with the usual practices of the London market. The leading underwriter was the New Hampshire Insurance Co. ("New Hampshire"), a U.S. insurance company, which was represented by American Inter-national Underwriters (UK) Ltd. in London. Although insurance companies from Germany, Sweden, Italy, France, and the U.S. were placed at risk, the bulk of the risk was placed on United Kingdom insurers (together, the "Insurers"). The Construction Companies' London Brokers prepared the wording of the policy. The policy did not include governing law or jurisdictional clauses. In 1989, the Construction Companies filed a series of large claims between £20 million and £60 million based on corrosion damage to the foundations of the airport building. The Insurers responded by issuing proceedings in London, seeking a declaration that they had avoided the policy on the basis of the Construction Companies' non-disclosure.⁸ The key issue in that case was whether the English Court had jurisdiction over the Construction Companies. The Court held that the English courts did not have jurisdiction over the Construction Companies under the Judgment Regulation.⁹ The Plaintiffs appealed.¹⁰ Lloyd L.J., who delivered the judgment for the Court of Appeal, upheld the lower Court's decision.¹¹

Before going through the reasoning behind the decision, it may be helpful to highlight certain key factors of the case. First, the insurance transaction had the most natural connection with London because the negotiation and conclusion of the policy took place in London, the London insurance companies shouldered the bulk of the risks, and the Construction Companies were represented by London Brokers.¹²

Second, there were few connections to other jurisdictions. The Construction Companies' only relevant connection to Germany is that they were domiciled there,¹³ and their only

7. *Id.* at 364.

8. *Id.*

9. *Id.* at 362.

10. *Id.*

11. *Id.* at 370.

12. *See id.* at 364.

13. *Id.* at 361.

connection to the U.S. is that their underwriter was domiciled there, though the underwriter acted through its representative in London for the transaction.¹⁴ Even though Iraq may have certain connections to the case because it was the place where the damage was claimed to have happened,¹⁵ this was not discussed in the judgment.

Third, although the insurance policy did not include a governing law clause and the Court did not decide this question, the insurance policy was likely to be governed by English law under the EU's choice of law rules, given its connections with London.

Fourth, the Construction Companies are sophisticated corporations. According to the judgment, the Construction Companies are substantial civil engineering and construction businesses. While there is no information regarding their actual size at the time, it is reasonable to assume that they are rather large corporations. For example, Strabag is currently the fifth largest construction company in Europe.¹⁶ In 2008, Strabag had approximately 73,000 employees and posted an output volume of around €13.7 billion.¹⁷ The Construction Companies' London brokers prepared the wording of the policy and initiated it.¹⁸ The Insurers referred to the Construction Companies as having equivalent or comparable bargaining power, a conclusion that the Court did not dispute.¹⁹

Fifth, the cross-border infrastructure project is the construction of the largest airport in Iraq at the time, and is still the second largest airport in Iraq to date.²⁰ In addition, the claims

14. *Id.* at 364.

15. *Id.* at 361.

16. Christian Gutleiderer, *Russian billionaire to buy \$1.6 bln Strabag stake*, REUTERS UK, April 25, 2007, <http://uk.reuters.com/articlePrint?articleId=UKL2554179020070425>.

17. Strabag, http://www.strabag.com/databases/internet/_public/content.nsf/Navigation?OpenAgent&docid=79E200B4108F278FC125736A0046758E (last visited Feb. 2, 2010).

18. *New Hampshire Ins. Co. v. Strabag Bau A.G.*, [1992] 1 Lloyd's Rep. 361, 364 (U.K.).

19. *Id.*

20. Patrick Hinton, *British Troops Leave Basra Airport*, SUITE101.COM, Jan. 6, 2009, http://britishaffairs.suite101.com/article.cfm/british_troops_leave_basra_airport.

involved here are huge. £20 million to £60 million in 1989 is worth roughly £50 million to £150 million today.²¹

With these factors in mind, the New Hampshire case raised several important issues: (1) why did the English Court hold that it had no jurisdiction when England was the jurisdiction that had the closest connections with the transaction?; (2) if the English courts did not have jurisdiction, which courts should have had jurisdiction?; (3) is there anything the Plaintiffs could have done differently to avoid this result?; (4) would the case be decided differently if similar litigation arose in the U.S.? These issues will be discussed after the major jurisdictional rules under the Judgment Regulation are explained in Part II.

II. THE JUDGMENT REGULATION

The Judgment Regulation applies to every member state of the EU, except Denmark.²² It generally applies to civil and commercial matters involving a defendant domiciled in a member state.²³ The Judgment Regulation brought a substantial change to the London insurance market, which is one of the leading insurance markets in the world. When the United Kingdom acceded to the Judgment Regulation, special consideration was given to the London insurance market.²⁴ One of the United Kingdom's requests was to exclude powerful multi-national corporations from the protections afforded to policyholders in general.²⁵ However, as explained below, this attempt was not overly successful. The relevant jurisdiction rules on insurance are set forth in Section 3 of the Judgment Regulation.

21. See Measuring Worth, Five Ways to Compute the Relative Value of a UK Pound Amount, 1830 to Present, <http://www.measuringworth.com/ukcompare> (last visited Feb. 2, 2010).

22. Europa - Summaries of EU Legislation, Jurisdiction, recognition and enforcement of judgments in civil and commercial matters ("Brussels I"), http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm.

23. See Council Regulation 44/2001, *supra* note 3, art. 2.

24. Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice, ¶ 136, 1979 O.J. (C 59) 71, 112 [hereinafter Schlosser Report].

25. *Id.*

A. Article 9(1) - Domicile

The most fundamental basis for jurisdiction under the Judgment Regulation is domicile. Under Article 2 of the Judgment Regulation, persons domiciled in a member state must be sued in the courts of that member state.²⁶ The central theme of Article 2 is that a court's location is the natural forum because it is where the defendant is domiciled, and thus the most reasonable forum in which a plaintiff can sue the defendant.²⁷ The insurance regime for insurance related matters also follows this general rule in Article 9(1)(a) of the Judgment Regulation, which allows an insurer domiciled in a member state to be sued in the courts of that member state.²⁸ However, in an attempt to protect the policyholder, the insured, and the beneficiary, Article 9(1)(b) further allows parties to bring suits against insurers in the courts of the member state where these parties are domiciled.²⁹ This greatly expanded the possible fora in which an insurance company could be sued, even if the insurance transaction at issue may have had few connections with the particular jurisdiction. On the other hand, the only jurisdiction in which an insurance company can sue a policyholder, the insured, or the beneficiary remains in its respective home jurisdiction.³⁰ Thus, applying these rules in the New Hampshire case, the Court of Appeal found that the Insurers could not sue the Construction Companies in England because the Construction Companies were domiciled in Germany.³¹ If the Insurers sued the Construction Companies in a EU member state, the only possible forum would be the German courts.

What if the Construction Companies brought the proceedings against the Insurers for non-payment instead? The Construction Companies would definitely be able to sue the Insurers in England, the place where the Insurers bearing the bulk of the risks are domiciled. The Insurers domiciled in other member states could possibly be joined under the joinder rules of the Judgment

26. Council Regulation 44/2001, *supra* note 3, art. 2.

27. *Id.*

28. *Id.* art. 9(1)(a).

