THE NEXUS OF FORUMS: A CONTRACTUAL THEORY OF JURISDICTION OVER THE CORPORATION

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Despite fundamental change in the structure of markets and the corporations contesting them, the private international legal rules applicable to the assertion of jurisdiction over corporations have remained basically static over the last fifty years. This article examines the role and content of jurisdiction rules by means of a synthesis of private international law with the contractual theory of the corporation. First, this synthesis helps to illuminate the important role of jurisdiction in any exposition of the rights arising from corporate contracts. Second, the economic theory that describes the relative desirability of alternative legal rules applicable to corporate contracts is equally useful in the analysis of jurisdictional rules. Third, the deconstructive approach implicit in contractual theory shows up the ontological assumptions underpinning extant jurisdictional rules as specious. The article proposes, amongst other things, a much more liberal entitlement to assert jurisdiction over a corporation in contract cases, as a means of directing parties to state their jurisdictional preferences ex ante.

I. INTRODUCTION

Clothing non-persons and non-entities with legal personality has a long history in the law. The concept has been studied scores of times, but the best account remains one of the oldest: Holmes' discussion in *The Common Law*. Holmes began his account with the vengeant tendency of ancient law to destroy things, slaves, swords, horses, whatever, which caused harm to other persons. The common law knew these things as *deodands*, and treated them as if they were the criminals. Holmes demonstrated the remarkable transformation of this inefficient and atavistic principle into the origins of admiralty actions in rem.

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Here too, the law conferred personality, treating the ship as if it were alive. It was Holmes' great insight that the extension of personality to something "no more alive than a mill-wheel" occurred for a pragmatic reason: to facilitate the satisfaction of an obligation against the only property, the ship, within the jurisdiction. Holmes said of the judges exercising this jurisdiction that "[w]hatever the hidden ground of policy may be, their thought still clothes itself in personifying language ... ".[1] Holmes regarded this as part of a pattern: although superficial forms remained, the animating norms constantly adapted themselves pragmatically to the needs and issues of the times.

This could not be more true of corporate law, another area obsessed by legal personality. It is an area where the atavistic tendency to reify is also better viewed as being based in pragmatic, rather than metaphysical, considerations. No one can doubt that when Tina and Tom incorporate their carpentry business, there will be, as there was before, 'just the two of them'. Corporate law does not suspend the laws of arithmetic: one plus one continues to equal two, and not three. The effect of incorporation is simply to permit Tina and Tom to use a legal fiction to facilitate joint contracting, and, typically, to enable them to contract with others on the terms of limited liability. Using the so-called entity principle is often a convenient simplification of those matters, provided we recognise that the corporation has as much life and personality as the Holmesian mill-wheel. Unfortunately, a century of corporate law has been so dominated by the entity principle that one is hard pressed to be sure that this proviso is satisfied.[2]

One area where the entity principle and its Manichean struggle between form and pragmatism have been a source of difficulty is the law relating to jurisdiction.[3] The adaptation of principles traditionally based on the concept of a defendant's 'presence' within a jurisdiction to the case of a corporation is fraught with difficulties. This problem is no mere philosophical speculation, since the assertion of jurisdiction is often the crux of the existence, the success, or the value of a cause of action.[4] This problem acquires further depth in an age of multinational corporations ('MNCs'), as these are frequently ordered in order

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1 OW Holmes, Jr, *The Common Law*, Little, Brown (1881).

2 Cf MJ Whincop, "Overcoming Corporate Law: Instrumentalism, Pragmatism and the Separate Legal Entity Concept" (1997) 15 *Company & Securities Law Journal* 411 (persistence of entity concepts has pragmatic justification).

3 Leading works on the subject include JJ Fawcett, "A New Approach to Jurisdiction over Companies in Private International Law" (1988) 37 *International & Comparative Law Quarterly* 645; L Brilmayer and K Paisley, "Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency" (1986) 74 *California Law Review* 1. For a critique of the application of conventional choice of law methods to corporations, see JL Goldsmith III, "Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method" (1989) 98 *Yale LJ* 597.

4 Since this article may be of interest to others besides private international lawyers, it is useful to distinguish jurisdiction from choice of law. Jurisdiction concerns the power and the willingness of a court or courts to entertain a particular suit against a particular defendant (ie to be the forum). Choice of law questions relate to determining which state's law is to be applied in the forum to the particular suit.

to make the assertion of state authority *in any jurisdictional domain* as difficult as possible.[5]

In this essay, we propose to bring together in a partial synthesis the law on the assertion of jurisdiction against a corporation and the economic theory of the corporation as a nexus of contracts. Contractual theories of the firm (of which corporations are a subset) have a decisive hegemony in economics, and have exerted enormous influence over contemporary corporate legal scholarship.[6] According to these theories, the corporation should not be regarded as an entity, but as a network of contracts between a number of constituencies. We propose such a synthesis for three reasons. First, it helps to illuminate the contractual theory of the firm. If some or all of the rights of corporate constituencies arise from, or are subject to, contract, jurisdictional rules have a crucial role in the exposition of those rights. The manner and forums in which rights can be enforced represent crucial parts of the specification of these rights. Second, the economic theory that describes the relative desirability of alternative legal rules applicable to corporate contracts is equally useful in the analysis of jurisdictional rules. We seek to ascertain the jurisdictional rules which best facilitate the formation and performance of contracts, and which are capable of achieving efficiency and distributive justice objects. Third, the deconstructive approach implicit in contractual theory shows up much of the ontological assumptions underpinning jurisdictional rules as specious.

We hope our exposition has the advantage that readers may find some value in our analysis, even while reserving doubts about the lager contractual theory of the firm. Even those unpersuaded by it may well see how jurisdictional rules have a crucial role (especially in MNCs) in the definition of entitlements, and that different forms of these rules have very different consequences. A contractual theory of jurisdiction proves conceptually simpler, and has the potential to solve some of the modern problems of adjudicating multistate disputes. Cynics should also recognise that the rejection of legal personality that the contractual theory counsels is a first step in emancipating the law from its dysfunctional jurisdictional rules and analytical methods.

Part II of this paper gives an outline of the contractual theory of the corporation. The theory is used to analyse the assertion of jurisdiction over corporations. General theoretical issues are explored in Part III. Since the primary concept of 'presence' is conceptually flawed when applied to corporations, we advocate reconsideration of the entire basis for asserting jurisdiction over corporations. Part IV provides an outline of the jurisdictional rules a contractual theory suggests for contract cases, and more briefly, those cases where contracting is impossible (such as some torts cases). In contract cases, we seek to encourage contracting parties to contract for jurisdiction, given the difficulty of devising rules to select the cost-minimising forum. We do this

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5 See, for example, EW Orts, "The Legitimacy of Multinational Corporations" in LE Mitchell (ed), *Progressive Corporate Law* (1995) 247 (including references to literature); JP Trachtman, "International Regulatory Competition, Externalization, and Jurisdiction" (1993) 34 *Harvard International Law Journal* 47.

6 See Part II.

by substantially eliminating a corporate defendant's entitlement to object to the establishment (but not the exercise) of jurisdiction. Because there may be no opportunity to contract in some torts cases, we advocate a rule providing the defendant with a limited menu of jurisdictional choices that might reasonably be expected to be appropriate forums. We also consider the procedural rules that our preferred jurisdictional rules require. Part V concludes the paper.

II. THE CORPORATION AS CONTRACT

A. Origins

The domain of microeconomics was traditionally the operation of the price system. That interest largely excluded the firm as a subject worthy of theoretical attention.[7] The firm was regarded as a production function. Its internal operation was something in respect of which most economists felt they could remain ignorant. The nature of firm organisation was analysed in a seminal paper, published in 1937, by Ronald Coase.[8] Coase had observed that firms allocate resources to particular uses. Economists, however, had long regarded resource allocation as the domain of the market. Coase noted that the nature of allocation in the firm and the market was different. Allocation occurred in the market by the decentralised responses of many consumers and producers to changes in price. Allocation occurred within the firm by managerial fiat.[9] The fact that this very different form of allocation apparently superseded the market suggested to Coase that using markets was costly. Market allocation depended on a process of spot contracting between factor suppliers and consumers. Resource allocation within a firm permitted economisation on these costs of contracting. Coase thought that the firm was able to do this because it functioned as a specialist contracting intermediary, decreasing the number of contracts that have to be formed, and the frequency of contracting. For Coase, the 'boundary' of the firm would be identifiable by reference to an equilibrium between the respective marginal costs of organising one more transaction within the firm, and contracting in the market.

Coase's radical contribution was belatedly recognised in the 1970s when economists sought to develop a neoclassical theory of the firm.[10] Economists responded to Coase's insight that the firm was a contracting intermediary by developing the idea that a corporation (being a subset of a larger family of firms)

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7 See, for example, JB Barney and WG Ouchi (eds), *Organizational Economics*, Jossey-Bass (1986), pp 6-10, 73-4.

8 RH Coase, "The Nature of the Firm" (1937) 4 *Economica* 386. For a discussion of earlier work, see RH Coase, "The Nature of the Firm: Meaning" in OE Williamson and SG Winter (eds), *The Nature of the Firm: Origins, Evolution and Development*, Oxford University Press (1993) 48 at 54. See also section III.D, which discusses another line of theory, the new institutional economics, that Coase's article initiated.

9 *Contra*, AA Alchian and H Demsetz, "Production, Information Costs and Economic Organization" (1972) 62 *American Economic Review* 777.

10 See generally WW Bratton, "The 'Nexus of Contracts' Corporation: A Critical Appraisal" (1989) 74 *Cornell Law Review* 407 at 415-19.

was a network of contracts.[11] That is, corporations are understood in terms of a contractual process in which the interests of a number of constituencies are brought into equilibrium. The law's recognition of corporations, and the laws that apply to them, represent a standard form contract which economises on the costs of these contractual processes.[12]

B. The Ontology and Political Economy of Contractual Theory

This contractual theory carried implications which violated the prevalent doctrinal and ontological premises of legal scholarship. The ideas that a corporation had 'owners' or interests of its own were rejected.[13] Even though shareholders had been the central object of corporation law, 'contractarians' pointed out that this was not because they owned the corporation. Because their interests in the network of contracts was in the nature of a permanent residual claim, deferred to all prior fixed claims, shareholders faced serious problems in contracting with managerial decision makers.[14] Fiduciary duties addressed these problems by using duties of loyalty and care.[15] These duties used shareholders' interests as the exclusive touchstone.

