JURISDICTIONAL BARRIERS TO ENFORCEMENT

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The substantive weaknesses discussed in other chapters of this book point to a lack of clarity concerning the nature and extent of shareholders' duties, and ambiguous legal provision for the domestic enforcement of such obligations as do exist. The weaknesses in national substantive laws are exacerbated by the present state of transnational harmonisation. There is a lack of focused attention on specific problems arising from the corporate form, particularly insofar as the negative externalities of limited liability and separate legal personality are concerned.[1] Coupled with intrinsic risks and costs of transnational litigation, this renders cross-border enforcement a costly and uncertain route for the attainment of justice. Essentially, the law fails to address the full spectrum of relationships arising from the corporate form in a coherent fashion, or to view significant market failures as much more than an 'unfortunate wrinkle in the economic perfection of the law'.[2]

Regulatory shortcomings include a lack of tailor-made systems of judicial and administrative cooperation which would enable stakeholders to exact claims against shareholders in a cost-effective fashion. Indeed, existing jurisdictional rules, and the practice of transnational litigation, enable shareholders to deploy litigation strategies which render transnational justice prohibitively expensive to the injured party. Shareholders can therefore use multinational corporate structures to insulate themselves from claims through a jurisdictional veil, which reinforces the corporate veil itself.[3]

A jurisdictional veil coupled with multiple corporate veils provides ultimate beneficial owners with a complex system of insulation from liability for potential harm caused to third parties.[4] Moreover, it creates further artificial ringfencing within an economic entity, insulating the entity itself from its own harmful activities.[5] Indeed, it is commonplace for contemporary

[1] For theoretical discussion of risk-transfer, see Susan E Woodward, 'Limited Liability in the Theory of the Firm' in Donald A Wittman (ed) *Economic Analysis of the Law. Selected Readings* (Blackwell, Oxford 2003) 153.
[2] David W Leebron, 'Limited Liability, Tort Victims and Creditors' (1991) *Columbia Law Review* 1565, 1601.
[3] See generally Peter Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) *International and Comparative Law Quarterly* 1.
[4] See e.g. Irit Mevorach 'Appropriate Treatment of Corporate Groups in Insolvency: A Universal View' (20017) *European Business Organization Law Review* 179.
[5] Ibid.

corporate group architecture to be designed to insulate parent companies from liabilities of their foreign subsidiaries, whether in tort or contract.[6] This is a far cry from the original conception of the limitation of liability whereby individual companies were expected to operate independently and deal with all third parties – including shareholders – at arm's length.[7] Insofar as the glitches of limited liability are concerned, the law has yet to catch up with the manner in which the market has deployed the facilities it provides. This is true of domestic systems which, particularly in common law jurisdictions, continue to enforce an orthodox view of separate legal personality.[8] But the problem is especially accentuated in a transnational context where the complexities of the private international law of companies are such that academic commentary often dares not tread;[9] that shyness is all the more apparent in the context of holistic transnational legislative intervention, or the conspicuous lack thereof.[10]

In the absence of legislative intervention, transnational corporate legal practice tolerates a significant degree of behaviour whereby wealth is transferred to shareholders to the detriment of vulnerable parties, often in situations where there is already significant economic disparity between parties and the states in which they are situated prior to the further transfer.[11] Whereas it is arguable, albeit qualifiedly, that contractual creditors are able to foresee the transfer of risk and to price this into agreements, the problem of risk-transfer is especially accentuated for non-contractual stakeholders who, generally, could neither foresee harm, still less deploy contractual mechanisms to guard against their bearing the risk of corporate activity.

Furthermore, the addition of a jurisdictional veil renders the rational apathy of shareholders ever more rational.[12] In the absence of the risk associated with transnational corporate activity operating as a commensurate cost for shareholders, monitoring the transnational activities of

[6] Muchlinski (n 3) 16-17; Sandra K Miller, 'Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: a Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches' (1998) *American Business Law Journal* 73, 129-132.
[7] Karl Hofstetter, 'Parent Responsibility for Subsidiary Corporations: Evaluating European Trends' (1990) *International and Comparative Law Quarterly* 576, 576
[8] See e.g. Brenda Hannigan 'Wedded to *Salomon*: evasion, concealment and confusion on piercing the veil of the one-man company' (2012) *Irish Jurist* 11-39.
[9] Muchlinski (n 3) 1; Paul Beaumont and Jonathan Harris 'Series Editors' Preface' in Justin Borg-Barthet *The Governing Law of Companies in EU Law* (Hart/Bloomsbury 2012) vii.
[10] See Justin Borg-Barthet, *The Governing Law of Companies in EU Law* (Hart/Bloomsbury 2012) 4-8 and the references therein.
[11] For a well-rounded discussion of the extent of opportunistic risk-transfer, contrast Leebron (n 2) 1565, and Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) *Yale Law Journal* 1879.
[12] For discussion of the nature and geographic extent of shareholders' 'rational apathy' see e.g. Mathias M Siems, *Convergence in Shareholder Law* (Cambridge University Press 2011) 89-90, and the references therein.

companies is often a poor investment of shareholders' time and resources.[13] Essentially, monitoring constitutes an opportunity cost which shareholders may find is disproportionate to the potential personal benefit.[14] It follows, then, that legal strategies are required which would make apathy less rational, albeit doing so in a manner which is proportionate to the overarching aims of the limitation of liability.

It is therefore argued hereunder that there is a need for international instruments to facilitate cross-border recovery of losses suffered due to shareholder acts or omissions. Ideally, this would be done on the basis of a holistic reform of both substantive and private international law, including relevant choice of law and jurisdictional rules.[15] The primary focus hereunder, however, is the manner in which litigation is costed beyond the means of would-be claimants as a consequence of a lack of tailor-made rules. It is submitted that reforming jurisdictional rules, and enhancing the role of the state in enforcement of obligations through cooperation between administrative authorities could offset, to a degree, the financial and psychological barriers to cross-border litigation.