29. *Id.* art. 9(1)(b).

30. *Id.* art. 12(1). This is subject to counterclaims under Article 12(2) and, in exceptional cases in certain direct actions, under Article 11(3).

31. See *New Hampshire Ins. Co. v. Strabag Bau A.G.*, [1992] 1 Lloyd's Rep. 361, 370 (U.K.).

Regulation.³² Alternatively, the Construction Companies could sue each party separately in the courts of the member states where they are domiciled.³³ In addition, as policyholders, the Construction Companies could choose to bring the suit in Germany where they reside, pursuant to Article 9(1)(b).³⁴ Thus, within the EU, the Construction Companies could shop between England and Germany. These rules are mandatory and, once the Construction Companies make their forum choice, there is nothing the Insurers can do to change it.

Table I summarizes the application of the Judgment Regulation in the New Hampshire case:

Table 1 – Jurisdictional Analysis of the New Hampshire Case

Plaintiff Court with Jurisdiction	Insurers suing Construction Companies	Construction Companies suing Insurers
England	A X	B √
Germany	C √	D √
New York	E X	F X*

* In theory, the Construction Companies could sue the Insurers in New York. However, it is likely that the New York court will decline jurisdiction on the ground of *forum non conveniens*.³⁵

32. See *id.* art. 9(1)(c) (providing an insurer domiciled in a member state may be sued if he is a co-insurer in the courts of a member state where proceedings are brought against the leading insurer). In the New Hampshire case, while the leading insurer is New Hampshire Insurance Co., a U.S. company, the fact that it was represented by an English company caused it to be deemed domiciled in England, according to Article 9(2), making Article 9(1)(c) applicable.

33. See Schlosser Report, *supra* note 24, ¶ 149.

34. See Council Regulation 44/2001, *supra* note 3, art. 9(1)(b).

35. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (finding that dismissal of a case on the basis of *forum non conveniens* may occur even where law in the alternative forum is unfavorable).

B. Article 9(2) - Expansion of the Domicile Rule

As a U.S. insurer, New Hampshire is not domiciled in any member state under the Judgment Regulation. Why then should it be subject to the jurisdiction chosen by the Construction Companies? The New Hampshire case did not analyze this point explicitly.³⁶ However, New Hampshire is bound by the Judgment Regulation because the basic domicile rule under Article 9(1) is expanded by Article 9(2), which provides that an insurance company is deemed to be domiciled in a member state if it has a branch, agency, or other establishment in one of the member states and the dispute arises out of such a branch, agency, or other establishment.³⁷ Accordingly, because New Hampshire was represented by its London representative in this transaction, it would be deemed domiciled in England on the basis of agency.³⁸ The New Hampshire case does not note, however, that there would have been a difference in the case if the representation involved an agency³⁹ or if New Hampshire had participated in the transaction directly. In *Group Josi Reinsurance Company S.A. v. Universal General Insurance Company*, the European Court of Justice held that the Judgment Regulation applied beyond solely the intra-Europe situation because Article 2 did not impose any limits.⁴⁰ In other words, Article 2 (or Article 9(1) in the insurance cases) applies not only when a EU party sues another EU party, but also when a non-European party sues a European party. If New Hampshire was not deemed domiciled in England, a difference would only arise if the Construction Companies sued New Hampshire. In that case, the Judgment Regulation would not have applied at all.⁴¹ Instead, the Construction Companies would

36. The New Hampshire case addressed a suit by the Insurers against the Construction Companies, so the court of appeals did not need to analyze a dispute brought by the Construction Companies against the Insurers.

37. Council Regulation 44/2001, *supra* note 3, arts. 9(1) - 9(2).

38. It is possible for a foreign insurance company to be deemed domiciled in more than one member state. For example, a U.S. insurance company with branches in London, Paris, and Geneva will be deemed to be domiciled in England, France, and Switzerland.

39. The judgment did not describe in detail the nature of the representation. If the representative is in fact an independent broker, such representation will not constitute a branch, agency, or other establishment under Article 9(2).

40. See Case C-412/98, *Group Josi Reinsurance Co. S.A. v. Universal Gen. Ins. Co.*, 2000 E.C.R. I-5925, I-5937; see also *Jordan Grand Prix Ltd. v Baltic Ins. Group*, [1999] 2 A.C. 127, 133. (H.L.) (appeal taken from Eng.) (U.K.).

41. See Council Regulation 44/2001, *supra* note 3, art. 2.

have needed to rely on the specific jurisdictional rules of the relevant jurisdiction in which they filed suit. For example, if the Construction Companies had filed suit against New Hampshire in Germany, assuming New Hampshire was domiciled in the U.S., there would have to be a valid basis under the jurisdictional rules of Germany apart from the rules of the Judgment Regulation. In any event, to the extent that a policyholder domiciled in the EU is involved in litigation with the insurer, the policyholder will have plenty of options and motivation to engage in forum shopping.

C. Is There Anything the Insurers Could Have Done Differently?

The combined effect of the above rules under the Judgment Regulation is ultimately unsatisfactory. After all, the only connection with Germany is the domicile of the Construction Companies, whereas the connections with London are overwhelming. Why were the rules designed that way in the first place? The purpose of the entire insurance section of the Judgment Regulation is to protect the policyholder, insured, and beneficiary, who are usually the weaker parties.⁴² These parties are, therefore, given both a shield and a sword. They can only be sued in their home jurisdiction, but they can sue others in multiple fora.

However, the Construction Companies at issue here are all large corporations that do not appear to deserve this protection. In the New Hampshire case, this is challenged by the Insurers' counsel.⁴³ Lloyd L.J., who delivered the judgment of the Court of Appeal, rejected this argument and referred, *inter alia*, to the drafting report of the Brussels Convention, which stated that the member states failed to find a "suitable demarcation line" to limit the application of Section 3.⁴⁴ Lloyd L.J., not surprisingly, rejected the request of the Insurers' counsel to rectify that failure by limiting the application to private parties.⁴⁵ The request to refer the question to the European Court of Justice for a preliminary ruling

42. *Id.* art. 13(2). *New Hampshire Ins. Co. v. Strabag Bau A.G.*, [1992] 1 Lloyd's Rep. 361, 367 (U.K.).

43. *See id.* at 367-69.

44. *Id.* at 367.

45. *Id.* at 369.

was rejected because the Court of Appeal considered the answers to be "straightforward . . . [and] involve no great difficulty."⁴⁶

Subsequent to this case, the European Court of Justice had an opportunity to revisit this issue in *Universal General Insurance Company v. Group Josi Reinsurance Company S.A.*⁴⁷ In that case, the European Court of Justice faced the issue of whether a contract between an insurance company and a reinsurance company falls within the regime of Section 3, possibly qualifying as an insurance matter under the Judgment Regulation.⁴⁸ The European Court of Justice held that reinsurance matters were not to be recognized as insurance matters. Instead, reinsurance matters are between professional insurance parties who do not need the protection of the Judgment Regulation.⁴⁹

In 2004, the European Court of Justice affirmed this view again in *Groupement d'intérêt économique (GIE) Réunion européenne v. Zurich España* when it presided over the issue of whether a dispute between two insurance companies falls within the regime of the insurance provisions of the Judgment Regulation.⁵⁰ *GIE* held that the provisions are not applicable due to the professional knowledge of the parties.⁵¹ In particular, the European Court of Justice quoted the following in both cases:

According to settled case-law, it is apparent . . . that, in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, they reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically.⁵²

On this basis, it seems that the argument of the Insurers' counsel may be persuasive. After all, the Construction Companies are all large corporations with substantial bargaining power. The

46. *Id.* at 372.