Reconceiving the corporation in contractual terms also was a means of reconciling economic liberalism with the apparent centralisation of power in corporations.[16] By seeing corporations in contractual terms, economists were able to explain corporate relations as a product of consensual private arrangements. This may have been the most important aspect of the theory in terms of political economy, since it sounded a challenge to the view of corporations as management-controlled fiefs needing public law controls.[17] This was an established world view since the time of Berle and Means.[18] The role of the government in incorporation was dismissed by the new theory as a clerical matter of filing, of no more significance to corporate contracting than birth certification is to conception.[19] By keeping corporations firmly to one side of the

11 AA Alchian and H Demsetz, note 9 *supra*; MC Jensen and WH Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure" (1976) 3 *Journal of Financial Economics* 305; OE Williamson, *Markets and Hierarchies*, Free Press (1975).

12 FH Easterbrook and DR Fischel, "The Corporate Contract" (1989) 89 *Columbia Law Review* 1416.

13 HN Butler and LE Ribstein, "Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians" (1990) 65 *Washington Law Review* 1 at 3, note 2 ("The corporation is, indeed, a bundle of interrelated contractual relationships, but there is no conceptual justification for reifying this interrelationship").

14 OE Williamson, "Corporate Governance" (1984) 93 *Yale LJ* 1197; EF Fama and MC Jensen, "Separation of Ownership and Control" (1983) 26 *Journal of Law & Economics* 301.

15 JR Macey, "An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties" (1991) 21 *Stetson Law Review* 23.

16 See generally WW Bratton, note 10 *supra*; C Sampford, "Law, Institutions and the Public/Private Divide" (1991) 20 *Federal Law Rev* 185.

17 See, for example, R Nader, J Seligman and M Green, *Taming The Giant Corporation*, Norton (1976).

18 A Berle and G Means, *The Modern Corporation and Private Property*, Harcourt, Brace & World (revised ed, 1967).

19 HN Butler and LE Ribstein, *The Corporation and the Constitution*, AEI Press (1995), p 20.

hackneyed public/private divide, the scope for statism in corporation law was reduced accordingly.[20]

C. Contractual Theory's Implications for Corporate Doctrine

Although the contractual theory has significant implications for political economy, its legal implications have perhaps been the major battlefield for its adherents and opponents.[21] Just as contractual rhetoric has a powerful legitimating effect, it also has normative implications for the regulation of the terms of those contracts. Contractarians have overwhelmingly argued for contractual freedom in the selection of the terms to which corporate contracts are subject.[22] In doing so, they have relied on Coase's 'other' paper on social costs.[23] Coase argued there that if costs of transacting are nil, prior allocations of property rights are irrelevant, except to the distribution of wealth. Parties will contract around inefficient grants by rearranging rights inter se. It follows that contractual freedom is most likely to permit parties to achieve efficient contractual arrangements.

This argument means that promoters should be able to make an initial offering of shares to the public on any terms they please, with a right to exclude any of the protections conferred by corporate law (such as fiduciary duties or the one share–one vote rule). Having regard to evidence on the pricing efficiency of securities markets,[24] contractarians assert that the market for securities in such companies will only clear where the security's price reflects the full value implications of the governance terms adopted, and those excluded. Therefore, a promoter would only propose to opt out of a corporate law rule where to do so maximised the value of the corporation. Legal rules which permit themselves to be excluded are described as *default rules*. This analysis implies a certain indifference to the substance of legal rules: in the long run, good rules will drive

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20 For more recent updates of this argument, see LE Mitchell (ed), *Progressive Corporate Law*, Westview (1995) and SM Bainbridge, "Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship" (1997) 82 *Cornell Law Review* 856.

21 A range of views on the subject are expressed in Symposium, "Contractual Freedom in Corporate Law" (1989) 89 *Columbia LR* 1395. See also WW Bratton, note 10 *supra*; HN Butler and LE Ribstein, note 13 *supra*.

22 FH Easterbrook and DR Fischel, *The Economic Structure of Corporate Law*, Harvard University Press (1991); HN Butler and LE Ribstein, note 13 *supra*.

23 RH Coase, "The Problem of Social Cost" (1960) 3 *Journal of Law & Economics* 1.

24 For reviews of the efficient markets literature, see EF Fama, "Efficient Capital Markets: A Review of Theory and Empirical Work" (1970) 25 *Journal of Finance* 383; EF Fama, "Efficient Capital Markets II" (1991) 46 *Journal of Finance* 1575. For application of the theory by lawyers, see RA Gilson and R Kraakman, "The Mechanisms of Market Efficiency" (1984) 70 *Virginia L Rev* 549; JN Gordon and L Kornhauser, "Efficient Markets, Costly Information and Securities Research" (1985) 60 *New York University Law Review* 761; DC Langevoort, "Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited" (1992) 140 *University of Pennsylvania Law Review* 851. For consideration by Australian scholars, see M Blair and IM Ramsay, "Mandatory Corporate Disclosure Rules and Securities Regulation" in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand*, Oxford University Press (1994), 264 at 275-7.

out bad ones in an efficient market without the need to worry too much about the form they take.[25]

In contrast to this 'triviality' analysis, there has been increasing interest in developing a more strongly textured account of default rule choice and the dynamics associated with excluding defaults.[26] Game theory and information economics have been used to examine how different default rules affect contracting and information revelation. The reasons why 'gap-leaving', or contractual incompleteness, occurs should influence the form 'gap-filling', or the default rule, takes. Scholars pointed out that contracts may be left incomplete for reasons other than the fact that parties consider that the benefit of contracting is less than its cost. Instead, one of the parties might prefer to leave a contract silent on a particular subject, rather than to disclose her preferences for one term rather than another. That disclosure might reveal information about her that would affect the decision of the other contracting party regarding the terms of the exchange. For example, a high risk contractor might prefer to stay silent on the subject of her entitlement to damages in the event of a default.[27] Disclosing his preference might reveal that she is a high risk, which is likely to affect, for example, the price charged or the care taken. Ayres and Gertner pointed out that the formulation of the default rule could affect the extent to which this strategic contractual incompleteness occurred.[28] They put forward the concept of a *penalty default*, a default rule designed to induce *separating* by reference to parties' preferences for particular contractual terms. Thus, some legal rules might be unfavourable to some types of contractors. These contractors would have an incentive to contract around the rule, so distinguishing themselves from contractors of other types.

This shows how penalty defaults can be used to cause contracting parties to reveal information to each other. Penalty defaults can also be used to cause the parties to reveal information to third parties (including courts).[29] For instance, rules which render contracts unenforceable if certain terms are not agreed, or are not the subject of a written memorandum, compel parties to reveal and document

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25 This position is exemplified by BS Black, "Is Corporate Law Trivial?: A Political and Economic Analysis" (1990) 84 *Northwestern University Law Review* 542. See also FH Easterbrook and DR Fischel, note 12 *supra* at 1432-3.

26 I Ayres and R Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99 *Yale LJ* 87 (*Filling Gaps*); JS Johnston, "Strategic Bargaining and the Economic Theory of Contract Default Rules" (1990) 100 *Yale LJ* 615; I Ayres and R Gertner, "Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules" (1992) 101 *Yale LJ* 729 (*Inefficiency*); R Craswell, "Contract Law, Default Rules, and the Philosophy of Promising" (1989) 88 *Michigan Law Review* 489; A Schwartz, "Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies" (1992) 21 *Journal of Legal Studies* 271. For its relevance to corporate law, see I Ayres, "Making a Difference: The Contractual Contributions of Easterbrook and Fischel" (1992) 59 *University of Chicago Law Review* 1391; M Klausner, "Corporations, Corporate Law and Networks of Contracts" (1995) 81 *Virginia Law Review* 757; MJ Whincop, "Of Fault and Default: Contractarianism as a Theory of Anglo-Australian Law" (1997) 21 *MULR* 187.

27 The rule in *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145, which limits contractual damages to foreseeable losses was the default rule used as a primary example in the new theory: see I Ayres and R Gertner, *Filling Gaps*, note 26 *supra*; JS Johnston, note 26 *supra*.

28 I Ayres and R Gertner, *Filling Gaps*, note 26 *supra*; I Ayres and R Gertner, *Inefficiency*, note 26 *supra*.

29 I Ayres and R Gertner, *Filling Gaps*, note 26 *supra* at 97-8.

their contractual preferences. It is cheaper for parties to do this ex ante than it is for a court, attempting to enforce the terms of the contract, to try to elucidate ex post what the parties' intentions were. The balance here is somewhat delicate since the enforcement of the default rule can have social costs; some penalties can lead to opportunistic rent-seeking by one of the contracting parties.[30] In the remainder of this article, we demonstrate how contractual theory, as informed by a theory of default rules, provides a useful tool for reviewing how we understand and apply the rules related to the assertion of jurisdiction over corporations.

III. A CONTRACTUAL CRITIQUE OF JURISDICTION OVER CORPORATIONS

A. Introduction: The Jurisprudence of Jurisdiction

In this part, we examine the traditional bases for asserting jurisdiction over a corporation. In particular, we examine the stress under which principles of jurisdiction are placed when they are translated from a context in which the defendant is a natural person to a context in which the defendant is incorporated. Before dealing with the specifics of our argument, we address some very general jurisprudential issues.

Our proposition is that the justification of jurisdiction is ultimately pragmatic, rather than deontological or doctrinal. Jurisdiction functions like a sieve, designed to sift and filter a range of entitlements to which a plaintiff lays claim. It catches a range of claims that the forum will not recognise, whether for practical reasons (eg, a judgment would never be enforced), or on the basis of more normatively 'loaded' criteria (eg, efficiency, comity, fairness, etc). The design of the 'sieve' is therefore very important. However, it is also a matter of profound difficulty. Take efficiency as a criterion. Its implications are simple (unlike, say, fairness or justice): proper jurisdictional rules should select the 'efficient forum' in which the parties' joint costs are minimised. Designing rules to do this in multistate disputes is likely to be very difficult. The parties' joint cost function is likely to be strongly fact-contingent, depending on the nature of the parties and the dispute, the locus of the evidence, the choice of law, the location of the defendant's assets, the information each party has on each other's case, and so on. We shall advocate an efficiency focus below. There are means of dealing with the difficulty of writing efficient rules which accord with economic theory and received doctrine. If a rule maker cannot ascertain the efficient forum for suit X, the rule maker will do best to allow the parties to make the decision for themselves, and enforces their agreement. However, this still leaves us with the basic question of what to do when no choice exists.