1.0 Seising the proper forum in the EU

The discussion hereunder proceeds on the basis that the imposition of obligations on shareholders presupposes that, in economic terms, they act as agents of other corporate stakeholders, as opposed to acting purely with a view to furthering self-interest, and that they should be held to account as such.[16] It is the presumption of this economic agency relationship which justifies any liability to other stakeholders in corporations. It is noteworthy that the Brussels I Recast Regulation[17] does not rely on any such analysis, and focuses instead on broad-brush distinctions between civil law classifications. It is beyond the scope of this chapter to consider the full spectrum of corporate legal theory and its implications for adequate

[13] Hansmann and Kraakman (n 11) 1894.
[14] Ibid.
[15] This should, in principle, consider both *ex ante* and *ex post* measures which would dissuade opportunistic behavior, and remedy it in the event of corporate insolvency. This chapter focuses in particular on core corporate law during the viable lifetime of companies. Cross-border insolvency regulation merits fulsome analysis beyond the scope of the present work.
[16] For a more sophisticated account of the relationship between self-interest and agency theory, and applicability to shareholders as agents, see John Hendry 'Beyond Self-Interest: Agency Theory and the Board in a Satisficing World' (2005) *British Journal of Management* 55, 56.
[17] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (hereinafter 'Brussels I Recast').

jurisdictional design.[18] Suffice it to note, however, that corporate stakeholders affected by the acts or omissions of shareholders could include employees, creditors, the company itself, other shareholders, and the public at large. Essentially, each stakeholder to whom it could be argued that a company owes obligations could in turn be owed obligations by shareholders as originators of the company, and as the stakeholders who exercise ultimate control over companies by virtue of their instruction rights, monitoring rights (and obligations), and their power to appoint officers exercising day-to-day control.

This section considers the ability of a stakeholder to bring an action through the prism of existing jurisdictional rules. What emerges from the analysis in an EU-context is a highly integrated market in which remedies for market failures remain fragmented due to the sheer cost of cross-border litigation and potential for expensive contestation of jurisdiction. Furthermore, there is a lack of specific focus on the particular nature of the relationships arising from the corporate form, including the vulnerability of corporate stakeholders to corporate decision-makers. Potential remedies include the reframing of jurisdictional rules, and the further involvement of states in monitoring and enforcement. These are considered in Section 1.2 and Section 3.

1.1 Current jurisdictional rules for private enforcement in the EU

The current jurisdictional design under the Brussels I Recast provides a number of avenues for courts to be seised of claims regarding shareholder liability. In the absence of exclusive grounds of jurisdiction,[19] which are discussed in Section 1.1.1 hereunder, the first port of call to determine which courts should exercise jurisdiction is consideration of whether there is a choice of court agreement between the parties. If so, that agreement will usually be upheld by the courts of the member states.[20] The operation of choice of court agreements is typically sound, although it is not free from criticism.[21] The analysis here focuses, however, on the rules

[18] For an account of the spectrum of theories of the firm and their potential deployment in company law, see for example John Paterson, 'The Company Law Review in the UK and the Question of Scope: Theoretical Concerns, Practical Constraints and Possible New Directions' in Robert Cobbaut and Jacques Lenoble (eds), *Corporate Governance. An Institutional Approach* (Kluwer 2003) 141, 141-179; Janet Dine, *The Governance of Corporate Groups* (CUP 2000) 1-36; Alice Belcher, 'The Boundaries of the Firm: The Theories of Coase, Knight and Weitzman' (1997) *Legal Studies* 22, 22-39.
[19] Brussels I Recast (n 17) Art 24.
[20] Brussels I Recast (n 17), Art 25.
[21] See e.g. Zheng Sophia Tang 'Cross-border Contract Litigation in the EU in Paul Beuamont, Mihail Danov, Katarina Trimmings and Burcu Yüksel (eds) *Cross-Border Litigation in Europe* (Hart/Bloomsbury 2017) 624-627.

concerning jurisdiction in the absence of choice by the parties since, as noted above, the primary concern in actions against shareholders is situations in which potential harm could not be foreseen and priced by the plaintiff, still less could a choice of court agreement have been concluded in advance of the events requiring litigation. Relevant provisions of the Regulation include the default rules concerning jurisdiction based on the domicile of the defendant,[22] special grounds of jurisdiction in tort and contract,[23] and exclusive jurisdiction over the internal affairs of a company.[24] It is pertinent to note also the possibility of suing co-defendants in a single court in which one of them is domiciled,[25] as well as bespoke rules for consumers and employees which afford claimants additional potential litigation venues as against shareholders.[26]

While the multiplicity of potential grounds of jurisdiction appears at first blush to favour the plaintiff, a lack of specific rules for the shareholder-stakeholder relationship, coupled with occasional lack of clear definition of key concepts, is problematic in that it reduces predictability and consequently increases costs of litigation. Jurisdictional wrangling where several grounds of jurisdiction are available is known to result in legal costs amounting to hundreds of thousands of Euros, and sometimes in excess of one million Euros, before substantive litigation has commenced.[27] These costs are in sharp contrast to the disposable income available to most individuals. The OECD average in 2017 was $30,563 (or €24,792 at the time of writing), which is dwarfed by the costs well-capitalised litigants are able to impose on litigation.[28]

Furthermore, Beaumont et al observe that jurisdictional challenges arise in 84.4 per cent of British cases concerning EU private international law instruments, often regardless of whether

[22] Brussels I Recast (n 17), Arts 4 and 63.
[23] Brussels I Recast (n 17), Art 7.
[24] Brussels I Recast (n 17), Art 24(2).
[25] Brussels I Recast (n 17), Art 8.
[26] Brussels I Recast (n 17), Sections 4-5.
[27] See e.g. the following family law cases: *V v V* [2011] EWHC 1190 (Fam) [61] "The overall bill to the family, now standing at £925,000, will no doubt top £1 million if next month's hearing about the children goes ahead. It should be recalled that this level of expense has been incurred without a basis of jurisdiction having been established"; *W Husband v W Wife* [2010} EWHC 1843 (Fam): legal costs amounted to determine jurisdiction amounted to £120,000; *JKN v KCN* [2010] EWHC 843 (Fam), [7] the combined legal cost to determine jurisdiction amounted to £900,000 at the preliminary stage. In civil and commercial matters, similar costs have been observed; e.g. in *Kolden Holdings Ltd v Rodette Commerce Ltd and another* [2008] EWCA Civ 10, the court lamented the expenditure of £400,000 on a spurious challenge to jurisdiction.
[28] OECD Better Life Index, 'Income' (2017). Available at: http://www.oecdbetterlifeindex.org/topics/income/ (accessed 22 March 2018).

the defendant has any realistic prospect of persuading the court that it should not exercise jurisdiction.[29] Of those challenges to jurisdiction, the vast majority are unsuccessful and appear to be primarily tactical, although it is worth noting - for the sake of completeness - that successful challenges indicate a degree of abusive attempts to ground jurisdiction by the plaintiff.[30] In any event, qualitative data corroborates the intuitive understanding that jurisdictional challenges are often deployed tactically in order to delay proceedings and increase costs with a view to exacting advantage over plaintiffs.[31] In these circumstances, a well-capitalized shareholder is at liberty to price litigation beyond the reach of the aggrieved party simply by contesting the jurisdiction of the court seised. The mere potential to do so could act as a disincentive to a would-be litigant seeking to enforce rights in cross-border cases, or as an incentive to reach extrajudicial settlements at values which they might not otherwise accept.