47. Case C-412/98, *Group Josi Reinsurance Co. S.A. v. Universal Gen. Ins. Co.*, 2000 E.C.R. I-5925.

48. *Id.* at I-05958.

49. *Id.* at I-05959.

50. Case C-77/04, *Groupement d'intérêt économique (GIE) Réunion européenne v. Zurich España*, 2005 E.C.R. I-4509, I-4531.

51. *Id.* at I-4530.

52. *Id.* at I-4529. See also *Group Josi Reinsurance*, 2000 E.C.R. at I-5959.

insurance policy's clauses are not predetermined by the Insurers either. Like the insurance company and reinsurance company, it seems equally unreasonable to protect the Insurers, despite not being "professional in the insurance sector"⁵³ per se. However, it is unlikely that the European Court of Justice will rule differently from the Court of Appeal. In the above cases, the European Court of Justice continued to approve previous cases that involved sophisticated policyholders. In fact, the paragraph cited above is from *Gerling v. Amministrazione del Tesoro dello Stato*, where the policyholder was also a rather powerful party, Italy's Ministry of Finance.⁵⁴ Accordingly, it appears that the holdings in *UGIC* and *GIE* are limited to professional insurance parties, while the sophisticated policyholders will continue to be protected by the Judgment Regulation. The only attempt of the Judgment Regulation to exclude the applicability of Section 3 from undeserving parties is the exclusion of certain types of "large risks" insurance that will be discussed in more details below.

D. Article 13(5) and Article 14 - Jurisdiction Clause

In hindsight, what other measures could the Insurers have taken in order to avoid this absurd result? An obvious choice would be to include a jurisdiction clause in the insurance policy. However, a jurisdiction clause would not help the Insurers in this case. According to the Judgment Regulation, an insurance policy's jurisdiction clause is only given effect against a policyholder, insured, or beneficiary, where at least one of the following applies:

- (1) the agreement is entered into by the parties subsequent to the dispute;⁵⁵
- (2) the policyholder and insurer are both domiciled or habitual residents in the same member state when the agreement was entered into;⁵⁶
- (3) the agreement allows the policyholder, insured, or beneficiary to bring proceedings in courts other than those indicated in Section 3;⁵⁷

53. *GIE Réunion européenne*, 2005 E.C.R. at I-4530; *Group Josi Reinsurance*, 2000 E.C.R. at I-5959.

54. *Gerling Konzern Speziale Kreditversicherung AG v. Amministrazione del Tesoro dello Stato*, 1983 E.C.R. 2503, [1984] 3 C.M.L.R. 638, 643.

55. Council Regulation 44/2001, *supra* note 3, art. 13(1).

56. *Id.* art. 13(3).

- (4) the policyholder who entered into the insurance policy is not domiciled in any member state.⁵⁸
- (5) The agreement relates to insurance involving the loss of or damage to ships, aircraft, or cargos,⁵⁹ and all large risks as defined in Council Directive 73/239/EEC.⁶⁰ If the insurance policy falls into the "large risks" insurance exception as mentioned above, the parties could opt out of the mandatory jurisdictional rules.

The most relevant exception appears to be the one dealing with large risks. Most of the large risks, as defined by the Council Directive, are risks in relation to traditional commercial insurance, such as loss of or damage to ships, aircrafts, or cargos, motor vehicle liability, fire and natural forces, and general insurance.⁶¹ The only large risk that is relevant to our discussion is the one relating to "miscellaneous financial loss," which is defined as "employment risks, insufficiency of income (general), bad weather, loss of benefits, continuing general expenses, unforeseen trading expenses, loss of market value, loss of rent or revenue, indirect trading losses other than those mentioned above, other financial loss (non-trading), and other forms of financial loss."⁶² If the relevant insurance falls into one of the aforementioned items in the miscellaneous financial loss category, a jurisdiction agreement will be effective against a policyholder, where the policyholder exceeds the limits of at least two of the following three criteria:

- (1) balance-sheet total = ECU\$6.2 million;
- (2) net turnover = ECU\$12.8 million;
- (3) average number of employees during the financial Year = 250.⁶³

57. *Id.* art. 13(2).

58. *Id.* art. 13(4). However, this rule does not apply if the insurance policy involved is compulsory or relates to immovable property in a member state. *See id.*

59. *Id.* art. 13(5).

60. *Id.* art. 13(5), 14. *See also* Charman v. WOC Offshore BV [1993] 2 Lloyd's Rep 551, 558 (U.K.) (narrowing the scope further by holding that the jurisdiction agreement must be related to one of the specified risks listed in Article 14 and no others or else it will be deemed ineffective).

61. Council Directive 73/239/EEC, Annex A, 1973 O.J. (L 228) 1, 1-17 (EC).

62. *Id.* Annex A, at 16.

63. *See id.*

There are three problems with this exception. First, the Council Directives have not defined financial loss and the European Court of Justice did not clarify the meaning of the term.⁶⁴ Although the Council Directives were all passed before the New Hampshire case, the English Court of Appeal did not refer to any relevant articles in the Judgment Regulation.⁶⁵ This may be because the insurance policy lacks a jurisdiction clause. However, given the extensive discussions in the case on whether large corporations should be covered by the protections of the Judgment Regulation,⁶⁶ the exception is highly relevant and its omission seems rather unusual. Perhaps its uncertain meaning is the reason.

Not coincidentally, leading hornbooks on the Judgment Regulation, including Dicey, Morris, and Collins and Brussels I Regulations, do not have any specific discussion on its meaning. Furthermore, general linguistic assumptions do not seem to be helpful in its interpretation. For instance, if we apply the *ejusdem generis* (“of the same kind”) rule, it is difficult to determine from the specific items listed above the “other financial loss” bullet point what general kinds of financial risks are covered. In short, financial loss is one of the terms in the Judgment Regulation that does not appear to have any real impact in practice. Given the highly favorable stand taken by the European Court of Justice over the policyholders, it is likely that the courts will construe financial loss narrowly, limiting it to the types of financial loss that are specifically listed.

Second, even if financial loss covered the insurance policy in the New Hampshire case, the exception only applies to large companies. For example, a company would have easily qualified for listing on the Frankfurt Stock Exchange, one of the largest stock exchanges in Europe, which currently only requires a minimum market capitalization of €1.25 million,⁶⁷ if it passed the financial criteria above. Third, the problems of how a court will treat small subsidiaries of large conglomerates and whether a court

64. *See id.*

65. *See New Hampshire Ins. Co. v. Strabag Bau A.G.*, [1992] 1 Lloyd's Rep. 361 (U.K.).

66. *Id.* at 365-70.

67. Deutsche Börse Group, Rules and Regs, http://deutscheboerse.com/dbag/dispatch/en/notescontent/gdb_navigation/listing/20_Going_Public/05_Regularien/INTEGRATE/zpd?notesDoc=KIR+LC_GP_Regularien&expandview.

will pierce the corporate veil if an individual subsidiary does not exceed the financial criteria arise.