Much of the literature addresses this problem by reducing it to an analysis of the relationship between a state with putative jurisdiction and a potential defendant. Using the properties of each entity (such as the defendant's domicile or some other 'contact'), legal reasoning is used to define the content of that

30 *Ibid* at 98.

relationship. For example, in a series of cases, the United States Supreme Court has attempted to define when a state has jurisdiction over a defendant by reference to the defendant's contacts with the state.[31] We disagree with this approach. First, attempting to reduce the corporation to an entity that has some examinable relationship with a forum is an enterprise that contractual theory dooms to failure. Second, the belief that jurisdictional (or any other) rules are capable of being derived analytically by pseudo-scientific or logical means is redolent of a dead formalism.[32] Jurisdiction must be viewed pragmatically.[33] Jurisdictional rules should be consequential in motivation, based on defensible normative criteria. They must be capable of practical application, with little or no need for convoluted metaphysical or conceptual analysis. But the rules applying to different classes of defendants need not be chained to the wheel of 'consistency'; one need not hope to articulate a single rule which applies to all types of defendants.[34] Hence, we advocate distinct rules applicable to corporations, which we believe are much more likely to lead to efficient allocation of jurisdiction. These rules eliminate complicated (sometimes bizarre) conceptual enquiries. Thus, the contractual theory we develop is also a pragmatic one.

B. The Meaninglessness of Presence

The literature on the assertion of jurisdiction over corporations rarely makes explicit the conceptions of the corporation on which analysis is based. By and large, most judges and authors seem to regard the corporation as either a natural or an artificial entity.[35] It seems to follow that the jurisdictional rules applying to a corporation can be assimilated with the most basic jurisdictional rule applying to an individual:[36] that a person may be subject to the jurisdiction in which he or she is present.[37] Therefore, one need only define what it means for a corporation to be 'present' in a jurisdiction. Presence is significant because jurisdiction has

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31 See, eg, L Brilmayer, "How Contacts Count: Due Process Limitations on State Court Jurisdiction" [1980] *Supreme Court Review* 77.

32 *Accord*; MJ Whincop, note 2 *supra*.

33 Pragmatism is a difficult concept to pin down, because of its diverse appeal across paradigms: see JP Diggins, *The Promise of Pragmatism*, University of Chicago Press (1994); HO Mounce, *The Two Pragmatisms*, Routledge (1997). The pragmatism we embrace is the variety expounded by Richard Posner in *The Problems of Jurisprudence*, Harvard University Press (1990) and *Overcoming Law*, Harvard University Press (1995). That variety emphasises theory, empiricism, and scepticism, while eschewing metaphysics and analytical formalism.

34 The efficiency analysis we use in this article to define jurisdictional rules that apply to corporations generally applies to natural persons as well. That is, contracting parties should be substantially unfettered in their choices of jurisdiction if they have not agreed to a jurisdiction clause. However, we would accept that there may be reservations in applying this to natural persons, for reasons explained in note 92

35 See, eg, *Adams v Cape Industries plc* [1990] 1 Ch 433; *Dunlop Pneumatic Tyre Co Ltd v AG Cudell & Co* [1902] 1 KB 342; *Okura and Co Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715; JJ Fawcett, note 3 *supra* at 646; JL Goldsmith III, note 3 *supra* at 614.

36 *La Bourgogne* [1899] AC 431.

37 See generally *Laurie v Carroll* (1958) 98 CLR 310. For a critique of the development of law on jurisdiction, see MC Pryles, "The Basis of Adjudicatory Competence in Private International Law" (1972) 21 *International & Comparative Law Quarterly* 61.

long been equated in Anglo-Australian law with service, and service has been tied to, and limited by, the notion of territorially limited sovereignty.[38] While presence may once have provided a sensible basis of jurisdiction,[39] its place as the foundation of jurisdiction can no longer be justified. The development of the law of jurisdiction in the twentieth century, in which the world has become increasingly internationalised and resources more mobile, has in general terms responded to the need for more substantial and meaningful bases than presence. Even as applied to natural persons, few jurisdictions now take the view that presence supplies a sufficient justification for the exercise of jurisdiction.[40] Nonetheless, a problem remains of defining criteria for the establishment of jurisdiction. One cannot resolve jurisdictional problems entirely by the use of, say, *forum non conveniens* applications, since they reverse the onus of proof from the plaintiff to the defendant. What, then, are the appropriate criteria for the establishment of jurisdiction over a corporation? The historical focus on the concept of presence in Anglo-Australian law has implicitly given way to examining where a corporation carries on business: the latter concept is taken to give content to the former. We first examine whether these approaches make sense at the conceptual level. We conclude that they do not, because of the profound difficulties of locating a nexus of contracts in space and time.

C. The Economic Boundary of the Firm

Does economic theory support an enterprise designed to establish the locus of a corporation's boundary? If so, can it be made compatible with the principles of territoriality on which jurisdiction relies? Once we have answered these questions, we can see how good a job the common law did in relating the corporation to particular jurisdictional territories.

The most obvious means to delimit the corporation is to borrow from Coase's idea of the boundary of a firm.[41] It will be recalled that Coase argued that the boundary of a firm was referable to the point at which the marginal advantage of intra-firm resource allocation equalled its costs. Beyond this point, the firm switches to market transactions to give effect to production-investment decisions. The development of a theory of vertical integration from these ideas has been attempted in the transaction cost economics research project.[42] According to Oliver Williamson, vertical integration (that is, organising a stage

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38 The High Court in *Laurie v Carroll* stated that "in an action *in personam*, the rules as to legal service of a writ define the limits of the court's jurisdiction": *ibid* at 323. See in general P Nygh, "The Common Law Approach" in C MacLachlan and P Nygh (eds), *Transnational Tort Litigation: Jurisdictional Principles*, Clarendon (1996) 21.

39 Cf AA Ehrenzweig, "The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens" (1956) 65 *Yale LJ* 289.

40 See P Nygh, note 38 *supra*, pp 35-6. In jurisdictions where presence is the foundation of jurisdiction, the doctrine of *forum non conveniens* has the practical effect of minimising the importance of presence alone.

41 See text accompanying notes 8-9, *supra*.

42 The main works in this paradigm are Oliver Williamson's trilogy: *Markets and Hierarchies* note 11 *supra*; *The Economic Institutions of Capitalism*, Free Press (1985); *The Mechanisms of Governance*, Oxford University Press (1996).

of production within a firm, and subjecting it to 'unilateral' governance) is most likely to occur where there are substantial contracting problems between buyer and seller, attributable to bilateral monopoly conditions.[43]

Take the much cited example of *Asahi Metal Industry Co Ltd v Superior Court*.[44] Asahi, a Japanese company, was joined in Californian proceedings by a Taiwanese tyre manufacturer, Cheng Shin, which purchased tyre valve assemblies from it in Taiwan. Cheng Shin sold tyres world wide, some of which incorporated Asahi tyre valve assemblies, and sought contribution from Asahi when it was sued in California Applying the theory of the firm to this case, it would be clear that Asahi was not present in California. Its transaction with Cheng Shin was clearly a market transaction, and delineated the relevant boundary of Asahi. It had not 'forward' integrated into tyre manufacture. The boundary so drawn clearly did not include California.

While a useful means of analysing many issues, the market/ hierarchy distinction is a weak foundation for constructing a theory of corporate presence for jurisdictional purposes. First, even if one can establish the 'marginal' transaction at the boundary, the theory does not provide any useful means of mapping the transactions or stages of production onto spatial areas. One still needs other means and other criteria for allocating intra-firm activities to jurisdictions.

Second, the theory may work well enough in locating the firm boundary in the context of production and distribution, as it should, since these were the paradigm questions it began with. Beyond these purposes, however, matters get decidedly sticky.[45] For example, it is not clear whether the firm boundary includes its shareholders. Williamson draws an analogy between the supply of equity finance and the vertical integration of a stage of production but the usefulness of the analogy is circumscribed.[46] The quality of fiat that distinguishes hierarchy from market is absent from the relation between equity shareholders and managers. Managers may control the money invested, but they do not tell shareholders what to do as they tell employees. Indeed, fiat runs, to an extent, the other way: shareholders have power to dismiss managers and to make other important decisions. The practical implication of accepting the shareholders as being within the firm boundary would mean that corporations were present in every jurisdiction in which shareholders were present.[47] Thus, the boundary drawn by this method would be a highly distorted one.

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43 OE Williamson, *Economic Institutions*, note 42 *supra*, ch 4, 5; B Klein, RA Crawford and AA Alchian, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process" (1978) 21 *Journal of Law & Economics* 297.

44 480 US 102 (1987).

45 MJ Whincop, note 2 *supra* at 415-6.

46 OE Williamson, "Corporate Governance and Corporate Finance" (1988) 43 *Journal of Finance* 567.

47 One may temporarily ignore the dizzying problems posed by incorporated shareholders, who are generally the majority in publicly traded companies. For a discussion of this problem in the context of US diversity jurisdiction, see PL Sealey, "An Alternative Approach to Diversity Jurisdiction for Corporations: Parent-Subsidiary Corporations" (1995) 20 *Journal of Corporation Law* 497 at 499-501. Compare the rejection in the US that shareholding in a jurisdiction is enough to assert jurisdiction over the shareholder corporation: *Shaffer v Heitner*, 433 US 186 (1977).

Third, it is unclear whether one really wants to use the firm boundary concept for jurisdictional purposes in the first place. Economic analysis suggests that 'intra-firm' transactions are subject to internal governance. Hierarchies develop their own ways of dealing with problems, their own forums, their own sanctions, and the like.[48] Market transactions, by contrast, contemplate less enduring relations between the parties.[49] Those transactions contemplate court enforcement (while also being subject to such disciplinary effect as the market can impose). Yet the issue of jurisdiction defines and limits the nature of the entitlement of a party to use court-ordered enforcement. To use the firm boundary simultaneously to differentiate types of governance, and to limit the jurisdictions to which the contract is subject runs the risk of internal contradiction. It seems very strange to say that because a corporation transacts in the market in jurisdiction A, rather than integrating that transaction within the firm, counterparties to that transaction should, ipso facto, be unable to assert jurisdiction against it in the jurisdiction where the transaction occurred. Maybe there are reasons why that is so, but the locus of the firm boundary is not one.