In the context of suits in which the respondent shareholder is a legal person, an attempt to seise a court of the state of the defendant's domicile is particularly susceptible to preliminary pleading contesting the jurisdiction of the court. The general rule that a defendant may be sued in the member state of his domicile must be read in conjunction with Article 63(1) of the Brussels I Recast, which defines domicile of a legal person. That article provides three potential venues in which to bring an action, namely the '(a) statutory seat; (b) central administration; or (c) principal place of business' of the legal person.[32]

The default rule grounding jurisdiction in the place of the domicile of the defendant is designed to provide clarity and to prevent the plaintiff from shopping for jurisdictional advantage.[33] Nevertheless, there remains a measure of choice as a consequence of multiple potential venues in which a legal person could be domiciled; it is not necessarily the case that the three connecting factors are to be found in the same jurisdiction. Indeed, the jurisprudence of the

[29] Paul Beaumont, Mihail Danov, Katarina Trimmings and Burcu Yüksel 'Great Britain' in Beaumont et al (n 21) 84.
[30] Mihail Danov and Paul Beaumont 'Effective Remedies in Cross-border Civil and Commercial Disputes: A Case for an Institutional Reform at EU Level' in Beaumont et al (n 21) 612.
[31] Beaumont, Danov, Trimmings and Yüksel (n 29) 84-85.
[32] For Cyprus, Ireland and the United Kingdom, a further definition is included to clarify the meaning of statutory seat in respect of these common law jurisdictions for whom the concept is somewhat alien: 'For the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.' (Brussels I Recast (n 17), Art 63(2)).
[33] See Brussels I Recast (n 17), Recital 15.

Court of Justice of the European Union on freedom of establishment of companies has restricted the ability of states to require the coincidence of the statutory seat and central administration of a company,[34] and market actors have increasingly taken advantage of the freedom to separate the location of the connecting factors with a view to benefiting from accommodating corporate law and fiscal regimes.[35]

Whereas the place of the company's statutory seat is readily identifiable with reference to requisite documentation,[36] where the court seised is that of the central administration or principal place of business, there is significant room for strategic preliminary pleading in which this factual connection is contested.[37] Unlike the statutory seat, which is a formal connecting factor for which evidence in writing is publicly accessible, the place of a company's central administration or principal place of business are not determined simply by identifying relevant documentation providing evidence of a legal formality. Rather, litigants may be required to adduce evidence that decisions are taken in a particular place in the case of the central administration, or that business activity is centred in a particular location in the case of the principal place of business.[38] Factual connections are certainly useful in respect of the determination of the governing law of a company in that they provide an indicator of where interests are primarily located, and where therefore governance should, arguably, be centred.[39] By the same measure, these connecting factors are potentially sound in respect of jurisdiction in the location of the company's main interests, which is more likely to coincide with the place in which creditors are situated.[40] Essentially, then, they provide connecting factors which in most cases would centre a dispute in a convenient court for the plaintiff, and one which is predictable for the respondent. Nevertheless, factual connecting factors are susceptible to

[34] Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-01459, Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* (NCC) [2002] ECR I-9919; Case C-378/10 *VALE Építési kft* [2012] ECR 00000.

[35] For empirical evidence, as well as analysis of the motivations for this phenomenon, see: Mathias Siems, Edmund Schuster, Federico Mucciarelli and Carsten Gerner-Beuerle 'Why Do Businesses Incorporate in other EU Member States? An Empirical Analysis of the Role of Conflict of Laws Rules' (2017) ECGI – Law Working paper No. 61/2017. Available at SSRN: https://ssrn.com/abstract=3012139 (accessed 22 March 2018); Mario Becht, Colin Mayer and Hannes F Wagner 'Where do Firms Incorporate?' (2008) *Journal of Corporate Finance* 241.

[36] See by analogy, Dagmar Coester-Waltjen, 'German Conflict Rules and the Multinational Enterprise' (1976) Georgia Journal of International and Comparative Law 197, 204-205.

[37] Much of the literature criticizing the real seat theory as an unpredictable system for the determination of the governing law can be transposed to a discussion concerning jurisdiction. See, in particular, Stephan Rammeloo *Corporations in Private International Law. A European Perspective* (OUP 2001) 11-20; Borg-Barthet 2012 (n 10) 41-46.

[38] See *Owners of Cargo Lately Laden on Board the Rewia v Caribbean Liners (Caribtainer) Ltd* [1991] 1 Lloyd's Rep 69.

[39] Coester-Waltjen (n 36) 206.

[40] Ibid 207.

criticism in that they are not readily determinable.[41] In the context of problems of potential strategic jurisdictional challenges, it is clear that opportunities have multiplied as a consequence of the *Centros* line of judgments which has resulted in far greater incidence of separation of the place of incorporation from the other connecting factors which could determine a company's domicile.[42] It follows, therefore, that where a plaintiff sues a shareholder in the place of its central administration or principal place of business, the likely advantage of that place being situated conveniently for the plaintiff is offset somewhat by the susceptibility of relevant connecting factors to strategic jurisdictional wrangling.