With these rules in mind, if the New Hampshire case had a jurisdiction clause in the insurance policy that granted exclusive jurisdiction to the English courts, it is unlikely that it would have been given effect against the policyholders because such a clause is not entered into subsequent to the dispute. Furthermore, the clause would not have given any new jurisdiction option to the Construction Companies, and it is unlikely that it would fall within the large risks exception. However, a jurisdiction clause will always be effective against the Insurers.⁶⁸

E. Article 1(2)(d) - Arbitration Clause

In the end, the only certain way that the Insurers could have effectively prevented litigating their disputes in an undesirable forum is by including an arbitration clause in the insurance policy. If the insurance policy had an arbitration clause, the case would be outside the scope of the Judgment Regulation.⁶⁹ However, an arbitration clause must be clear and unambiguous. For example, the insurance policy in the New Hampshire case contains an arbitration clause, but the clause only refers disputes to arbitration when disputes involve the quantum of the compensation, rather than the validity of the liabilities.⁷⁰ More importantly, while an arbitration clause could mitigate the problem, it is not a perfect solution. An arbitration clause could help because it is outside of the Judgment Regulation's scope, but is conversely limited for that same reason. In order to fully understand this statement, we must observe what would happen if an insurance policy includes an arbitration clause.

With the Judgment Regulation out of the picture, the national law of the member states, including their traditional conflict of laws rules, governs all issues concerning the arbitration agreement. This includes the governing law, the arbitration process, the appointment of arbitrators, and, most importantly, the enforcement of the arbitral awards. Apparently, with so many different countries in the EU, the result of the arbitration depends

68. See Council Regulation 44/2001, *supra* note 3, art. 13(2).

69. See *id.* art. 1(2)(d).

70. *New Hampshire Ins. Co.*, [1992] 1 Lloyd's Rep. at 365.

on the designated location of the arbitration and the governing law the parties agreed upon in the insurance policy. Thus, insurance companies should bargain for a favorable arbitration location with favorable governing law to the transaction. This is easier said than done. When dealing with sophisticated policyholders that have equal bargaining power, an agreement to arbitrate may not even be reached, let alone conceded to upon favorable arbitration terms. If the policyholders are not sophisticated, the validity of the arbitration agreement could be challenged under the respective national contract laws on grounds of unconscionability or public policy. Even if we assume that the insurance companies could obtain favorable arbitration terms, such as arbitration in London under English law, the biggest hurdle remains the enforcement of the arbitral awards.

Most of the EU's member states are signatories to the New York Convention, an international treaty that promotes judgment enforcement among signatories.⁷¹ Under the New York Convention, when the Insurers receive arbitral awards in London under English law, the arbitral awards must be enforced or recognized in the home jurisdiction of the Construction Companies, assuming they have no operations or assets in the United Kingdom. Article III of the New York Convention provides that "there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."⁷² Accordingly, the difficulty of enforcing arbitral awards depend on the standard measures each member state has in enforcing their domestic arbitral awards, including any inherent defenses that are available to the policyholders in order to challenge the awards.

Comparatively, the situation would be very different if the Judgment Regulation applied. Apart from harmonizing jurisdictional rules, the Judgment Regulation streamlines the enforcement mechanism among member states. Once a judgment is issued in the court of a member state within the scope of the

71. For parties to the Convention, see Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 21 U.S.T. 2517, Part 3, 330 U.N.T.S. 38, 2 [hereinafter New York Convention].

72. New York Convention, *supra* note 71, 21 U.S.T. at Part 1, 330 U.N.T.S. at 3.

Judgment Regulation, the judgment is given the "same force and effect as a judgment of the court in which it is registered, and proceedings for or with respect to its enforcement may be taken, as if the judgment had been originally given by the registering court."⁷³ This resembles the notion of full faith and credit practiced by U.S. courts, and the judgment is subject to very few challenges. Apparently, if insurance companies are not subject to more unfavorable treatment under the Judgment Regulation, the uniform and easy judgment enforcement mechanism under the Judgment Regulation would be preferred over arbitration under the New York Convention. However, the current rules only mean that the insurance companies will face an efficient enforcement system should they fail to insert an arbitration clause and, as a result, may have an unfavorable judgment entered against them in court.

In short, a standard arbitration clause requiring arbitration in London under English law will never be a one-size-fits-all solution. Given the current rules, however, it would be the best available measure in order to defend the interests of the insurance companies.

F. Other Jurisdictional Bases

In addition to the above rules, which allow the courts to derive general jurisdiction over the insurance companies, the Judgment Regulation provides for other bases of jurisdiction. With liability insurance, for example, insurance against legal liability to third parties and insurance of immovable property, the insurance company may be sued where the harmful event occurred.⁷⁴ The courts will also have jurisdiction in a third party claim that is brought by an injured party against the insured, where the insurer asks to be joined.⁷⁵ Articles 11(2) and 11(3) also allow, to a limited extent, the injured parties to bring direct proceedings against insurers.⁷⁶

73. DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS 650 (Lawrence Collins ed., 14th ed. 2006).

74. See Council Regulation 44/2001, *supra* note 3, art. 10(2).

75. *Id.* art. 11(1).

76. For a detailed discussion on the direct actions, see DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS, *supra* note 73, at 435.

III. THE UNITED STATES JURISDICTION RULES

Would the U.S. courts have jurisdiction in the New Hampshire case? As neither party in the case initiated proceedings in the U.S., we will analyze that scenario based on the general jurisdictional rules in the U.S.

Since *International Shoe Co. v. Washington*, the U.S. Supreme Court has laid down “minimum contacts” as the basic jurisdictional test in the U.S. In *International Shoe*, the Supreme Court held that a state could exercise personal jurisdiction over a defendant if the defendant had minimum contacts with the state and it was fair for the defendant to defend the lawsuit there.⁷⁷ However, the Supreme Court did not clearly define what constitutes minimum contacts. Instead, the Supreme Court noted that minimum contacts depends on the “nature and quality” of the contacts with the state.⁷⁸ Accordingly, unlike the Judgment Regulation, there is no hard and fast rule for U.S. courts.

Commentators generally divide personal jurisdiction into two broad categories: specific jurisdiction and general jurisdiction.⁷⁹ Specific jurisdiction refers to jurisdiction over claims arising out of acts specific to the dispute.⁸⁰ In order for specific jurisdiction to be established, the contacts must be related to the dispute.⁸¹ In other words, the same contacts might not be sufficient in an unrelated dispute in the same state. General jurisdiction, on the other hand, refers to jurisdiction founded upon a basis independent from the nature of the dispute between the parties.⁸² General jurisdiction can be established even if the contacts in question do not relate to the dispute, as long as such in-state contacts are very substantial.⁸³

The Supreme Court further elaborates on specific jurisdiction in *McGee v. International Insurance*, the “grandfather of Supreme Court jurisdictional opinions in contract cases,”⁸⁴ which also happens to be an insurance case.⁸⁵ In *McGee*, a California resident purchased a life insurance policy from an Arizona insurance

77. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 326 (1945).

78. *Id.* at 319.

79. EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 300 (3d ed. 2000).

80. *Id.* at 299.