We may conclude that economics provides us with no simple way of fixing the corporation's presence in one jurisdiction or another. The next section considers whether the use by the common law and legislation of the place a company carries on business sufficiently avoids these conceptual problems.

D. Taking Care of Business

One attempt to make the 'presence' concept meaningful is to consider a corporation's economic interests or contacts within a jurisdiction. Thus, the important case of *Dunlop Pneumatic Tyre Co Ltd v AG Cudell & Co*[50] holds that a corporation is present in a jurisdiction if it transacts business there for a definite period of time from some fixed place within the jurisdiction.[51] Although this principle remains part of the law, much of its significance has been overtaken. A common expedient adopted in the legislation of varying countries is to require a company incorporated within a jurisdiction to have a registered office there, and to require the same of a foreign company if it carries on business there.[52] Corporate legislation usually provides deeming provisions to permit effectual service of process by leaving it at the registered office.[53] Thus, the company carrying on business within the law area of a state is effectively subject to its jurisdiction. This effectively simplifies the common law principle mentioned above.

Is this an approach which makes sense? It simplifies the complexities of ascertaining corporate presence when the existence of a registered office is not in

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48 OE Williamson, *The Mechanisms of Governance*, note 42 *supra*, pp 97-100.

49 See generally IR Macneil, "Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law" (1978) 72 *Northwestern University Law Review* 854.

50 Note 35 *supra*.

51 See also *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156 at 165; *Adams v Cape Industries plc*, note 35 *supra* at 521.

52 *Corporations Law* s 601CD.

53 *Corporations Law* ss 109X (companies incorporated in Australia), 601CX (foreign companies).

doubt. In other cases, however, some of the dilemmas of the 'presence' concept pervade the concept of 'carrying on business'. One continues to require a process that maps activities and transactions onto territories. For example, Manufacturer Ltd may be incorporated in jurisdiction J, and manufacture a product there for which the primary market is in K. The product is sold to Entrepreneur Ltd in a spot market transaction in J; Entrepreneur Ltd resells the product in K. It is unclear what it means to say in such a case that Manufacturer is, or is not, carrying on business in K. One might say that Manufacturer does not carry on business in K because its 'decision agents'[54] do not make their decisions there, because it has no infrastructure there, or because the 'risk' passed in J. However, these issues are becoming ever slighter in their significance. With continuous improvements in communication and distribution technology, the locus of these matters becomes less and less significant. As such matters become more manipulable, it becomes increasingly easy to evade jurisdiction if its establishment is made to depend on them.[55]

Other approaches to defining business are possible. One would be to have regard to the nature of the connections and interests a corporation has with a jurisdiction, and to use these to form a judgment whether business is carried on in a jurisdiction.[56] This approach is similar to the way in which contractual choices of law are determined in default of a choice of law agreement. The court must ascertain the jurisdiction which has the "closest and most real connection".[57] The problem is that while it can be hard to form a relative judgment on the jurisdiction with the *closest* connections to a contract, it may be even harder to find stable criteria for an absolute standard of what is *sufficiently close* to be 'carrying on business'. Once again, there is a problem of steering between underinclusivity and overinclusivity. The attempts made by the United States Supreme Court, for example, to define 'minimum contacts' for the assertion of jurisdiction are vague and unprincipled. The leading authority, *International Shoe Co v Washington*,[58] speaks of "certain minimum contacts ... such that the maintenance of [a] suit [in the forum] does not offend 'traditional notions of fair play and substantial justice.'"[59] This question-begging approach is hardly clarified by the cases following it. Indeed, later cases added circularity to generality by asking whether the defendant "should reasonably anticipate being haled into" a forum, given the defendant's connections with it.[60]

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54 The terminology is borrowed from EF Fama and MC Jensen, note 14 *supra*.

55 Cf JJ Fawcett, note 3 *supra* at 653-4.

56 This resembles the approach to jurisdiction in the US, required by the due process clause of the US Constitution: *International Shoe Company v Washington*, 326 US 310 at 316, 320 (1945).

57 *Bonython v Commonwealth of Australia* [1951] AC 201 at 219; *Armadora Occidental SA v Horace Mann Insurance Company* [1977] 1 All ER 347 (cf on appeal [1978] 1 All ER 407); *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Aust) Pty Ltd* (1989) 18 NSWLR 172; *Akai Pty Ltd v The People's Insurance Company Ltd* (1996) 188 CLR 418.

58 Note 56 *supra*.

59 *Ibid* at 316.

60 *World-Wide Volkswagen Corp v Woodson*, 444 US 286 (1980).

An alternative approach would be to say that a corporation carries on business within K if the corporation services demand within it.[61] This is little better. Demand in which market? The one Entrepreneur buys in, or the one the consumers buy in? What if there is further processing by Entrepreneur, as in *Asahi*?[62] Markets are troublesome to define, as we have seen to be true of hierarchies. Neither lends itself to reification without substantial distortion. Another problem of demand servicing is one of proportionality: how much demand must one service before jurisdiction can be asserted, and does the answer depend on the consequences of jurisdiction being established?

The reader may ask: what is objectionable about Consumer in K suing Manufacturer in K in respect of a product defect? Manufacturer made the product, and Consumer bought it. If there are any rights to be asserted, K is as good a place as any other, since the damage was experienced there. There may be real issues of choice of law, but why is K objectionable as a jurisdiction for the resolution of such a dispute? We find nothing inherently objectionable about K as a jurisdiction. However, reaching this result abandons any attempt to identify the corporation as being present in, or connected with, or carrying on business in K, and so being amenable to its jurisdiction. Two other approaches might be used to rationalise K as a jurisdiction in this way. One is to establish the political 'legitimacy' of K's exercise of jurisdiction; another is to say that the contract permits or requires litigation in K. The next sections explore these competing theories further.

E. Political Rights

So far, we have had little to say about the state that exercises the jurisdiction. Much conflicts literature, especially American scholarship, lies under the spell of government interest analysis, under which conflicts are resolved conformably with the interests and policies underlying the conflicting laws applicable to the problem.[63] One of the most substantial critics of government interest analysis is Lea Brilmayer.[64] Brilmayer argues that the authority of a state, exercised through its court, to pursue its interests is most tenuous in a multistate conflicts case. The furtherance of these interests presupposes the legitimacy of the state's

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61 Cf *Burger King Corp v Rudzewicz*, 471 US 462 (1985) where the Supreme Court held that sufficient jurisdictional contacts might be established over a defendant who never "physically entered" a jurisdiction, if that defendant "purposefully directed" its efforts towards residents of that state (*ibid* at 476). See also *Keeton v Hustler Magazine*, 465 US 770 at 774 (1984).

62 The *Asahi* court divided evenly on whether or not it suffices for jurisdiction if one places goods into the 'stream of commerce'. Four judges thought it did; the other four thought it did not unless a defendant takes specific actions evidencing an intent to serve a market in the relevant state: note 44 *supra* at 112 (1987).

63 See B Currie, *Selected Essays on the Conflict of Laws*, Duke University Press (1963). Government interest analysis is the prevalent choice of law method in US judicial decision-making, particularly in torts cases: S Symeonides, "Choice of Law in the American Courts in 1996: Tenth Annual Survey" (1997) 45 *American Journal of Comparative Law* 447 at 459-61. Governmental interest analysis is significant in the *Restatement (2nd) on the Conflict of Laws*, § 6 (Choice of Law Principles). The method has never been seriously contemplated or applied in Australian conflicts.

64 L Brilmayer, *Conflict of Laws*, Little Brown (2nd ed, 1995).

right to do so. Brilmayer asserts that this is a political question, which requires a deontological analysis of the political rights of a litigant vis-à-vis the state.[65]

Brilmayer makes her arguments as part of an analysis of choice of law. However, it seems fair to say that the arguments are, if anything, more relevant to the assertion of jurisdiction.[66] In the choice of law context, the arguments seem oddly dependent on a range of implicit assumptions. Why would a person, over whom state J has no legitimate political authority, be adverse to the application of J's law? Certainly, if the law discriminates against out of state residents, either on its face or in effect, the answer is clear. But the sorts of laws that arise in a private international law context are often not of this character, as is demonstrated by the fact that it is common to agree contractually to the application of the law of a state which would not, in the absence of contractual agreement, have authority over either contracting party. Indeed, discriminatory contract laws are rare, since parties can usually refuse to contract or demand an adjusted price. On the contrary, some areas of contract law, such as corporate law, are the subject of competition between jurisdictions, each of which seeks to offer the most attractive laws to contracting parties in order to get benefits such as franchise taxes or extra legal work.[67]

The choice of law argument is not very weighty, but the argument is worth considering as an argument about jurisdiction. Modifying Brilmayer's arguments slightly, she would say that a corporation incorporated in jurisdiction H may be subject to jurisdiction J's authority under certain circumstances.[68] She asks whether the corporation's connections with J are volitional and purposeful. If they are, a case for assertion of J's jurisdiction may be legitimate. An involuntary association is not enough.

There are two problems with Brilmayer's analysis. The first is that her account of political rights is incomplete. It is insufficient to explain why the party 'to be burdened' should be subject to J's coercive authority. It should also be explained why the party 'to be benefited' has a right to invoke that authority.[69] Why should all plaintiffs stand in a similar position to be able to sue a defendant in J? One might answer by saying that those who are to burdened in one context *are* those who are to be benefited in another. In other words, political rights not only define those against whom states *cannot* exercise power, they define those who have a right to invoke that power; namely, those against whom it can be invoked. Such an answer is inconsistent with Brilmayer's claim

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65 L Brilmayer, "Rights, Fairness, and Choice of Law" (1989) 98 *Yale LJ* 1277 at 1293-4. See also TS Kogan, "Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity" (1987) 62 *New York University Law Review* 651.

66 Brilmayer recognises that jurisdiction raises much the same issues, but she clearly regards these issues as separate: *ibid* at 1296.

67 See generally RK Winter, Jr, "State Law, Shareholder Protection, and the Theory of the Corporation" (1977) 6 *Journal of Legal Studies* 251.