Special grounds of jurisdiction, which a plaintiff may opt to deploy in place of the general grounds based on the defendant's domicile, raise similar concerns regarding vexatious jurisdictional challenges. This is most especially evident where it is arguable that a claim could be framed as both a breach of contract and a tort. In contractual matters, an action may be brought in the place of the performance of the contract.[43] The contractual place of performance and the place in which the harmful event giving rise to a non-contractual obligation are often not the same, of course. It follows that facts which could be argued to straddle contract and tort may, in principle, be subject to the jurisdiction of a plurality of courts. The Court of Justice of the European Union has offered some clarity on the demarcation between contract and tort: a case is classified as contractual for the purposes of jurisdiction where there exists 'an obligation freely assumed by one party towards another.'[44] There remains, however, ample room for litigants to argue that courts have been seised incorrectly, particularly since the judgment in *Granarolo*, in which the Court of Justice obfuscated the meaning of contract by extending it to situations in which there is a 'tacit' contractual relationship.[45] The precise circumstances in which there is a tacit contractual relationship are, of course, a matter of fact to be determined by a court on the basis of 'a body of consistent evidence'.[46] It follows that any attempt to seise a court on the basis of jurisdiction in non-contractual matters is susceptible to contestation on the grounds that there is a tacit contractual relationship. Equally, if a plaintiff argues that there is a tacit contractual relationship, the respondent is at liberty to make the

[41] Rammeloo 2001 (n 37) 14-15.
[42] See Siems, Schuster, Mucciarelli and Gerner-Beuerle (n 35).
[43] Brussels I Recast (n 17), Art 7(1).
[44] Case C-26/91 *Handte* [1992] ECR I-03967, para 15.
[45] Case C-196/15 *Granarolo SpA v Ambrosi Emmi France SA* EU:C:2016:559, paras 23-28. For academic commentary, see Michael Wilderspin, 'Cross-border Non-contractual Disputes: The Legislative Framework and Court Practice' in Beaumont et al (n 21) 641-642.
[46] *Granorolo* (n 45), para 26.

opposite argument. In either case, the need to adduce evidence, and the susceptibility of a claim to contestation, again provide litigants with significant room to prolong proceedings and multiply costs.[47]

Furthermore, whether jurisdiction in tort or contract is contested on grounds of incorrect classification, there is further room for jurisdictional challenge once the broad classification is determined. In particular, in non-contractual matters there is ample opportunity for strategic contestation of jurisdiction based on the location of the tort, in addition to a seemingly inexorable need for clarification of concepts from the Court of Justice of the European Union.[48] Article 7(2) of the Regulation provides that, in matters relating to tort, delict or quasi-delict, an action may be raised in the courts of the place where the harmful event occurred. It is, of course, open to the shareholder to contest the assertion that an alleged harmful event did in fact occur in a particular place with a view to prolonging litigation or signalling an ability to cost it prohibitively. Similar issues arise in respect of contractual litigation, where further classification as a contract for the provision of services or sale of goods is required.[49] In the context of the present regulatory scheme, this is arguably unavoidable save to the extent that deficiencies in national procedural systems which allow room for prolongment of proceedings could be curtailed through supranational legislative intervention.[50]

Bespoke jurisdictional rules concerning employees[51] and consumers[52] provide some remedy to the cost of establishing jurisdiction in a convenient location for the more vulnerable party in a shareholder-stakeholder relationship. Exceptions to the default rule concerning jurisdiction in the place of the domicile of the defendant are to be interpreted narrowly, however.[53] It follows that an attempt to seise the court of the place of a consumer's domicile, or the place where an employee habitually works, would require a direct contractual relationship with the respondent. In order to sue a shareholder using these jurisdictional grounds, therefore, would fail unless the company itself was also sued with the shareholder due to the proximity of the claims against the company and the shareholder.[54] Here too, of course, a lack of tailor-made rules allows the

[47] See Uglješa Grušić 'Long-Term Business Relationships and Implicit Contracts in European Private Law (2016) *European Review of Contract Law* 395, 397; Wilderspin (n 45) 641.
[48] Wilderspin (n 45) 640-641.
[49] Brussels I Recast (n 17) Art 7(1).
[50] Danov and Beaumont (n 30) 605.
[51] Brussels I Recast (n 17), Section 5.
[52] Brussels I Recast (n 17), Section 4.
[53] Case C-168/02 *Kronhofer* [2004] ECR I-6009, para 14.
[54] Brussels I Recast (n 17), Art 8.

shareholder to contest the joinder of proceedings. In particular, the plaintiff is required to show that there is a risk of irreconcilable judgments; the onus is on the plaintiff to show that the claim has not been brought against both the company and the shareholder 'for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled'.[55]

In addition to the expense arising from protractive strategies deployed in jurisdictional disputes, the need to litigate in a foreign jurisdiction could be prohibitive in and of itself.[56] By way of example, engaging lawyers in a foreign jurisdiction in addition to one's own multiplies costs, whether a plaintiff is placed at further disadvantage due to potential disparities in cost arising from economic asymmetries between jurisdictions. Moreover, potential costs of translation, travel, and other unavoidable logistical barriers and opportunity costs operate as a further disincentive.[57] This is before the potential litigant has even paused to consider a lack of substantive harmonization resulting in additional cost arising from the need to appoint court experts to prove foreign law, and the potential disputes as to the meaning of foreign law.[58]

1.1.1 Minority Shareholders and Exclusive Jurisdiction

In addition to the jurisdictional grounds noted above, it is pertinent to consider the rules on exclusive jurisdiction in matters pertaining to the internal affairs of a company. Article 24(2) provides that the following matters shall be within the exclusive jurisdiction of the state of the company's seat:

> in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

[55] Case C-103/05 *Reisch-Montage AG v Kiesel Baumaschinen Handels GmbH* [2006] ECR I-6827, para 32.
[56] Louis Visscher 'A Law and Economics View on Harmonisation of Procedural Law' in Xandra E Kramer and CH van Rhee (eds) *Civil Litigation in a Globalising World* (Springer 2012) 82-84
[57] See generally Jean Albert et al *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* (European Commission DG 2007). Available at https://e-justice.europa.eu/fileDownload.do?id=99bdd781-aa3d-49ed-b9ee-beb7eb04e3ce (Accessed 15 March 2018); Adriani Dori and Vincent Richard 'Litigation costs and procedural cultures – new avenues for research in procedural law' in Burkhard Hess and Xandra E Kramer (eds) *From Common Rules to Best Practices in European Civil Procedure* (Nomos 2018) 303-352.
[58] See Visscher (n 56) 82-84.

The first hurdle to consider here is the scope of exclusive jurisdiction. Article 24(2) is particularly relevant to minority shareholders insofar as they might seek to impugn acts of the company. In this respect, it is uncontroversial that Article 24(2) would apply. Accordingly, where a minority shareholder contests a decision of other shareholders taken via the company's general meeting, for example, this would be subject to the jurisdiction of the court of the company's seat. Not necessarily so, however, shareholder obligations *inter se*. The Court of Justice of the European Union has affirmed repeatedly that Article 24(2) is to be interpreted narrowly and addresses only the validity of decisions of a company, as opposed to matters which in some way are linked to decisions of the company.[59] An unfair prejudice claim resulting from a decision of the controlling shareholders in the company would not necessarily, it seems, be governed by the rules on exclusive jurisdiction save if it seeks to impugn the decision itself or an aspect thereof.[60] Nor is it clear whether a failure to act would equally be governed by Article 24(2). In such cases there is no decision to impugn, unless it can be shown that the company had deliberately decided not to act.