81. *Id.* at 300.

82. *Id.*

83. *Id.* at 310.

84. *Id.* at 380.

85. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

company. Subsequently, the defendant, a Texas insurer, purchased the insurance policy from the Arizona insurer and then solicited the policyholder to renew the policy under the original terms.⁸⁶ After the policyholder died, the defendant denied liability on the basis that the policyholder committed suicide and, therefore, was barred from compensation.⁸⁷ The beneficiary then brought an action against the defendant in California.⁸⁸ The Supreme Court held that the defendant had minimum contacts in California, even though the defendant did not have agents or offices in California.⁸⁹ Accordingly, even if the defendant only solicits one transaction in California, this is sufficient to establish specific jurisdiction.

Applying these basic jurisdiction rules to the New Hampshire case, the Insurers would not be able to sue the Construction Companies in the U.S. The English court did not refer to the domicile of New Hampshire in the New Hampshire case, but we will assume that its domicile is New York for the sake of discussion. The Construction Companies, assuming they had no substantial operations in the U.S., cannot be subject to any U.S. court on the basis of either specific or general jurisdiction (see Box E in Table 1). However, if the Construction Companies filed a suit against New Hampshire in New York, there may be a chance that the Construction Companies could succeed in establishing jurisdiction based on general jurisdiction because their headquarters are located there (see Box F in Table 1). While there may be a jurisdictional basis for the Construction Companies to bring a suit in New York, the New York courts would probably not exercise jurisdiction due to the *forum non conveniens* doctrine.

A. *Forum Non Conveniens* Doctrine

Under the doctrine of *forum non conveniens*, U.S. courts may exercise discretion when deciding whether or not to decline jurisdiction on the ground that there exists a more appropriate forum.⁹⁰ Although the doctrine is discretionary, its application is far from arbitrary. The court must review all relevant factors, including the plaintiff's preference, the availability of witnesses

86. *Id.* at 221.

87. *Id.* at 222.

88. *Id.* at 221.

89. *Id.* at 222-23.

90. SCOLES ET AL., *supra* note 79, at 479-80.

and evidence, the litigation costs, the administrative difficulties of the court, and the governing law, just to name a few.⁹¹ When applying this doctrine to the New Hampshire case, it is obvious that England is the more appropriate forum because it has the most connections with the transaction and it is available to the Construction Companies. Moreover, English judges have substantial experience and expertise in adjudicating insurance cases, especially with respect to insurance policies that are drafted in accordance with the practices of the London market, and thus, are more capable of interpreting certain policies that are governed by English law. Comparatively, New York has very little connection to the New Hampshire case, except for the domicile of the lead underwriter. There is also a general presumption in U.S. courts stating that cases brought by foreign plaintiffs are less convenient compared to those brought by domestic plaintiffs.⁹²

If the Construction Companies sued the Insurers in Germany (see Box D in Table 1), would the German courts grant the Insurers' request to decline jurisdiction on the basis of *forum non conveniens* or a similar notion? The answer is no, even if the German courts recognize the *forum non conveniens* doctrine under the traditional German conflict of laws rules. It is well-settled that there is no room under the Judgment Regulation for a court in a member state to decline jurisdiction when jurisdiction arises thereunder.⁹³ Similarly, an English court could not enjoin the defendants from pursuing a lawsuit in Germany because of the anti-suit injunction in this case,⁹⁴ no matter how unreasonable the assumption of jurisdiction.

In summary, due to the potential application of the *forum non conveniens* doctrine, the Construction Companies are probably unable to sue in New York, though they could choose to sue in London or Germany. Bringing suit in London or Germany seems like the most reasonable choice in light of the few ties to New York and the availability of a much more appropriate forum in England.

91. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

92. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981).

93. Case C-412/98, Group Josi Reinsurance Co. S.A. v. Universal Gen. Ins. Co., 2000 E.C.R. I-05925, I-05933.

94. See Case C-159/02, Turner v. Grovit, 2004 E.C.R. I-3565, I-3576.

B. Jurisdiction Agreement and Arbitration Agreement

Although it is extremely difficult to enforce a jurisdiction agreement against a policyholder under the Judgment Regulation, U.S. courts will usually give a jurisdiction agreement effect unless it is affected by "fraud, undue influence, or overweening bargaining power."⁹⁵ It is also believed that, "in practice[,] clauses are rarely denied enforcement on this ground."⁹⁶ In the New Hampshire case, assuming there is a jurisdiction agreement granting exclusive jurisdiction to the English courts, U.S. courts would likely give effect to the jurisdiction agreement, given the equal bargaining power between the parties and the excellent reputation of the English courts on insurance matters. The U.S. courts will also generally enforce arbitration agreements. In fact, it is more difficult to oust an arbitration agreement than a jurisdiction agreement, because U.S. courts will only deny enforcement of such agreements if "the fraud or duress [is] specific to the clause."⁹⁷

C. What if the New Hampshire Case Happened in the United States?

When analyzing the New Hampshire case, it appears that the U.S. rules are much more reasonable and likely to provide a more satisfactory result. However, what if we reverse the facts of the New Hampshire case? In our hypothetical New Hampshire case (the "New Hampshire case II"), we will assume that the Insurers are from England and entered into an insurance policy with the Construction Companies, located in California. The insurance policy was negotiated and concluded in Texas by the Insurers' Texas representative and the Construction Companies' Texas insurance brokers. In our hypothetical, the insured risks of the insurance policy continue to be in Iraq. The analysis of our hypothetical is summarized in Table 2 below:

95. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

96. *SCOLES ET AL.*, *supra* note 79, at 471.

97. *Id.* (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974)).

Table 2 – Jurisdictional Analysis of *New Hampshire Case II*

Plaintiff	English Insurers	California
Court with	suing California	Construction
Jurisdiction	Construction	Companies suing
	Companies	English Insurers
Texas (playing the role of England)	A √	B √
England (playing the role of New York)	C X	D √
California (playing the role of England)	E X	F X

At first glance, the situation is the same as *McGee* if the California Construction Companies filed a lawsuit against the English Insurers for non-payment in California. After all, the Supreme Court in *McGee* held that the plaintiff was entitled to a claim for non-payment in California against the Texas insurer, even if the Texas insurer had only tenuous contact with California, including the sale of a single insurance policy.⁹⁸ Thus, like the New Hampshire case, the insured is allowed to sue the foreign insurer in the state where the insured is domiciled.

However, it is argued that the Supreme Court never laid down any rigid categorical rule as did the EU. While it is true that the Supreme Court in *McGee* held that the California Court had jurisdiction, this was mainly because of the Texas insurer's intentional effort to sell in California.⁹⁹ In the New Hampshire case II, the English Insurers do not make any effort to sell in California, and their representative and the Construction Companies' Texas insurance brokers conclude the insurance policy in Texas. Consequently, the English Insurers have no minimum contacts with California that would justify the California Court's assumption of jurisdiction (see Box F in Table 2). This view is supported by *Hanson v. Denckla*, a Supreme Court case that was decided less than one year after *McGee*.¹⁰⁰

In *Hanson*, the Supreme Court further established the standard of "purposeful availment."¹⁰¹ According to the Supreme

98. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

99. *Id.*

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

101. *Id.* at 253.