68 See also L Brilmayer, "Consent, Contract, and Territory" (1989) 74 *Minnesota Law Review* 1.

69 *Accord*, *World-Wide Volkswagen Corporation v Woodson*, note 60 *supra* at 292 (1980) (noting that the plaintiff's interest in obtaining relief is relevant to the forum's interest in adjudication), and TS Kogan, note 65 *supra* at 676-7. Brilmayer assumes the plaintiff's entitlement to commence proceedings may be justified as an exercise of the plaintiff's consent: note 64 *supra* at 276.

that political rights are negative, not positive.[70] The answer is also inconsistent with the common law's indifference to attributes of the plaintiff where jurisdiction is invoked regularly.[71] Further, it could be a dysfunctional rule. In a multistate contract between parties based in different jurisdictions (say, a contract of sale), it would seem that each jurisdiction has political rights against only one of the parties. But if that were so, neither jurisdiction could adjudicate the contract because either the plaintiff lacked political rights, or the defendant had a right to be 'left alone'. Something is needed to break the impasse, which is almost always pragmatic. For example, constraining a products liability suit by the buyer may result in insufficient deterrence of negligent manufacture.

Brilmayer defends her argument that persons (including corporations) voluntarily associating with a jurisdiction should expect to be subject to its laws and jurisdictions, by reference to Hirschman's classic exposition of the concept of 'exit'.[72] The party subject to jurisdiction may leave it, since Brilmayer would require a volitional association with it as a preliminary to subjection to jurisdiction.[73] It seems reasonable to say that the ability to dissociate gives some legitimacy to the assertion of jurisdiction against those who choose not to do so. But it tells us very little else that is meaningful. The key policy question is not the availability of *exit*, but the justifiability of the prescribed conditions for *entrance*. Using the idea of a 'stream of commerce' as a basis for jurisdiction, as in *Asahi*, may be legitimate, because the manufacturer could choose not to sell that product. But because other formulations would be legitimate as well, legitimacy's normative content is thin. Choosing between legitimate rules can only be done on the basis of pragmatic and consequential grounds. One might readily agree with Brilmayer that the interests of one state in isolation are an unjustifiable calculus for consequential analysis. However, surely the preferred unit of analysis is the interests of the parties; the competing merits of different jurisdictional rules are most tractable when one asks whether the forum those rules select is appropriate given the rights between those parties.

This point is one of general validity. The dominance of party interests over state interests in private international law cases is clear. The role of the state in these cases is small. It provides a court, a courtroom, an adjudication and an enforcement procedure, and not much more. The animation of these processes, especially the all important chase for assets for execution, is dependent on the efforts and resources of the parties. In these circumstances, political rights are not so much 'wrong', as simply out of place. The jurisdictional issue, like the choice of law and enforcement issues, is part and parcel of a particular dispute. That dispute is a private one. The parties' entitlements to jurisdiction must be justified according to their substantive entitlements. Because corporations are fundamentally contractual artefacts, the horizontal relation between parties is primarily a matter of contract.

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70 L Brilmayer, note 65 *supra* at 1295.

71 *Oceanic Sun Line Special Shipping Inc v Fay* (1987) 165 CLR 197 at 241, *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554.

72 A Hirschman, *Exit, Voice, and Loyalty*, Harvard University Press (1970).

73 L Brilmayer, note 65 *supra* at 1306-7.

F. A Contractual Theory of Jurisdiction

We have seen that attempts to 'spatialise' the corporation's existence are very difficult. Because the corporation is a network of contracts, the number and terms of which, and parties to which, will regularly change, the corporation's dubious ontology greatly complicates analyses of presence and similar concepts. The common law's approach to the assertion of jurisdiction depends on a two-tier process, the first of which involves analysing presence. The second, mutually exclusive tier involves examining the (circumscribed) entitlement of a plaintiff to serve originating process ex iuris.[74] Our analysis suggests that the first tier is almost meaningless when applied to corporations. If that is so, the logic for restricting the second tier of service is questionable (unless one simply wishes to make it hard to sue corporations). Since our analysis suggests that what is within, and what is outside the jurisdiction is a proposition better left to analytical philosophers than lawyers, it is clear that we must reconsider the *entire* basis for asserting jurisdiction against a corporation. In this section, we seek to explain the essential elements of a contractual theory of jurisdiction over corporations, and the options available. More specific applications are deferred until Part IV.

The starting point of our reconsideration is to remember that a corporation is a network of contracts. The question of jurisdiction over a corporation is therefore, in the first instance,[75] a question about the manner in which entitlements acquired by contracting parties are recognised, and how the rights under those contracts are enforced. The first and simplest rule of jurisdiction in contractual cases should be that, subject to relatively few exceptions, the parties may agree to submit to the jurisdiction of whichever court they please. Such agreement is usually expressed in an exclusive jurisdiction clause. That jurisdiction need have no connection with the parties. The jurisdiction clause will usually be specifically enforced by means of a stay of proceedings,[76] or occasionally an anti-suit injunction,[77] unless there are substantial reasons not to do so (such as unconscionability).[78] Jurisdiction is therefore contractible. This makes sense, since, like other terms (including the applicable law), jurisdiction

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74 The circumscription occurs by restricting the grounds for service ex iuris, either by requiring the plaintiff to obtain leave prior to service on these grounds (eg High Court Rules O 10 r 1), or, more commonly, by requiring that the plaintiff obtain leave to continue if the defendant does not enter an appearance (eg Supreme Court Rules 1970 (NSW) Pt 10 r 1A, Rules of the Supreme Court (Qld) O 11 r 1). In the Federal Court, the plaintiff may either seek leave before serving out or seek leave to continue if the defendant does not appear: Federal Court Rules, O 8 r 2. The distinction between tiers is similar to the American distinction between general and special jurisdiction: see *Helicopteros Nacionales de Colombia v Hall*, 466 US 408 at 414 (1984).

75 Later we deal with issues involving non-contractual claims.

76 *Oceanic Sun Line Special Shipping Co Inc v Fay*, note 71 *supra* at 224, 230-2 per Brennan J, 259-61 per Gaudron J; *The Eleftheria* [1970] P 94 at 103; *Leigh-Mardon Pty Ltd v PRC Inc* (1993) 44 FCR 88 at 99.

77 *British Airways Board v Laker Airways Ltd* [1985] 1 AC 58 at 81.

78 Public policy may also play a role: *Akai Pty Ltd v The People's Insurance Company Ltd*, note 57 *supra*. Cf MJ Whincop and ME Keyes, "Statutes' Domain in Private International Law: An Economic Theory of the Limits of Mandatory Rules" (1998) 20 *Syd LR* 435.

has a significant role in the division of exchange surplus between the contracting parties, and in the resolution of contracting disputes. Parties are likely to have the best information on their jurisdictional preferences.

If parties have contractual freedom to agree to jurisdiction, it follows that a failure to exercise that freedom leaves a contract which is incomplete: although it may specify substantive contractual obligations, the contract's provisions are incomplete as regards enforcement. It follows that contracts which are silent on choice of jurisdiction can be analysed in terms of default rule methodology. In other words, jurisdictional rules in contract cases can be regarded as simply a set of default rules. The parties are generally at liberty to contract around them. When they do, those contracts are appropriately respected. The problem, however, is to ascertain the appropriate jurisdictional default rules, when they do not.

The process of choosing jurisdictional default rules is complicated by three factors. First, Part II indicated that there are varying reasons why one might prefer one default to another. For example, a default rule might be selected because the forum it selects is thought to be preferred by a majority of contracting parties. Alternatively, jurisdictional defaults might be set to induce information revelation: either between contracting parties, or to a third party such as a court. Finally, a court might attempt to determine the jurisdiction the parties would have contracted for had they turned their mind to the matter.

The second complication is choice of law. Choice of law interacts with jurisdiction in varying ways. Relatively strict choice of law rules can be diluted by expansive entitlements on the part of the plaintiff to choose forums, given the tendency of forums to apply local 'procedural' rules (which can substantially affect results). There are other interactions between the two.[79] Therefore, one cannot assume that 'other things' are 'equal' when analysing jurisdictional rules.

Third, jurisdictional rules operate at two levels. One can identify rules for the *establishment* of jurisdiction and rules for the *exercise* of jurisdiction. The establishment rules provide for the sorts of cases over which a court regards itself as having jurisdiction. In the context of human defendants, the first stage establishment rule is presence in the jurisdiction, and the second stage establishment rule is found in the 'long arm' rules on service ex iuris. The exercise rules provide reasons why a court, although properly seised of jurisdiction, may refuse to exercise it. Exercise rules embrace the principles applicable to stays of proceedings, especially on *forum non conveniens* grounds. There is an interaction between the two levels of rules: one might limit the domain of legitimate forums either by limited establishment rules, or by

79 JJ Fawcett, "The Interrelationships of Jurisdiction and Choice of Law in Private International Law" [1991] *Current Legal Problems* 39.

expansive exercise rules.[80] Choices between the two may have important consequences. Limited establishment rules might save the significant costs of stay applications. On the other hand, it may be preferable to create a *forum non conveniens* procedure for reasons in addition to providing a direct control on undesirable forums. We believe that one of the purposes of *forum non conveniens* is to decrease the 'security' of the plaintiff's forum choice, by allowing the defendant to put the choice 'into play'.[81] When that happens, each party, wanting to demonstrate that their preferred forum is the most appropriate, must disclose important aspects of its case in order to do so. Given the high information costs in multistate litigation, this process will increase the amount of information available to parties about each other's case and its value. More information should facilitate settlement.[82] For the purposes of this paper, we shall assume the appropriateness of a relatively expansive exercise rule, which might be closer to *forum non conveniens* than the "clearly inappropriate forum" rule in *Voth v Manildra Flour Mills Pty Ltd*,[83] in order to concentrate on establishment rules.

The choices that we make across these three dimensions limn the concept of the 'governance' of a multistate nexus of contracts. Since governance is fundamentally contractual, jurisdictional rules provide an important framework for the way in which 'substantive' contractual rights are asserted. The jurisdictional framework is, like the substantive aspects of the contracts, susceptible of substantial private ordering.

In constructing a theory, we specifically seek to overcome two problems of other conflictual theories of jurisdiction: reliance on rules which attempt to spatialise the corporate fiction, and disregard of the 'horizontal' relation between the parties, in favour of the 'vertical' relation between one or both of them and the state. We seek to deal first with the jurisdiction of a court in relation to contractual causes of action. We then analyse the jurisdictional rules that should apply where the cause of action lies in tort, having particular regard to torts that do not involve contracts. We then provide a means for dealing with a thorny problem in both procedure and corporate law: the subsidiary–holding company relation.