In any event, where a claim is governed by Article 24(2), a shareholder would be required to bring an action in the courts of the member state in which the company's seat is situated, and every other state must refuse jurisdiction. When determining the seat, however, Article 24(2) refers back to the private international law of the member states. Notwithstanding judicial intervention in respect of cross-border recognition of companies, and indeed partly due to a lack of consistency in that respect,[61] the member states retain diverse rules on the meaning of the seat of a company. Several member states continue to rely on factual connecting factors to determine the seat.[62] This disconnect between choice of law and jurisdictional rules presents further potential for contestation of jurisdiction for the reasons noted above in respect of factual connecting factors for domicile of legal persons.[63]

[59] Case C-327/07 *Hassett and Doherty*, paras 22-26; Case C-302/13 *flyLAL-Lithuanian Airlines*; Case C-560/16 *E.ON Czech Holding AG v Michael Dědouch and Others* ECLI:EU:C:2018:167 para 33. For academic commentary concerning earlier cases, see Paul Beaumont and Burcu Yüksel 'Cross-Border Civil and Commercial Disputes Before the Court of Justice of the European Union' in Beaumont et al (n 21) 557-558.
[60] *Dědouch* (n 59) paras 34-43.
[61] See Justin Borg-Barthet 'Free at last? Choice of Corporate Law in the EU following the judgment in *VALE*' (2013) *International and Comparative Law Quarterly* 503-512.
[62] Ibid.
[63] See Section 1.1 above.

Moreover, the rule in Article 24(2) is problematic to the extent that a minority shareholder is not necessarily entitled to choose a court which is conveniently located or indeed which is well-suited to address the relevant matters expeditiously. The cost of protracted litigation, for example, might render the potential benefit too distant or uncertain. Still, there is an irresistible logic to grounding jurisdiction in the state of incorporation or the company's seat given the likely fluency of that court in relevant substantive law.[64] Furthermore, the majority shareholder bearing responsibility for corporate decisions may change from time to time, and it would therefore be cumbersome to allow jurisdiction to float when the matter at hand is closely connected to a specific jurisdiction in which proceedings might have already begun.[65] To these justifications, it is worth adding an overarching principle that shareholders have a contractual relationship with one another and it is therefore perfectly tenable to argue that, in principle, the act of incorporation is comparable to a prorogation clause whereby shareholders agree to submit a defined class of disputes to the exclusive jurisdiction of defined courts.[66]

That irresistible logic is dented, somewhat, in respect of a company which has transferred its seat or changed its governing law. The judgment of the CJEU in *Vale* enables a company to change its place of incorporation as a consequence of the Court's interpretation of the contractual nature of corporate law in the context of freedom of establishment.[67] Unlike cross-border mergers, which are now governed by the Cross-Border Merger Directive,[68] seat transfers operate in a legislative vacuum insofar as minority shareholder protections are concerned. It follows that the decisions of the company regarding the place of incorporation need not necessarily be endorsed by all shareholders, save to the extent that shareholders accept the fluidity of the corporate contract implicitly. A minority shareholder may therefore be subjected to a change in the governing law – and consequently a change in the fora in which suit may be brought – without having consented or having been provided with opportunities to

[64] *Dědouch* (n 59) para 30.
[65] *Dědouch* (n 59) para 44.
[66] See by analogy Case C-214/89 *Powell Duffryn plc v Petereit* [1992] ECR I-01745.
[67] Case C-378/10 *VALE Építési kft* [2012] ECR 00000. For academic commentary see Oliver Mörsdorf, 'The legal mobility of companies within the European Union through cross-border conversion' (2012) *Common Market Law Review*, 629–670; Justin Borg-Barthet, 'Free at Last? Choice of Corporate Law in the EU Following the Judgment in *VALE* (2013) *International and Comparative Law Quarterly*, 503-512; Stephan Rammeloo, 'Freedom of establishment: cross-border transfer of company 'seat' - The last piece of the puzzle?' (2012) *Maastricht Journal of European and Comparative Law* 563-588.
[68] Directive of the European Parliament and of the Council of 26 October 2005 (EC) 2005/56 on cross-border mergers of limited liability companies [2005] OJ L310/1.

compensate for a lack of consent by way of termination of their membership of the company.[69] Here too there is a need for legislative intervention with a view to addressing remaining lacunae in the regulation of cross-border corporate mobility.[70]

1.2 Alternative classifications of shareholder obligations

If existing and future regulation of shareholders' obligations within core company law and liability for certain acts of a company are to be enforced fully by relevant stakeholders, it may be necessary to make specific provision to classify the nature of the breach of those obligations for the purposes of the exercise of jurisdiction. At present, it is not entirely clear which heads of jurisdiction would apply to such obligations since they could variously be classified as pertaining to the internal affairs of the company, arising from tort, or contractual obligations. As noted above, the law affords ample room for litigation concerning jurisdiction in these circumstances. Indeed, in *Dědouch* Advocate General Wathelet laments a lack of dedicated jurisdictional grounds to address matters arising from corporate relationships.[71] There is, essentially, a failure to view the firm as a distinct market.[72]

Insofar as exclusive jurisdiction over internal affairs of companies is concerned, Article 24(2) of the Brussels I Recast is framed with reference to a restricted list of acts of the company in cases in which the validity of those acts is contested. Barriers to enforcement of obligations to minority shareholders could be remedied by inserting text to the following effect:

> in proceedings which have as their object the liability of a shareholder to another shareholder for the acts of a company in which they hold shares or for the acts of shareholders in their capacity as shareholders of that company, the courts of the state in which the company is incorporated or, in proceedings concerning such

[69] See e.g. Roberta Panizza, *Cross-Border Transfer of Company Seats* (European Parliament Policy Department for Citizens' Rights and Constitutional Affairs 2017: PE 583.143), 2. Available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583143/IPOL_BRI(2017)583143_EN.pdf (Accessed 22 March 2018).