Court, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."¹⁰² This approach has been adopted by subsequent state court cases. For example, in *Malone v. Equitas Reinsurance Ltd.*, the insured, who was from California, obtained a stop-loss policy to cover business risks in England, which an incorporated association of English insurance underwriters (the "Association") underwrote. The insured brought a suit against the Association and the English underwriter in California. The insured alleged that the Association and the English underwriter were obligated under the plan to provide coverage under the policy.¹⁰³ The California Court of Appeal noted that *McGee* did not hold that "the simple fact that beneficiaries of an insurance policy issued by a foreign corporation reside in California is sufficient to establish personal jurisdiction over that corporation."¹⁰⁴ Accordingly, by simply obtaining insurance to cover business risks in England from their English agents, the correspondence from London to California, for example, making some payments under the policy and denying others, does not constitute sufficient minimum contacts in California, as is required under *McGee*.

Another distinction between *McGee* and the New Hampshire case II is the bargaining power of the plaintiffs. Unlike the powerful corporate Construction Companies, the plaintiff in *McGee* is a private individual.¹⁰⁵ In *McGee*, the Supreme Court expressed concern that requiring the plaintiff to travel to Texas for the lawsuit would essentially deprive her of the opportunity to sue the insurer.¹⁰⁶ However, this does not mean that U.S. courts will blindly protect policyholders as does the Judgment Regulation.

In *Burger King Corp. v. Rudzewicz*, the Supreme Court held in favor of the financially more powerful Florida franchisor in its lawsuit against the Michigan franchisee, and decided that the

102. *Id.*

103. *Malone v. Equitas Reinsurance Ltd.*, 101 Cal. Rptr. 2d 524, 526-27 (Cal. App. Dep't Super. Ct. 2000).

104. *Id.* at 530; *see also* *Tri-West Ins. Servs., Inc. v. Seguros Monterrey Aetna, S.A.*, 78 Cal. App. 4th 672, 677 (Cal. Ct. App. 2000).

105. *See McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

106. *Id.* at 223.

Florida courts did not have jurisdiction.¹⁰⁷ Refusing to categorize the case simply according to the financial strength of the parties, the Supreme Court reached a decision after it concluded that the franchisee had purposefully availed itself in Florida, establishing sufficient minimum contacts to be subject to jurisdiction in the Florida courts.¹⁰⁸ In particular, the Supreme Court expressly rejected the notion that “an individual’s contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party’s home forum.”¹⁰⁹

Applying the rules above, the only state in which the California Construction Companies could sue the English Insurers in the New Hampshire case II is Texas, where the transaction has more contacts therein (see Box A in Table 2). Similarly, if the English Insurers sought a declaratory judgment in Texas, the California Construction Companies would likely be subject to jurisdiction in the Texas courts, because their Texas insurance brokers solicited the insurance coverage (see Box B in Table 2). The purposeful availment requirement would likely be satisfied as well. This result is desirable because there appears to be no reason why the jurisdiction rules should reach a different result in cases initiated by the California Construction Companies rather than the English Insurers.

The only unsatisfactory result is that the California Construction Companies will be able to sue the English Insurers in the English courts under the Judgment Regulation (see Box D in Table 2). However, this has nothing to do with the U.S. jurisdictional rules. It should also be noted that the Judgment Regulation will not apply to cases where the English Insurers try to sue the California Construction Companies in England (see Box C of Table 2), because the California Construction Companies are not domiciled in a EU member state. Thus, the case would be outside the scope of the Judgment Regulation. If we apply the traditional jurisdictional rules of England instead, it is unlikely that the English courts will assume jurisdiction in the case.

It may be argued that the given facts of the New Hampshire case II are too one-sided, leaning towards a particular jurisdiction. What if the English Insurers’ representative negotiated the

107. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985).

108. *Id.* at 479-80.

109. *Id.* at 478.

insurance policy in both Texas and California? If the English Insurers' representative negotiated the insurance policy in both Texas and California, minimum contacts could be established in both Texas and California. This would then give the California Construction Companies the opportunity to "shop" between the jurisdictions. However, jurisdiction rules are not the only mechanism for the U.S. courts to manage proper allocation of jurisdiction. As mentioned above, the *forum non conveniens* doctrine allows U.S. courts in different states to defer to a more appropriate forum in another state.¹¹⁰ This is true even if a court has found minimum contacts in its own state.¹¹¹ Consequently, where it is possible for the plaintiff to file suit in more than one state, its counsel must assess the chance of the case being declined by courts based on *forum non conveniens*. Furthermore, the parties could have prevented the jurisdictional dispute by including a jurisdiction clause or an arbitration agreement.¹¹²

The application of the New Hampshire case and the New Hampshire case II to the jurisdictional approaches of the Judgment Regulation and the U.S. are summarized in Table 3 below:

Table 3 – Summary of the New Hampshire Case and New Hampshire Case II

	New Hampshire Case	New Hampshire Case II
Insurance Companies suing Construction companies	<p>English courts have no jurisdiction. New York courts have no basis to assume jurisdiction.</p> <p>Only German courts can assume jurisdiction.</p>	<p>Texas courts, playing the role of English court, will exercise jurisdiction.</p> <p>California courts, playing the role of German courts, will likely decline jurisdiction. English courts, playing the role of New York courts, will not assume jurisdiction.</p>

110. SCOLES ET AL., *supra* note 79, at 479-80.

111. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (3d ed. 2009).

112. *Id.* § 1064.

**Construction
companies
suing
Insurance
Companies**

May shop between **German and English** courts. May potentially sue in the **New York** courts by general jurisdiction, but likely to be declined due to *forum non conveniens*.

Texas courts, playing the role of English court, will exercise jurisdiction. **California** courts, playing the role of German courts, will not have jurisdiction. **English** courts, playing the role of New York courts, will have jurisdiction.

IV. CRITICISMS

A. *The Rigidity of the Judgment Regulation*

While the U.S. jurisdiction rules are not perfect, they have three significant mechanisms that ensure proper allocation of jurisdiction: (1) flexible jurisdiction rules, (2) the availability of *forum non conveniens*, and (3) the general enforcement of jurisdiction agreements.¹¹³ By limiting the options available to the plaintiff, whether the plaintiff is the Construction Companies or the Insurers, to only those that are reasonable, U.S. jurisdictional rules help prevent forum shopping. Comparatively, the Judgment Regulation's rules are much more rigid. By eliminating the *forum non conveniens* doctrine and substantially limiting the effect of the jurisdiction clause for insurance companies, it is more likely to lead to absurd results and promote forum shopping. In addition, although U.S. courts protect weaker parties in appropriate situations, they do not blindly protect them as their counterparts do in the EU.¹¹⁴ Ultimately, the U.S. jurisdictional rules are more likely to achieve the goal of protecting policyholders who deserve such protection than the Judgment Regulation.

Comparing the Judgment Regulation and U.S. jurisdictional rules could be viewed as a classic "rule versus standard" choice. The Judgment Regulation is rule-based. In most circumstances, it is clear which court is going to assume jurisdiction. Moreover, the,

113. *Id.* § 3828.