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80 Historically, there has been an observable relation between the width of establishment and exercise rules. In broad terms, development of Anglo-Australian law has moved from narrow to wide bases for both establishment and exercise of jurisdiction. Long arm rules have been considerably expanded since they were first enacted in the mid-nineteenth century, although these bases of jurisdiction are still treated as exorbitant. The reasons for which a court may refuse to exercise jurisdiction have also broadened, particularly since 1987. Compare *Maritime Insurance Co Ltd v Geelong Harbour Trust Commissioners* (1908) 6 CLR 194 and *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382 with *Oceanic Sun Line Special Shipping Co Inc v Fay*, note 71 *supra*; *Voth v Manildra Flour Mills Pty Ltd*, note 71 *supra*; *Henry v Henry* (1996) 185 CLR 571.

81 We argue this in detail in our working paper, "The Divided Forum: Towards an Economic Theory of *Forum Non Conveniens*" (1998) (copy on file with authors).

82 WM Landes, "An Economic Analysis of the Courts" (1971) 14 *Journal of Law & Economics* 61; RA Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973) 2 *Journal of Legal Studies* 399.

83 Note 71 *supra*.

IV. ASSERTING JURISDICTION OVER THE CORPORATION

A. Default Rules in Contract Cases

We have sketched above the primary bases for choosing between defaults. The rule could be a simple untailored rule, for example, one requiring litigation to be brought in the place the contract was entered. Alternatively, the rule could be tailored by a court at the time of the litigation: where would these parties have preferred to litigate, had they negotiated at the time of the contract? Finally, the rule could be framed as a penalty default, designed to induce information revelation or explicit contracting.

The first consideration relevant to choosing between these options is that a party's costs in each jurisdiction will differ in quantum and timing. Those costs will depend on the nature of the dispute. As we noted in section IIIA, the jurisdictional rule would ideally choose the forum in which the parties' joint costs were minimised.[84] However, finding a generic untailored rule which accomplishes this in a majority of cases, across a variety of types of disputes, is unlikely. Unless the untailored rule permits some sort of choice between two or more jurisdictions (for example, the place of the defendant's domicile *or* the *locus contractus*), it may frequently prove to be inconsistent with the parties' presumed preference for joint cost-minimisation. The more costly it is for litigation to be brought, the greater the ability of parties to engage in opportunistic contractual behaviour. This is undesirable, and may deter trades. This analysis may explain why 'long arm' rules in relation to service are in effect choice-expanding, rather than choice-restricting. Although there are undeniably problems which arise from forum shopping, it is desirable to provide in the first instance for decisions regarding forum to be put in the hands of the parties, since they have better information than anyone else.

The second consideration is whether we want courts to attempt to simulate ex ante bargaining by fully informed parties in relation to jurisdictional issues. In other words, should courts attempt to fill gaps with tailor made jurisdictional determinations? To some extent, courts do something like this in a *forum non conveniens* application. Therefore, there is some element of jurisdictional tailoring in our legal system.[85] However, it is important to note that this tailoring process enters at the exercise stage, not at the initial establishment of jurisdiction. By that stage, the plaintiff has been afforded an opportunity to make a unilateral choice of jurisdictions. Provided the choice is not clearly inappropriate, the plaintiff will not lose on the stay application in Australia as a matter of law,[86] and is quite likely to succeed even in jurisdictions with fully blown *forum non conveniens* procedures. Tailoring by a court at the

84 We assume that the choice of forum has no direct efficiency effects other than on party costs. This may not be so. For example, one forum might excuse a party from the performance of a wealth-maximising contract. These costs could be included as part of the joint cost calculus. Alternatively these sorts of issues could be addressed as separate choice of law considerations.

85 Its reliability, however, depends on the extent to which factors unrelated or inimical to efficiency (such as 'protecting the local') affect *forum non conveniens* determinations.

86 *Voth v Manildra Flour Mills Pty Ltd*, note 71 *supra*.

establishment stage is probably a thing of limited value, if for no other reason than that a court determination would be required before litigation could begin.[87] If there are gains to be had from agreement in respect of a forum, parties are likely to be able to achieve these gains for themselves (by way of a negotiated jurisdiction clause) in a majority of cases, and at a lower cost than a court.

So far we have suggested that untailored, choice-restricting rules are likely to be dysfunctional, and tailored rules are costly and largely unnecessary. The main option that remains is a jurisdictional 'penalty default'. Penalty defaults seek to achieve information revelation, either between contracting parties, or to a non-party. Inducing disclosure 'within the contract' (based on asymmetric information problems) seems inapplicable. It is not clear what private information a contracting party could possess that a jurisdictional rule could usefully compel him or her to disclose to the other party. Perhaps a jurisdictional rule that would compel one of the parties to litigate in a jurisdiction which requires a plaintiff to provide security for costs might force the plaintiff to disclose possible solvency problems as part of the process of contracting for a jurisdiction clause. But the real question is the extent to which jurisdictional preferences are capable of being unbundled into information about the party.[88] Maybe this will occur in some cases, but they do not intuitively seem to be dominant. Such a default would normally require reliance on a *single* default jurisdiction.[89] It is unlikely that the high social costs of such an inflexible rule would be warranted by the efficiency gains from information forcing.

However, the second type of penalty default, forcing information to be revealed to a third party, is a much more useful solution. Jurisdictional disputes are costly, and if the law reports are any guide, occur quite frequently in multistate cases. The cost of filling the gaps in these contracts is high. However, it would seem that the cost of contracting for a jurisdiction clause is relatively low. Drafting costs are close to nil, and the costs of ex ante negotiation are almost certainly likely to be lower than trying to cut such deals when disputes have arisen.[90] The clause is relatively easy to enforce, unless courts open up the grounds for reviewing these clauses (which would normally be unwise[91]). Jurisdictional rules should therefore be designed to give both parties incentives to state their preferences at the time of contracting. How can

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87 Cf *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 at 464.

88 MJ Whincop and ME Keyes, "Putting the 'Private' Back Into Private International Law: Default Rules and the Proper Law of the Contract" (1997) 21 *MULR* 515 at 535.

89 If the default retained a number of options, separating (and therefore information revelation) is unlikely occur.

90 The marginal cost of including a jurisdictional provision in a standard form contract would be nil unless the law imposes special requirements to disclose that term. The reviewer of this paper has correctly pointed out that even if we are correct in believing that ex ante costs are low, parties may not contract where the probability of litigation is not high. This is not, however, a fatal objection: the *forum non conveniens* procedure provides an opportunity for courts to tailor ex post in the cases where ex ante contracting is not thought to be justifiable. Note also that a wide range of forum options (including arbitration) is likely to increase the parties' ability to contract ex ante.

91 See generally MJ Whincop and ME Keyes, note 78 *supra*.

that be done? There are three possibilities. The first is not to enforce the contract if jurisdiction is unspecified, a result that is at odds with common experience. The second possibility is that parties could be given a truly dreadful default forum and be forced to contract around it. But that has high social costs if the parties have not contracted around it and litigation eventually becomes necessary. It may well induce breach by the party performing last.

A more promising possibility is to permit the plaintiff, which could be either contracting party, to choose any jurisdiction, unless they have agreed to a jurisdiction clause. In other words, constraints on personal jurisdiction are simply waived. Both parties effectively give each other a right to choose any forum in which to litigate.[92] This is a valuable right. It does not suffer the problem of choice-restricting rules drafted by regulators under conditions of impacted information, since it places the litigation decision into the hands of the party with the best information on his or her costs. However, because both parties have a right to select the forum, each recognises the potential for 'races for the line' and overlitigating in multiple forums, should the contract become disputatious. In other words, the right might induce too much hostile litigious behaviour even though cooperation would be mutually beneficial. Both parties recognise that they are likely to be better off controlling this potential 'prisoner's dilemma'[93] by making a credible commitment to a single, mutually acceptable jurisdiction, or to submit to the jurisdiction of enumerated forums if a single choice is not possible. Hence, a mutual right to forum selection ex post constitutes an incentive for both parties to contract ex ante. Thus, the rule functions as a contract-inducing penalty default that encourages jurisdictional preferences to be stated.

Let us revisit a case such as *Asahi* in light of our analysis. We have rejected the notion that untailored rules assigning jurisdiction to, for example, the forum in which the defendant corporation (Asahi) is present, or to the forum where the contract was made or breached,[94] are likely to be cost-minimising. Likewise, requiring Cheng Shin to seek a verdict on whether the parties would have chosen California as the forum is likely to be costly and may delay the settlement of litigation. Our belief is that the first-best solution is to enforce any exclusive jurisdiction clause in the parties' contract. Likewise, we believe that the best way to induce such contracting is for the parties to have a right in the absence of agreement to establish jurisdiction where they choose (subject to the requirement that the jurisdiction has a *forum non conveniens* procedure). Thus, the suit in California could continue, subject to the Californian court staying its procedure

92 This model assumes both parties are incorporated. Should the defendant be a natural person, we revert to more conventional two-stage jurisdictional rules. In corporation-natural person contracts, terms are often those in a standard form proffered by the corporation. It would be inefficient for corporations to leave a gap in the contract and profit from the penalty default. This can also be justified intuitively on grounds of fairness: a natural person should not be driven around the world by the whim of a corporate plaintiff.

93 A 'prisoner's dilemma' is the description commonly given to situations where parties' individual interests induce them to prefer actions which are mutually disadvantageous for them: see D Baird, R Gertner and R Picker, *Game Theory and the Law*, Harvard University Press (1995), pp 31-5.

94 This was probably Japan, but these determinations are always vexed by the formalisms of offer and acceptance.

on *forum non conveniens* grounds. Given the possibilities of dead-weight losses to the plaintiff from a successful *forum non conveniens* application by the defendant, the plaintiff at the time of litigating has an incentive to choose an appropriate forum. Both parties recognise that it will often be wealth-maximising to agree to a forum ex ante in order to avoid (a) the costs of interlocutory applications; and (b) the exposure to a potentially undesirable forum.