[70] See e.g. See for example Conseil allemand pour le droit international privé, 'Proposition du Deustcher Rat für Internationales Privatrecht en vue de l'adoption d'une réglementation du droit international des sociétés au niveau européen/national' (2006) *Révue Critique* 712, 712-734; Eva-Maria Kieninger, 'The Law Applicable to Corporations in the EC' (2009) *RabelsZ* 607, 619-620; Christian Timmermans, 'Impact of EU Law on International Company Law' (2010) *European Review of Private Law* 549, 566; Paul Beaumont and Peter McEleavy, Anton's Private International Law (3rd edn SULI/W. Green 2011) 25.31; Anneleos Bart 'Crossing Borders: Exploring the Need for a Fourteenth EU Company Law Directive on the Transfer of the Registered Office' (2015) *European Business Law Review* 581-612.

[71] Advocate General Wathelet in Case C-560/16 *E.ON Czech Holding AG v Michael Dědouch and Others* (n 59), para 23.

[72] See Ronald H Coase, 'The Nature of the Firm' (1937) *Economica*, 386, 386-405.

> liability arising from changes in the governing law of the company, the state in which the company is incorporated or the state in which the company was incorporated at the time of the relevant acts.

This would be consistent with the contractual view of the relationship between shareholders, albeit with adjustments to allow the plaintiff the option of capturing the contractual choice of law at the relevant time in the event that this is changed. Importantly, it would also do away with multiple factual definitions of a company's seat with a view to reducing opportunities for strategic contestation of jurisdiction.

Other claims concerning the liability of shareholders could, in principle, continue to be governed by one of the other heads of jurisdiction, particularly tort, and occasionally contract. Nevertheless, common classification of claims against shareholders by non-shareholder constituencies would be beneficial insofar as it would limit room for preliminary pleas concerning jurisdiction, thereby removing hurdles to substantive claims. This could be achieved by way of a recital to clarify which rules to apply, and how to determine the relevant jurisdiction in each case. Alternatively, a clear classification of shareholder liability by way of tailor-made rules recognizing the vulnerability of defined non-shareholder constituencies and situating jurisdiction in the courts of the plaintiff's domicile would leave little room for doubt, or strategic pleading to dissuade potential litigants. Private international law instruments do, of course, recognise that disparity between the parties should, in some circumstances, be redressed by way of exception to the general rules.[73] Indeed, the current jurisdictional rules concerning tort, employees, consumers, and the general rule on the domicile of a company are intrinsically designed with a view to providing the plaintiff with the option to sue in the court of their own domicile since this is the likely location of the company's real seat or the place in which a harmful act could be argued to have taken place. Providing a clear and explicit rule to this effect in respect of shareholders' obligations would, in principle, limit the possibility of strategic contestation of jurisdiction. In the case of shareholders in groups of companies in particular, it would also provide clear recognition of the vulnerability of third parties to the risk-transfer arising from shareholders' ring-fencing of liabilities.

These measures could not, however, eliminate the problem of private international law litigation altogether. It is submitted, therefore, that states are required to exercise a more active

[73] See e.g. Brussels I Recast (n 17), Recital 14.

role in the cross-border enforcement of obligations. How this could be achieved is explored further in Section 3 hereunder, following brief consideration of the effects of lack of global harmonisation.

2.0 Lack of a global instrument on jurisdiction, recognition and enforcement

The barriers highlighted above in respect of the European Union pale in comparison to the situation pertaining in cases connected to states outwith the European judicial area. Globally, there is no universal instrument on jurisdiction and recognition and enforcement of judgments. The Hague Choice of Court Convention provides some remedy, but given that its scope is limited to business-to-business cases in which there is a choice of court agreement,[74] it is usually of no consequence to a claimant seeking to enforce shareholder obligations. Litigants are left to contend with the vagaries of divergent private international law rules concerning both jurisdiction and enforcement, including ample room for contestation of jurisdiction, available most especially in common law jurisdictions.[75] That jurisdictional rules concerning the extent to which national courts are suited to address transnational claims are not necessarily applied consistently provides further room for litigants to prolong proceedings through reliance on unclear and conflicting precedent.[76] Nor is there any instrument coordinating choice of law rules, including the demarcation between substance and procedure, which would make substantive outcomes predictable. Still less has there been any successful effort to coordinate private international law rules concerning companies or corporate groups with a view to addressing the market failures arising from the entity doctrine.

Several high-profile cases in which it was argued that shareholders bore responsibility for a company's activity highlight the barriers arising from a lack of international harmonisation. The facts of cases like *Bhopal,*[77] *Lubbe v Cape*[78] and *Shell*[79] illustrate the gravity of the

[74] Hague Convention of Choice of Court Agreements 2005, Arts 1-2.
[75] See e.g. Muchlinski (n 3).
[76] Cassandra Burke Robertson 'Transnational Litigation and Institutional Choice' (2010) *Boston College Law* Review 1081, 1107-1113.
[77] *In re Union Carbide Corporation Gas Plant Disaster at Bhopal India in December 1984* 634 F.Supp 842 (SDNY 1986).
[78] *Lubbe v Cape Plc* [2000] 1 WLR 1545.
[79] *His Royal Highness Okpabi v Royal Dutch Shell Plc* [2017] EWHC 89 (TCC). It is noteworthy in this case that Shell sought a stay on grounds of *forum non conveniens* notwithstanding the clear prohibition of the application of that doctrine in the CJEU judgment in Case C-281/02 *Owusu v Jackson* EU:C:2005:120.

substantive abuses which transnational corporate architecture is capable of shielding. These cases concern allegations of human rights abuses and significant environmental harm by corporations for which it was claimed that shareholders – parent companies specifically – were responsible. But it is the procedural lengths to which the shareholders were willing and able to go that are most troubling for present purposes, particularly when considered in the context of the fact that these cases were remarkable in that claimants were sufficiently organised and well-resourced to bring actions in the first place. In each of these cases, as in many others before and since, a lack of predictable rules allowed shareholders to contest jurisdiction on *forum non conveniens* grounds, and to appeal decisions on the exercise of jurisdiction to higher courts in a G7 state. When considered in the context of mass torts arising from activities in materially poorer communities in less developed countries, the full import of jurisdictional wrangling is especially stark.