114. *See Burger King Corp.*, 471 U.S. at 462.

discretion of the court is kept to a minimum in order to reach the same result in all member states. Thus, it could be argued that this system has the advantage of being more predictable. On the other hand, the U.S. jurisdictional rules are standard-based. Before deciding whether a court in the U.S. will have jurisdiction over a defendant, the plaintiff's counsel must conduct a minimum contacts analysis of the defendant, which may not be as clear as merely deciding the domicile of the defendant. However, it is submitted that the U.S. jurisdictional rules are more flexible and more likely to produce a just result in a given case.¹¹⁵

As we have seen throughout this article, the rule-based Judgment Regulation is more prone to producing absurd situations where litigants could find themselves in a court they never expected. While standards might not always be better than rules, standards usually fit better with jurisdictional matters. If we look at the practice of international commerce, it is no coincidence that New York law and English law are always preferred.¹¹⁶ Apart from the fairness and commercial savvies of substantive law, fair conflict of law rules also play a big part. Since the ability of the parties to litigate in an appropriate forum has a significant weight in the final decision, it is worthwhile to take the extra mile to reach a fair decision in each individual case rather than settling for a simple and predictable forum.

That being said, the EU was subject to more limitations than the U.S. when building up their jurisdictional rules. Although the U.S. consists of fifty different states, the legal systems among them are rather similar. The same cannot be said of the EU because each member state has had its own unique and long standing legal system for hundreds of years. In order to harmonize the Judgment Regulation's jurisdictional rules as an effort to facilitate the integration of the EU, it is understandable that the Judgment Regulation's drafters preferred a more heavy-handed approach that eliminated the discretion of the courts in each member state and achieved a more standardized result. However, while this is a reasonable justification, it may be an unsatisfactory explanation

115. Christopher W. Meyer, *World Wide Advertising: Personal Jurisdiction Around the Whole Wide World?*, 54 WASH. & LEE L. REV. 1269, 1271 (1997).

116. Traditional English conflict of laws, which are much closer to the U.S. rules, are still applicable in cases where the defendant is not domiciled in a member state. In other words, the Judgment Regulation is not applicable in those cases.

for litigants who are forced to litigate their disputes in inappropriate fora.

B. Unfairness Experienced by the Insurance Companies

By looking more closely at the Judgment Regulation's application in insurance matters, it becomes obvious that the Judgment Regulation is not fair to the insurance companies. The problem of rigidity that is mentioned above is intensified when the rules are so one-sided that they favor the policyholders indistinctively. It gives the policyholders too many options to forum shop, while limiting insurance companies to litigating at the home jurisdiction of the policyholders. In addition, the Judgment Regulation practically eliminates the discretion courts have in preventing potential injustice.¹¹⁷ While the rule-based system might be justified in the EU, the specific rules here are simply flawed, particularly their failure to take into account the unfair advantages gained by sophisticated policyholders. As mentioned above, the Judgment Regulation protects the policyholder, insured, and beneficiary, without looking beyond the labels.¹¹⁸ This is not fair treatment to the insurance companies, which deal with these powerful policyholders on an arms-length basis.

We can also look at this unfairness from an economic perspective. According to Richard Posner, the goal of the jurisdictional rules is to allocate the dispute to the forum in which the combined cost of the parties will be the lowest.¹¹⁹ By "subsidizing" the parties who do not deserve the protection, the equilibrium is disturbed and the total cost of the litigation will likely increase. Here, the cost is not limited to the combined cost of the parties and includes the cost to the legal system. In the New Hampshire case, for example, it is easy to imagine that both the litigants and the German court will have to take extra steps to collect evidence and interview witnesses in London. In addition, the German court will likely have to apply English law to adjudicate the matter. Thus, an inefficient rule will likely lead to social waste.

117. Council Regulation 44/2001, *supra* note 3, art. 9.

118. *Id.* art. 9.

119. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* Ch. 1 (6th ed. 2003).

C. Unfairness Against Foreign Insurance Companies Under the European Rules

If rules are unfair to an industry in general, they are more unfair to foreign insurance companies. The analysis above demonstrates the unreasonableness of deeming the U.S. insurance companies as being domiciled in England under Article 9(2). If the EU applied the minimum contacts test to the New Hampshire case, it could easily conclude that the English courts could acquire jurisdiction over the U.S. insurance company on the basis that it conducted business in London through a branch office. In this regard, it is not unreasonable to deem the U.S. insurance company as domiciled in England. However, the most significant impact of deeming the U.S. insurance company as domiciled in England is making the U.S. insurance company fall under the tenets of the Judgment Regulation regime. This will make the Article 9(1)(b) rule applicable to them, for example, making it possible for the plaintiff to sue from its home court, a German court in this case, as well. As many U.S. insurance companies have a branch, agency, or establishment in London, they will always be deemed domiciled there as far as their European operations are concerned. Therefore, if a U.S. insurance company does more than transact through a representative, it potentially has two domiciles, one in London and the other in the U.S.

In addition, unlike insurance companies based in the EU, U.S. insurance companies usually have smaller operations in Europe. If both EU insurance companies and U.S. insurance companies are regarded as domiciled in the EU, it would be much more costly for U.S. insurance companies to defend themselves in the EU. If this increased cost is to be reflected in higher premiums by U.S. insurance companies, the effect would be to impose a tariff on the import of insurance products from the U.S. This situation is unfair to foreign insurance companies.¹²⁰ Comparatively, there is no distinction between the application of the jurisdictional rules over a domestic insurance company and a foreign insurance company per se under U.S. jurisdictional rules. The only test to be

120. Unfairness also occurs when U.S. insurance companies do not have a branch in Europe. Since they would not be regarded as domiciled in Europe, the Judgment Regulation would not apply. However, a European policyholder could use all exorbitant jurisdiction bases, which are prohibited for use against an entity of a member state and against a U.S. insurance company.

considered is whether the insurance company in question, whether foreign or in the U.S., has established the minimum contacts in a given state so that it will be fair for that state to exercise jurisdiction.

D. Unfair Protection of European Policyholders, Insureds, and Beneficiaries

On the other side of the coin, the protection of the Judgment Regulation is discriminatory against a foreign policyholder, insured, and beneficiary that purchases an insurance policy from a EU insurance company. Since these foreign policyholders are not domiciled in the EU, the Judgment Regulation's protections are not applicable¹²¹ no matter how much they deserve protection. Comparatively, there is no special protection available for a domestic policyholder, insured, or beneficiary per se in the U.S. While there are special statutes that allow the state insurance commissioner to be deemed the insurer's attorney for service of process for non-admitted, foreign insurance companies, these statutes do not constitute a basis for exercising jurisdiction.¹²² Independent jurisdictional ground must be found over the foreign parties in order to satisfy due process.¹²³ Therefore, the protections that are solely available to EU policyholders are another form of tax imposed on foreign purchasers.

V. RECOMMENDATIONS

The term "forum shopping" might have carried a bad name over the years. After all, the famous *Erie* case was said to be an attempt by the Supreme Court to prevent forum shopping.¹²⁴ Nevertheless, forum shopping is a reality. As long as there are differing jurisdictional rules, counsel for parties in litigation will continue to explore the best possible forum for their clients. From the perspective of the courts, forum shopping may not be wholly negative. Lord Denning, probably the most famous and influential

121. The jurisdictional rules of the respective European Union member state will apply in this case.

122. *Tri-West Ins. Servs.*, 78 Cal. App. 4th at 676 (discussing the effect of the California Insurance Code).