Despite the novelty of this construction, our own system is moving towards it. Provided one can satisfy the jurisdictional requirements of a preferred forum, which grows increasingly easy as 'long*er*' arm rules on service are adopted, and the concept of carrying on business becomes ever more fuzzy, a party to a contract which has genuine multistate elements will usually have a wide range of forums amongst which to choose. The only substantial constraints are encountered at the exercise level. In section C, we consider what further rules are needed to supplement this rule.

B. Torts Rules

It is obviously difficult for a contractual theory of jurisdiction to deal with claims which do not involve any contract. How do we deal with torts? In the first instance, it is worth pointing out that torts and contracts are not mutually exclusive. A variety of tort problems arise in contractual contexts, including products liability, negligent misstatement, and workplace accidents. We would argue that these should be subject as nearly as possible to the same private international law rules as contractual claims, a position which we defend elsewhere.[95] What this means is that where there is a contract between the tortfeasor and the victim, any choice of law and of jurisdiction would normally be enforced in respect of a matter arising from the contract, irrespective of the doctrinal basis on which the plaintiff puts his or her claim. This consistency of treatment overcomes a potential criticism that different rules applying to torts and contracts would lead to lacunae in jurisdiction when claims are based on concurrent liability.

The torts that remain might be described as 'non-market' torts, and include a range of personal injury cases allegedly attributable to the negligence of servants and agents, as well as some of the most troublesome cases arising in the MNC context: damage to private property caused by industrial operations.[96] Before discussing jurisdiction, our views, detailed elsewhere, are that such torts should be subject to *lex loci delicti* rules.[97] Ascertaining the *locus delicti* can be seriously problematic in market torts, because markets by nature can span

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95 "The Market Tort in Private International Law" (1999) 19 *Northwestern Journal of International Law and Business* (forthcoming). Our argument is similar to arguments by PE Nygh, "The Reasonable Expectations of the Parties as a Guide to Choice of Law in Contract and Tort" (1995) 251 *Recueil des Cours* 268.

96 See, for example, *Dagi v BHP (No. 2)* [1997] 1 VR 428; *In re Union Carbide Corp Gas Plant Disaster at Bhopal, India* 634 F Supp 842 (SD NY 1986), 809 F 2d 195 (2d Cir), 484 US 871 (1987).

97 MJ Whincop and ME Keyes, "Economic Analysis of Conflict of Laws in Torts Cases: Discrete and Relational Torts" (1998) 22 *MULR* 370.

considerable geographical distances. That problem is much less apparent in non-market torts, where the spatial context of the tort is usually much easier to pin down. If a *lex loci delicti* rule is not destabilised by expansive exceptions for procedural law,[98] it should go a substantial way to reducing inefficient forms of forum shopping, especially in combination with *forum non conveniens* rules. In which jurisdictions, then, should the defendant be permitted to sue the corporation?

The main question is whether or not one ascribes to a substantially unqualified right in the plaintiff to choose a forum (as we have in contract cases). The main argument in favour of a restricted list of jurisdictions is that the parties do not have an opportunity to contract in relation to jurisdiction. Thus, the logic of the penalty default, that the penalty is used to induce the parties to communicate their jurisdictional preferences, cannot be justified where there is no opportunity for that communication. However, the counter argument might be that, whether or not there is an opportunity to contract, the *forum non conveniens* procedure continues to provide a (sufficient) control on inefficient forum selection. Which argument is correct?

It was suggested above that the ability of untailored jurisdictional rules to pick efficient forums is unlikely. Hence, rules that eliminate choices have little to recommend them, in torts as well as in contract. For example, one might think the *locus delicti* is the natural forum. Maybe it often is; but what if the parties come from other forums, or if the defendant is not a resident there, and has no assets there against which judgment might be enforced? It may not be a suitable forum at all. Thus, the real decision must be whether one prefers unlimited or limited choices, where 'limited choices' are still substantial. Thus, under a limited choice model the plaintiff might be able to elect to commence against the corporation in one of the following: (a) the plaintiff's place of domicile at the time of the tort; (b) the *locus delicti*; (c) the jurisdiction in which the defendant is incorporated or has its principal place of business;[99] (d) the place of management of the corporation in which decisions causing the tort was made. This probably comes close to exhausting the range of jurisdictions that might be appropriate, as cost-minimising forums.

As between the two proposals, the main difference would be that the plaintiff would not be able to commence litigation in "moth-to-the-flame" jurisdictions[100] if these jurisdictions have no connection to the litigation, whereas it could establish jurisdiction there under the unlimited model. Even under a uniform choice of law rule, there may continue to be private advantages to litigating in these jurisdictions, such as jury assessment of civil damages.[101] Whether or not matters continue in such a forum under the unlimited model depends on decisions made at the exercise of jurisdiction stage (for example, the selected

98 See generally WW Cook, "'Substance' and 'Procedure' in the Conflict of Laws" (1933) 42 *Yale LJ* 333 at 343-4.

99 We deal with the problem that arises when the corporation is in fact a corporate group in Part IV C (iv).

100 *Smith Kline & French Laboratories v Bloch* [1983] 2 All ER 72 at 74 (Lord Denning MR).

101 Cf WM Landes and RA Posner, *The Economic Structure of Tort Law*, Harvard University Press (1987), pp 302-6.

jurisdiction might grant a stay, or another jurisdiction might grant an anti-suit injunction). To the extent that the probability of 'moth-to-the-flame' jurisdictions being appropriate (that is, efficient) is low, it would seem to be efficient to prohibit the plaintiff from establishing jurisdiction in them in the first instance by using criteria to limit the 'authorised' jurisdictions. The costs of enjoining proceedings in these forums is likely to exceed any possible efficiency gain from retaining them. We therefore favour a limited range of forum choices, along the lines indicated, if parties lack the ability to contract ex ante in relation to jurisdiction.

C. Supplementary Rules

Forum shopping is the obvious risk if the law creates an unfettered right to choose jurisdiction. Because a litigant does not bear all of the social costs of the forum selection, that selection may turn out to be inefficient. This may be because the marginal benefit to the plaintiff from litigating in the chosen jurisdiction may be outweighed by the marginal cost to the defendant. Alternatively, it may result from the fact that the choice of law rules of the available forums would select different laws of the cause. If so, the plaintiff will prefer the rule which maximises his recovery, even though the chosen forum is not the cost-minimising one. This forum shopping problem can be addressed by supplementation with several associated rules. The rules we have proposed raise other questions, too, which we analyse below.

(i) Choice of Law

We mentioned above that choice of law and jurisdiction are equations in need of a simultaneous solution. We would argue that appropriately designed choice of law rules can minimise some of the inefficiencies that arise from expansive jurisdictional rules. Elsewhere, we have considered a range of choice of law rules applicable to contracts.[102] The simplest rule (which also happens to be identical to our analysis of jurisdiction) is to permit parties to make their contractual choices of law, as with jurisdiction. However, we do not favour the use of penalty defaults where the parties have *not* made a contractual choice of law; rather we prefer a series of untailored rules referable to contract types.[103] The reasons for such a choice are considered in more detail in the other works, but such rules are preferable to alternative approaches using 'closest-connection' tests.[104] In simple cases, the two tests are likely to produce uniform outcomes, but the latter test becomes indeterminate when there are substantial multistate connections. Untailored rules, if properly specified, are likely to reduce this uncertainty and facilitate settlement. When two or more untailored rules

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102 See MJ Whincop and ME Keyes, note 95 *supra*.

103 For example, products liability cases would normally be referable to the law of the place of sale to the plaintiff; employment cases would be referable to the law of the place the majority of services were to be rendered; contracts employing seamen would be referable to the law of the port in which the seaman was engaged; negligent misstatement cases would be referable to the place of business of the professional, and so on.

104 See authorities in note 57 *supra*.

overlap, and produce divergent outcomes, we favour a limited form of ex post tailoring to choose amongst these.[105] These rules would powerfully limit the incentive to manipulate forum for choice of law advantages.

What explains the difference between our advocacy of untailored rules in choice of law problems, and penalty defaults in jurisdiction? We would argue that, by the time a court comes to decide the minority of cases that do not settle, its choice of law decision can normally only have distributive effects. The only reason choice of law rules have efficiency consequences is because they exacerbate forum shopping (as *lex fori* rules do), they prolong litigation (for instance, because they increase uncertainty), or, where relevant, they complicate contracting (where the anticipated lex causae will be unclear). Untailored rules with territorial focuses are the most likely to avoid these problems. In contrast, the efficiency effects of jurisdictional rules 'kick in' much earlier, since they lock the parties into litigating within a particular forum. They are therefore much more likely to impose higher social costs if they get forum allocation wrong. We have already suggested that they are likely to err in selecting the efficient forum on a regular basis because of the unpredictable comparisons between forums on a case by case basis. Hence the need to avoid choice-restricting solutions, and to encourage contracting.

(ii) Implied Jurisdictional Clauses

It is customary for courts to reject the notion that choice of law clauses constitute a submission to jurisdiction.[106] On the face of it, this seems a reasonable assumption. If the parties were capable of agreeing to a choice of law, and embodying the agreement in a written term, the marginal cost of agreeing to and drafting a jurisdiction clause would seem to be low. But there is no reason to believe that the cost is zero (or indeed that parties are always perfectly rational and informed in making their choices as to what they agree and what they leave open). Although it is an empirical question, we suspect that a majority of persons who have agreed to choice of law *and* jurisdiction terms will choose the same ones. Moreover, a choice of law is most likely to be given its fullest effect in the courts of the jurisdiction providing that law. This is because procedural rules of a foreign forum may stifle the effect of the choice of law. It would also seem to be likely that the probability of errors in the application of a court's own law will be substantially lower than the probability of errors in the application of foreign law. If these premises are correct, it is logical to reverse the current presumption by recasting the default so that a choice of law also operates as an exclusive choice of jurisdiction.[107] That requires those who want a different jurisdiction to contract for it.

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105 That is, of the options pointed to by the presumptions, which would these parties be most likely to have contracted for ex ante.

106 *Dunbee Ltd v Gilman & Co (Aust) Pty Ltd* (1968) 70 SR (NSW) 219; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572. Cf *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 1 WLR 1676.