Moreover, where a *forum non conveniens* claim is upheld by a court, it follows that claimants are required to bring fresh proceedings in another state and, if they have the resources to do so and are successful despite potential inequality of arms, to then seek to enforce the judgment in the courts of other states. In cases such as *Cape*, a decision to stay proceedings in favour of a South African court would have further exacerbated inequality of arm due to the unavailability of legal aid for the claimants.[80] When considered in the context of multinational entities such as Shell composed of some '1367 different companies which are located in 101 different countries', claimants are truly faced with a veritable jurisdiction and enforcement maze in the absence of predictable jurisdictional rules and systems of administrative cooperation.[81]

These cases highlight the considerable room for the planning of corporate architecture with a view to transfer of risk to non-shareholder constituencies where the facts of cases do not fall within both (i) substantively, the narrow factual exceptions to limited liability carved out by the courts,[82] and (ii) procedurally, the defences to a claim of *forum non conveniens*.[83] Strategic design of group structure therefore continues to enable multinational entities to ring-fence risky

[80] Muchlinski (n 3) 6.
[81] *Opkabi v Shell* (n 77) [82]. For academic commentary, see Mihail Danov 'Cross-Border Litigation in England and Wales: Pre-Brexit Data and Post-Brexit Implications' (2017) Exeter Centre for International Law Working Paper Series 2017/3, 32. Available at http://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/research/Danov_-_Cross-Border_Litigation_in_England_and_Wales_-_ECIL_WPS_2017-3.pdf (accessed 20 March 2018).
[82] *Opkabi v Shell* (n 81) [70-80].
[83] See Muchlinski (n 3) and Burke Robertson (n 76).

activities, thereby ensuring that assets and liabilities are kept as separate as possible. That the mass torts considered in this section persisted over a significant period of time, and continue to present shareholders with a considerable armoury of litigious techniques must surely give international regulators pause for thought. Here too there is a need for the intervention of states, and the coordination of their interventions, with a view to limiting the transfer of risk to poor risk-bearers.

3.0 Locating the State

Given that the very existence of companies, including the conferral of special legal features, and the recognition of those features on a cross-border basis is contingent on concessions of states, it is arguable that shareholder obligations are owed to states by way of quid pro quo. This is borne out in the practice of all states' corporate laws.[84] On some accounts of the emergence of the corporate form, the state endows a company with separate legal personality and limits the liability of shareholders with a view to attaining particular ends.[85] It follows that states are owed obligations in exchange for the conferral of these special legal features.[86] This is relatively uncontroversial. Even the United Kingdom – a jurisdiction which is otherwise permissive of contractual freedom of shareholders – imposes monitoring obligations on institutional shareholders in listed companies in such a manner as to render those obligations indirectly owed to the state.[87] Moreover, it is arguable that the state's conferral of special legal features which result in risk-transfer to third parties requires the state to exercise a policing function as a consequence of the state's own agency relationship with natural persons subject to its jurisdiction. Indeed, the governance of companies is, arguably, an exercise in the outsourcing of state functions to the shareholders in the first place, and to the company by extension.[88]

[84] See Borg-Barthet 2012 (n 10) 57.
[85] See Dine (n 18) 1-36.
[86] Ibid.
[87] See Financial Reporting Council, UK Stewardship Code 2012. Available at https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf (Accessed 18 March 2018).
[88] See Janet McLean, 'The Transnational Corporation in History: Lessons for Today?' (2004) *Indiana Law Journal* 363, 363–72; Dine (n 18) 114–16. For an account of the introduction of limited liability in its historical context, see Donna Loftus, 'Capital and Community: Limited Liability and Attempts to Democratize the Market in Mid-Nineteenth-Century England' (2002) 45 *Victorian Studies* 93, 93–120.

That obligations could be owed by shareholders to the state is therefore broadly accepted. But the matter of which the state (or states) is owed obligations and can therefore enforce those obligations inspires little consensus.[89] The question of enforcement cannot fully be separated from that of the governing law of companies. Essentially, disagreement concerning which state is responsible for the organisation of a company's internal affairs has knock-on effects in respect of the question of which state is to enforce obligations of a company and its constituents. During the ordinary course of a solvent company's lifetime, it is only the state which has control over the internal affairs, including the life and death of a company, which can exact effective measures to police the observance of obligations of corporate constituents.[90]

The core problem in respect of the determination of the governing law relates to the extent to which corporate decision-makers – shareholders in particular – should be free to order the internal affairs of a company, including the delimitation of matters which are subject to corporate law, such as obligations which may be owed by the shareholders.[91] The contractual school of thought, referred to as the incorporation theory, takes the view that promoters of companies should be free to choose the most efficient law.[92] In contrast, the concessionary view has it that companies are creatures of national law and that they should be subject to the laws of the state with which they are most closely connected because this is where the most affected polity is located.[93]

Latterly, there has been significant global movement towards the adoption of a contractual view of choice of law. In this construct, the legal system which is empowered to regulate a company

[89] For an overview of relevant theoretical disagreements, see Rammeloo 2001 (n 37) 11-20; Ernst Rabel, *The Conflict of Laws: A Comparative Study. Volume 2* (2nd edn University of Michigan USA 1960) 31-46; Francisco J Garcimartín Alférez, 'Cross-Border Listed Companies' (2007) 328 *Recueil des Cours de l'Académie de Droit International* 13, 48-55

[90] See Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd* [2003] ECR I-10155, para 105.

[91] Werner F Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond' (2004) *The International Lawyer* 813, 817–18; Eric Stein, 'Conflict-of-Laws Rules by Treaty: Recognition of Companies in a Regional Market' (1970) *Michigan Law Review* 1327, 1333; Florence Guillaume, 'The Law Governing Companies in Swiss Private International Law' (2004) *Yearbook of Private International Law* 251, 257; Andrew Johnston and Phil Syrpis, 'Regulatory Competition in European Company Law after *Cartesio'* (2009) *European Law Review* 378, 389–90.

[92] Stefano Lombardo, 'Conflict of Law Rules in Company Law after *Überseering*: An Economic and Comparative Analysis of the Allocation of Policy Competence in the European Union' (2003) *European Business Organization Law Review* 301, 314–22; Michael J Whincop, 'Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law' (2000) *University of Toronto Law Journal* 41, 52–54; Edward M Iacobucci, 'Toward a Signaling Explanation of the Private Choice of Corporate Law' (2004) *American Law and Economics Review* 319, 319–20.