123. *Id.* at 676-77.

124. *Hamilton v. Roth*, 624 F.2d 1204, 1214 (3d Cir. 1980); *Edelson v. Soricelli*, 610 F.2d 131, 135 (3d Cir. 1979).

judge in England over the last century, once said in *The Atlantic Star*: "You may call this 'forum-shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of goods and the speed of service."¹²⁵ While U.S. judges might not have explicitly echoed this statement, it can be seen from various cases that U.S. judges are always confident that their courts will reach a just outcome. The rather broad jurisdictional bases in the U.S. states reflect this belief. In fact, New York law and English law remain the most popular choices as the governing law in international transactions.¹²⁶ This could be attributed to the practicality and commercial savvies of the bodies of laws themselves, as well as the general expectation that both U.S. and English courts will do a good job of adjudicating any disputes that may arise.

However, the emphasis here is not to debate whether forum shopping is good or bad. The real problem with forum shopping in Anglo-American insurance litigation is the lack of equivalent jurisdictional rules in the EU between insurance companies on one side and policyholders, insureds, and beneficiaries on the other side. The U.S. jurisdictional rules, despite their oft-criticized broad applicability, give both sides a level playing field. While actual applicability might still lead to the imposition of jurisdictions that might not be the most appropriate in difficult cases involving ties with multiple jurisdictions, the rules seek a fair and just outcome. In contrast, there exists a wholesale unfairness in cases where sophisticated policyholders manage to take advantage of loopholes in the Judgment Regulation at the expense of insurance companies. As mentioned above, the insertion of arbitration clauses could partially mitigate this potential unfavorable effect of the Judgment Regulation, but the situation is not close to ideal. Instead, this article recommends a number of ways that the Judgment Regulation could be improved. The recommendations are set forth below from the most ideal to the most practical.

125. *The Atlantic Star*, [1973] 1 Q.B. 364, 382 (U.K.).

126. Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 393-94 (2008).

A. *Forum Non Conveniens*

The doctrine of *forum non conveniens* gives maximum flexibility to the courts of the member states to look into the entire circumstances surrounding a case in order to determine whether they should assume jurisdiction. For example, in the New Hampshire case, when German construction companies attempted to bring litigation in the German courts, the German courts would have been able to balance their interest in protecting the German parties against litigating in London, a more convenient forum. The insurance companies could present evidence that the German policyholders were sophisticated parties and intended to grant English courts jurisdiction in the first place.¹²⁷ In the end, the German courts might still have decided to protect their own corporations, but the doctrine at least allows the insurance companies to present their case. In effect, this makes the protection of the policyholders a presumption, allowing the courts to exercise discretion in order to find a more appropriate forum for special cases.

B. *Limiting the Application of Section 3*

It may be difficult for the Judgment Regulation to bring in a wholesale change in *forum non conveniens*. A more practical approach is to amend Section 3 to limit the applicability to the "private insured" that deserve legitimate protection under the Judgment Regulation. This type of reform has been performed under Section 4 of the Judgment Regulation, which governs the jurisdictional rules of consumer contracts.¹²⁸ Previously, this section provided certain protections regarding "matters relating to the sale of goods on installment [sic] credit terms,"¹²⁹ but it was not clear who would be entitled to the protections.

In *Soci t  Bertrand v. Paul Ott KG*, the European Court of Justice rejected the argument that a sale of machine tools by one company to another, with payment to be made by two bills of exchange at sixty and ninety days, falls into the scope of Section 4.¹³⁰ It held that this section was originally intended to entail the

127. See *New Hampshire Ins. Co. v. Strabag Bau A.G.*, [1992] 1 Lloyd's Rep. 361, 371 (U.K.).

128. *Id.*

129. *Id.*

130. Case 150/77, *Bertrand v. Paul Ott KG*, 1978 E.C.R. 1431, ¶¶ 7, 22.

restriction of the jurisdictional advantage to buyers *who are in need of protection*.¹³¹ These buyers were considered to occupy weaker economic positions than the sellers due to the fact that they are private consumers and are not engaged when buying the product acquired on installment credit terms, in trade, or professional activities.¹³² Shortly after the decision, this section was amended and clarified in order to show that it only applies to buyers who might broadly be classified as consumers. In the New Hampshire case, counsel for the Insurers tried to use Section 4 in order to persuade the Court of Appeal to interpret Section 3 to cover only "private policyholders," but the argument was rejected.¹³³ However, despite subsequent cases from the European Court of Justice repeatedly stating that the original intention of Section 3 was to protect weaker parties, the Court continued to ignore the specific issue of the sophisticated policyholders.

With regard to such a clear statement and the Court's experience with consumer contracts, it seems obvious that the European Court of Justice should carry out such an intention and exclude not only professional insurance parties from the protections, but also those sophisticated policyholders who do not deserve such protections. It just takes one more step for a court and the EU to face the reality and limit the application of such protections to those who deserve them.

C. Clarifying the "Large Risks" Exception

As outlined above, the parties may opt out of the Judgment Regulation when the insurance policy in question deals with large risks. However, the large risks exception is still limited and unclear. From a structural point of view, clarifying the exception should be easy. The exception is already specified in subsequent Council Directives of the EU and the extension thereof does not require an amendment to the Judgment Regulation itself. In particular, the kind of limitation envisioned has already been included in the current Council Directive for financial loss.¹³⁴ What the EU needs to do is to clarify the definition of financial loss and

131. *Id.* ¶ 21.

132. *Id.*

133. *New Hampshire Ins. Co.*, [1992] 1 Lloyd's Rep. at 367-68.

134. Council Directive 73/239/EEC, *supra* note 61.

to apply a general exception to all insurance policies entered into by sophisticated policyholders.

Although there is a debate as to what should be the right threshold for sophisticated policyholders (and the current one appears to be too high), it is a step in the right direction. This reform in the jurisdictional rules might not be as complete as the previous two suggestions, but it should help alleviate the problem substantially. The net effect of the change will be to encourage insurance companies to negotiate a jurisdiction clause with sophisticated policyholders, a task both parties should be able to achieve considering the consequence of not having such a clause. Meanwhile, cases involving weak policyholders, insureds, and beneficiaries will continue to be protected by the Judgment Regulation.

D. What if the European Union Decides to Make No Change at All?

If the EU decides to make no change to its current jurisdictional rules, the U.S. courts and government should not change its current jurisdictional rules in order to force a change on the EU's side. As demonstrated above, the U.S. rules manage to achieve consistent and fair results in most cases. In addition, in order to continue the popularity of U.S. law in international commerce, the preservation of the current system is essential. Finally, the U.S. Supreme Court has taken the view that U.S. commerce abroad would be hampered if its courts did not adopt an internationalist approach.¹³⁵ By enforcing the jurisdictional clause granting exclusive jurisdiction to England in favor of the German party and not the U.S. party, the U.S. Supreme Court stated in *M/S Bremen v. Zapata Off-Shore Co.* that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."¹³⁶ Therefore, U.S. courts should not retaliate by imposing unreasonable jurisdictional rules on European insurance companies.

135. LAWRENCE COLLINS, *ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS* 267 (1994).

136. *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 9 (1972).