107 This might be described as an 'untailored' default formulated on majoritarian grounds.

(iii) Forum Non Conveniens

Although we favour a substantially unqualified choice in establishing jurisdiction, we favour the use of *forum non conveniens* pleas. The primary value of the *forum non conveniens* application is, first, that it provides some control on choices of substantially inefficient jurisdiction. Second, as we noted above, by decreasing the security of the plaintiff's choice of jurisdiction, it leads to more informed litigating because it is a weakly dominant strategy for parties to release information relevant to their 'valuation' of competing forums. This should increase the ability of the parties to settle. Undoubtedly, the benefits of *forum non conveniens* do not come for nothing: the process is a costly one. However, the parties' ability to agree to a jurisdiction clause lets them cap those costs. It is an open question just how different Australia's rules on stays, as determined in *Voth*, really are from the English or American rules. Certainly, they seem narrower, although they are more liberal than the rules in *St Pierre*. The high frequency with which the High Court has granted stays suggests the difference is not that great.[108]

(iv) Corporate Groups

So far in this paper, we have outlined a theory of the assertion of jurisdiction against a corporation. We have treated the corporate defendant as what might be called a 'stand alone fiction'. That is, there is a single incorporated body corresponding to a related bundle of contracts. This of course would be the exception, not the rule, as most corporations of any scale, especially MNCs, are structured in group forms.

Corporate groups create recurring conceptual and practical problems for the assertion of jurisdiction. Spatially-oriented jurisdictional rules may make it difficult to assert jurisdiction against corporations other than a local subsidiary, if all of the group's business there is conducted through it.[109] It may frequently be valuable to be able to sue a parent. Of particular significance to limits on that ability is the old chestnut that a corporation is a separate legal entity, which itself is usually traced to the decision of the House of Lords in *Salomon v Salomon & Co Ltd*.[110]

Various writers have struggled with the appropriate means of dealing with this problem. One solution considered by various writers is the use of enterprise

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108 *Voth*, note 71 *supra* (stay granted); *Henry v Henry*, note 80 *supra* (stay granted); *Akai Pty Ltd v The People's Insurance Company Ltd* note 57 *supra* (stay not granted because an exclusive jurisdiction clause was inconsistent with a mandatory rule); *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 146 ALR 402 (stay granted).

109 If the corporation conducted its business in, say, Australia, it would have to register as a foreign company under the *Corporations Law*. However, if it incorporates a subsidiary here to conduct the same business, there would seem to be no further obligation.

110 [1897] AC 22. Note that *Salomon* had nothing to do with a corporate group. It concerned the rights of the creditors to proceed against Mr Salomon, when they had contracted with Salomon & Co Ltd. This difference is important, as it comes down to enforcing the terms of real contracts on one hand, and respecting the property rights allocated between corporate groups by non-contractual unilateral acts on the other.

theory.[111] In effect, this asks whether the subsidiary and the parent comprise a single economic entity, even though in law they may be a recognised duality. According to Fawcett:

> a foreign parent which has a subsidiary company in England will [not] necessarily have an economic presence in England [and therefore be subject to jurisdiction under the author's preferred rule.] It will all depend on whether the parent and its subsidiary form a single economic entity ... [I]t is not enough to show mere ownership of the subsidiary by the parent.[112]

The theory is an interesting one, but it has two problems. First, it is unclear why a subsidiary permitted to be managed more or less independently of the foreign parent should preclude the parent from being sued in the local forum. These sorts of managerial decisions are taken internally, as part of corporate governance and power allocation decisions. For instance, managerial autonomy in a jurisdiction is most likely when information relevant to management is costly to transfer. It is unclear why these decisions should bind those, besides managers and shareholders, who are not party to them, given they can obviously create an externality.[113] Second, an economic entity approach encourages the maintenance of a façade of subsidiary independence. Australian income tax cases are replete with examples of cases where illusions were conjured because it was gainful to deceive the eye.[114] Judges have not consistently shown themselves to be astute members of the conjurers' audience in recognising corporate legerdemain, and it is an open question whether they will be more attentive in a tax evasion case or in a private suit. More importantly, maintaining a façade has social costs, both to those erecting and those seeking to dismantle them.

Is there a better solution, which accords with the premises of our contractual theory? The crucial point is that corporate groups are structured by unilateral acts of corporate managers, or by bilateral contract with shareholders. Those against whom the corporate group's topology is asserted are rarely parties to those acts. In the case of contractual claims, the usual law on corporate groups can be understood as a default rule that precludes claims against other companies in the group. Why not simply reverse the default rule by permitting the foreign parent to be sued as a party to the proceedings, and put the onus on the subsidiary to contract for immunity for the remainder of the group?[115] In contracting for such immunity, procedural rules, such as reasonable notice requirements, might be used to increase the likelihood that the other contracting

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111 P Blumberg, *The Law of Corporate Groups* (1983); JJ Fawcett, note 3 *supra* at 663-5; L Brilmayer and K Paisley, note 3 *supra*.

112 JJ Fawcett, note 3 *supra* at 664-5. See also *Adams v Cape Industries plc*, note 35 *supra* at 532-44.

113 See generally H Hansmann and R Kraakman, "Towards Unlimited Shareholder Liability for Corporate Torts" (1991) 100 *Yale LJ* 1879.

114 *Deane v FCT* (1982) 82 ATC 4112. Cf *Investment & Merchant Finance Corp Ltd v FCT* (1971) 125 CLR 249. See generally A Freiberg, "Abuse of the Corporate Form: Reflections from the Bottom of the Harbour" (1987) 10 *UNSWLJ* 67. The Commissioner may have greater coercive power to penetrate disguises than the average plaintiff.

115 There are potentially some (surmountable) contractual problems of privity (is the other group company a party?), and consideration.

party knew that he or she was giving up rights against other group companies. The alternative default rule implicit in the current law places the burden of being informed about group arrangements on the counterparty. This is both unfair and inefficient, since the 'subsidiary' is clearly the 'lowest cost bearer' of this sort of information as between the two.[116]

It might be argued that respecting the form of the entity reduces the uncertainty facing the company. That is, subsidiaries enable companies to minimise the forums in which they will be liable, and the laws to which they will be subject.[117] Maybe that's true, but the preferable way to do the same thing is by jurisdiction and choice of law agreements notified to the counterparty at the time of the contract, rather than by permitting the defendant to decide these issues unilaterally and leaving it to the counterparty to locate costly information about these matters.

This approach forms an interesting contrast with an apparently greater modern willingness to disregard the corporate 'veil' in torts cases.[118] In *Briggs v James Hardie & Co Pty Ltd*, Rogers AJA pointed out that a victim does not choose his injurer. The judge contrasted torts cases with contract cases, where he would be more inclined to respect the corporate veil. However, our analysis of the default rules applicable to jurisdiction over other group companies argues against a more pronounced corporate veil in contract cases. Especially in mass market transactions, the consumer's relationship to the seller is a take-it-or-leave-it one. The seller's identity is not negotiable, and the likelihood of a consumer investigating corporate structure before purchase is vanishingly small. The anti-veil default rule makes good sense in these cases. There is certainly no warrant for differentiating these cases from Rogers AJA's analysis of torts, apart from respecting contracts opting out of the proposed default.

In contract cases involving greater negotiation, where the marginal search cost in respect of group structure is relatively low, matters are more evenly poised. Nonetheless, the 'veil lifting' default rule has advantages over the 'veil respecting' default. First, it directs the attention of the parties to state more explicitly their intentions regarding intra-group recourse. Second, it functions as a penalty default, because it may compel the party with better access to information about group structure to disclose it under the pressure of a rule that is not preferred.[119] For example, the management of a group with

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116 We extract this terminology from Guido Calabresi's famous analysis: G Calabresi, *The Cost of Accidents*, Yale University Press (1970), pp 135-97.

117 JA Sommer, "The Subsidiary: Doctrine Without a Cause" (1990) 59 *Fordham Law Review* 227.

118 H Hansmann and R Kraakman, note 113 *supra*. In Australian law, see *Briggs v James Hardie & Co Pty Ltd* (1989) 7 ACLC 841. It should be noted that, at present, our concern is with jurisdiction, rather than with the substantive act of veil lifting. Undoubtedly, the issues are not distinct, and our comments probably apply equally to substance as to procedure: PI Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations*, Little Brown (1987), pp 107-08; DG Brown, "Jurisdiction Over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do You Have to Pierce the Corporate Veil?" (1992) 61 *Cincinnati Law Review* 595. We should also note that we are not presently interested in suing shareholders, only other group companies.

119 See text accompanying nn 27-29.

undercapitalised foreign subsidiaries may prefer a non-recourse rule more than groups without such subsidiaries. By contracting around the rule, such groups signal their existence in a separating equilibrium, so leading to more informed contracting.

V. CONCLUSION

Sheeting home liability to far flung corporate empires is thought to be one of the central challenges to the modern legal system. Possibly the first step to be taken in achieving that goal is to stop thinking about the corporation as a thing, and to start viewing it as a process. The second step is a more general reconceptualisation of private international law issues as horizontal ones between litigants, which do not involve citizen-state relations apart from what is implicit in relevant laws.

Once these steps are taken, the usefulness of current jurisdictional rules must be regarded as doubtful. The use of spatial concepts to establish jurisdiction over a corporation makes little sense, because the corporation has no defined presence in space, and because increasingly business and management are capable of manipulative unilateral relocation. One interested in fairness might take the view that the corporation should be subject to jurisdiction in a wider range of forums. We have taken this view, but we accept that the rule should be subject to contract between the parties; indeed we think that increasing the range of selectable forums is most likely to lead to first-best contractual solutions. In torts cases, a similar view holds. However, it is modified to restrict the number of forums to those that parties might reasonably be expected to contract for.

We thus find it intriguing to conceive a corporation that is a nexus of multistate contracts as a 'nexus of forums'. Rather than attempting to tie corporations to jurisdictions, as the law has tried, and failed, to do, we see the multistate corporation as a freewheeling construct to which no jurisdiction has an exclusive claim. Conversely, the corporation's political right to be 'left alone' by a jurisdiction can only arise from private treaty between contracting parties. Jurisdiction becomes a matter not of politics, or of government interests, or of sovereignty, but of private ordering. Jurisdiction is a part of the enforcement of contracts, and contracts in turn (partially) define jurisdiction. This is the next stage in Holmes' analysis of the path of law: first, one recognises the hand of history on the doctrine of the present. Then one uses theory to clarify the ends desired and the means to obtain them. We hope this article contributes to clarifying ends and selecting better means, and that it also serves as a reminder that the justification of jurisdiction is always a pragmatic one.