[93] Coester-Waltjen (n 36) 206.

is the system in which corporate decision-makers have chosen to incorporate the company, or indeed to reincorporate it.[94] This may or may not be a legal and administrative system with which the company has a strong factual connection.[95] It follows, then, that the state which is empowered to regulate the relationship between shareholders and other corporate stakeholders is not necessarily one which has a real interest in the effects of corporate activity, save to the extent that the company is in good stead insofar as the formalities of incorporation are concerned.[96]

Freedom of incorporation often results in that state having little political interest in the effects of shareholder activity or inactivity. Indeed, there is compelling evidence to support the view that it drives states to lower substantive protections, and arguably enforcement standards, with a view to accommodating shareholders as the primary drivers of incorporation choices.[97] One solution is for the question of the governing law to be revisited with a view to facilitating control by the most closely connected state.[98] This would offer significant advantages for state enforcement of obligations, including relatively uncomplicated routes to the imposition of penalties by corporate registries. An ancillary benefit would be greater familiarity with the governing law among all stakeholders, which in turn would reduce costs of discovery of rights and obligations.[99] It would not, however, resolve all cross-border matters since cross-border activity would subsist regardless, and cross-border shareholder obligations would therefore arise too. Nor is it especially likely to be a palatable solution to regulators and commentators who view freedom of choice as a central plank of the emergence of integrated international markets.[100] Regardless of any resolution of the governing law problem, therefore, there will remain multiple states to which it is arguable that shareholders owe obligations. It follows that there is a need for coordination of state activities by way of administrative and judicial cooperation.

[94] See Rammeloo 2001 (n 37) 11-20; Rabel (n 89) 31-46; Garcimartín Alférez (n 89) 48-55.
[95] Ibid.
[96] Coester-Waltjen (n 36) 205-206.
[97] See Borg-Barthet 2012 (n 10) 63-64.
[98] Ibid 142-170.
[99] Coester-Waltjen (n 36) 206.
[100] See e.g. Tito Ballarino, 'From *Centros* to *Überseering*: EC Right of Establishment and the Conflict of Laws' (2002) *Yearbook of Private International Law* 203, 208.

3.1 Administrative cooperation

The question of enforcement by the state raises difficult conceptual questions concerning legal mechanisms to be deployed to this end. A traditional private international law approach would exclude acts *iure imperii* from the scope of cross-border recognition and enforcement of judgments and administrative decisions.[101] In other words, where the state exercises a regulatory function to police the activities of shareholders, there is not a predicable system of cross-border enforcement to facilitate this since public acts are beyond the scope of relevant private international law instruments.[102] It follows that, in the absence of systems of cross-border administrative cooperation between authorities, the possibility of enforcement of obligations on a cross-border basis is constrained to a significant extent by the vagaries of international politics rather than law.

The flaws of a strict demarcation between public and private acts are recognized in a growing number of private international law instruments, most notably in family law instruments of the Hague Conference and the European Union.[103] In particular, it is recognized that a less capitalised litigant often requires the assistance of state entities in order to enforce a claim in other states.[104] Accordingly, where artificial legal distinctions between public and private aspects of the same set of facts operate as a shield against the enforcement of obligations, private international law has now subsumed functions which are more properly characterised as public.

In this vein, a future instrument addressing the cross-border enforcement of shareholder duties could, in principle, include provision for authorities in different states to cooperate with a view to enabling stakeholders to enforce claims through state action on their behalf. Enabling states to enforce obligations through a system of cross-border cooperation would provide numerous advantages over private enforcement alone. Firstly, state authorities could act *ex officio* to bring breaches of shareholder duties to the attention of authorities in other states, or to request the enforcement of their decisions elsewhere. This would be in keeping with the obligation of

[101] See Borg-Barthet 2012 (n 10) 18-19.
[102] Brussels I Recast (n 17), Art 1.
[103] See e.g. Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007 (hereinafter 'Hague Maintenance Convention 2007'), Chapter II; Hague Convention on the Civil Aspects of International Child Abduction 1980, Chapter II; Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338/1, Chapter IV.
[104] Hague Maintenance Convention 2007, Arts 15-16.

states to fulfil their fiduciary function towards natural or legal persons affected by decisions to establish companies or recognize those established elsewhere.[105] Secondly, administrative cooperation could be particularly efficacious insofar as it would supplement traditional private international mechanisms and limit cost for complainants who lack the means to contend with the attrition of protracted procedural and substantive litigation.[106] In particular, a system could be envisaged in which a state in receipt of a complaint could, if it judges the complaint to be prima facie tenable, communicate the breach to authorities in the state of incorporation with a view to the latter state deploying administrative measures to remedy the breach. This could have multiple benefits in terms of reduction of litigation costs, and would shift the onus to the putative recalcitrant shareholder to disprove a prima facie tenable complaint.

Proportionality could be ensured by way of the prima facie evaluation of a complaint which would limit the possibility of vexatious abuse of the mechanism by having impartial public authorities act as gate-keepers. Furthermore, the deployment of any such system could, if necessary, be circumscribed through means-testing of complainants, and the limitation of complaints to natural persons only as against legal persons only.[107] The risk of abuse of such a system could be further limited by deploying modest administrative charges to reduce the incentive to use the system for minor or weak complaints, and through the possibility of recovery of administrative costs where a complaint proves to be manifestly untenable. In sum, then, if the view is taken that shareholders owe fiduciary obligations to states and/or that the state owes policing obligations to corporate stakeholders, a system of administrative cooperation between states would go some way to supplement a system of private enforcement both through ex officio state action, and through private complaints which could be limited to instances in which state assistance is merited and proportionate.

4.0 Conclusions: A need to dedicate attention to private international law of companies in the round

As noted above, there exist numerous routes to enforce claims against shareholders on a cross-border basis. The difficulties posed by jurisdictional rules are not to be found in a dearth of routes to enforcement. Rather, a lack of specific focus on market failures arising from the

[105] See Dine (n 18) 1-36.
[106] See Danov and Beaumont (n 30) 612.
[107] See Hague Maintenance Convention 2007, Art 16.

corporate form results in private international law rules which enable shareholders to deploy litigation strategies which price enforcement prohibitively. A lack of predictability as a consequence of diverse legal routes and outcomes therefore operates as a barrier in and of itself. Consequently, litigants are less likely to pursue claims against shareholders who are better equipped to deal with the attrition resulting from protracted legal proceedings with uncertain outcomes. Indeed, whether in the European judicial area or elsewhere, well-capitalised respondents are empowered under current rules to raise pleas which ensure that there is indeed a great deal of attrition and thereby to render litigation less affordable and attractive for the injured party.

Solutions to weaknesses in cross-border enforcement mechanisms are not to be found solely in a jurisdictional scheme which renders the exercise of jurisdiction and the enforcement of judgements more attractive to claimants. Revisiting questions concerning the substantive harmonisation of shareholder liability should be accompanied by a root and branch overview of private international law rules with a view to enhancing the role of states in the transnational protection of vulnerable parties. The scenarios noted above suggest that, notwithstanding the degree of complexity, there is a pressing need for administrative cooperation to facilitate the enforcement of shareholders' obligations.