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Rethinking Foreign Submission: Upholding the Legitimate Expectations of the Parties.

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Submitted in fulfilment of the requirements of the Degree of LLM by Research.

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January 2022

Word Count: 32,974

Abstract

Foreign submission has been recognised as a basis of international competence since the turn of the twentieth century. Nonetheless, its meaning and the reason why the act of submission can bind a judgment debtor to a foreign judgment in England remain obscure. This thesis gives a detailed account of the historical origins of foreign submission, drawing out its conceptual and theoretical ambiguities. The consent-based analysis of the concept, which has gained traction in recent years, is criticised as creating an imbalance between the claimant and defendant when enforcement is sought. A new perspective, based upon the legitimate expectations of the litigants, is offered. Within this framework, the procedural law of the court of origin will play a crucial role, assisting in drawing the line between when the conduct of a litigant should and should not amount to foreign submission for the purpose of judgment enforcement.

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Acknowledgment

I would first like to thank my supervisor Dr Bobby Lindsay for all of his advice, guidance and support throughout the process of completing this thesis, especially in such a challenging and unpredictable year.

I would also like to express my gratitude to my partner, my parents and my friends for their generous and continuous support.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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CHAPTER 1: Introduction

International competence is a cornerstone of the enforcement of foreign judgments *in personam* at common law.[1] If the court from which the judgment originated ('court of origin') lacks international competence, its judgment may not be enforced by the foreign court in which enforcement is sought ('court addressed'). In assessing this competence, the court addressed applies neither its own rules of adjudicatory jurisdiction, nor the rules on which the court of origin assumed jurisdiction.[2] Instead, from the perspective of English law, international competence can only be established by submission to, or presence within, the jurisdiction of the court of origin: 'nothing more is required; nothing less will do'.[3] Whilst presence has long been criticised as a basis of foreign judgment enforcement,[4] foreign submission has, for the most part,[5] been accepted.[6]

Submission has been used to denote a wide range of conduct, involving directly or indirectly engaging with the jurisdiction of the court of origin, leaving its precise meaning in contention. The thesis focusses on the consequence of participating in foreign proceedings;[7] the theoretical reason why submission by participation justifies enforcement is debated. This uncertainty is particularly pertinent to commercial litigants. If a judgment *in personam* is handed down against a non-resident litigant, they may not hold sufficient local assets within the state of origin to satisfy the judgment debt. The successful litigant ('judgment creditor') will hope to enforce against the assets of the unsuccessful litigant ('judgment debtor') in another jurisdiction. Conversely, the judgment debtor may have chosen not to participate in the proceedings so as to avoid becoming amenable to an inconvenient jurisdiction outside of their country of residence. They will hope that this limits the effect of the foreign judgment to the state of origin.

There is thus a constant balancing exercise ongoing between the interests of the judgment creditor and judgment debtor, to which the question of foreign submission is fundamental.

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[1] Indeed, competence is an indispensable condition in most jurisdictions, see Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36(1) American Journal of Comparative Law 1.
[2] *Adams v Cape Industries plc* [1990] Ch 433, 518.
[3] Briggs, *Civil Jurisdiction and Judgments* (6 edn, Informa Law 2015), [7.47].
[4] See, for instance: Read, *Recognition and Enforcement of Foreign Judgments* (HUP 1938), 150.
[5] cf Dickinson, 'Foreign Submission' (2019) 135 LQR 294.
[6] Saumier, 'Submission as a Jurisdictional Basis and the HCCH 2019 Judgments Convention' (2020) 67 Netherlands International Law Review 49.
[7] Submission by jurisdiction agreement will only be examined in so far as it relates to the conceptual and theoretical meaning of submission by participation.

If the judgment debtor has submitted to the jurisdiction of the court of origin, the judgment is *prima facie* enforceable.

1.1 The Place of Submission

Bringing clarity to the concept of foreign submission becomes all the more important when the wider context within which it operates is considered. As a member of the European Union ('EU'), the United Kingdom of Great Britain and Northern Ireland ('UK') benefited from the 'efficient, speedy and simplified'[8] enforcement of judgments under the Brussels I Recast Regulation ('the Recast')[9] and its predecessors,[10] as well as the 2007 Lugano Convention ('Lugano II').[11] All eligible judgments handed down in a European member state were directly enforceable within the UK and *vice-versa*.[12] On the UK's departure from the EU, the Recast and associated European instruments ceased to apply,[13] causing speculation about the regime applicable to EU judgments from Exit Day.[14] The UK government dispelled any suggestion that the 1968 Brussels Convention might revive,[15] and the EU rejected the UK's application to accede to Lugano II.[16] Limited certainty was provided by the UK's accession to the Hague Convention on Choice-of-Court Agreements ('2005 Convention)[17] in its own right,[18] but only in so far as the court of origin is designated by an exclusive jurisdiction

[8] Garcimartín and Saumier, Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (The Hague Conference on Private international law– HCCH Permanent Bureau 2020), 3.
[9] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
[10] Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I); 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[11] Convention of 30 October 2007 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[12] Recast, Article 45
[13] These instruments applied until the 31 December 2020, the end of the agreed implementation period, see EU (Withdrawal Agreement) Act 2020, s1A(6) and s39.
[14] Poro, 'Implications of Brexit on Enforcement of Judgments in Civil and Commercial Matters' (2021) 36(3) JIBLR 91.
[15] Dickinson, 'Dickinson on the Fate of the 1968 Brussels Convention: No Coming Back?' (*EAPIL*, 19 February 2021) https://eapil.org/2021/02/19/dickinson-on-the-fate-of-the-1968-brussels-convention-no-coming-back/comment-page-1/> accessed 6 January 2022.
[16] Cuniberti, 'European Commission Explains Rejection of UK's Application to Lugano Convention' (*EAPIL*, 5 May 2021) < https://eapil.org/2021/05/05/european-commission-explains-rejection-of-uks-application-to-lugano-convention/> accessed 6 January 2022.
[17] Convention of 30 June 2005 on Choice-of-Court Agreements.
[18] HCCH, 'United Kingdom joins 2005 Choice of Court and 2007 Child Support Conventions' (*HCCH*, 28 September 2020) https://www.hcch.net/en/news-archive/details/?varevent=751 accessed 6 January 2022.

agreement and is itself a party to the 2005 Convention.[19] The 2019 Hague Judgments Convention goes much further in providing a 'global framework' for the reciprocal enforcement of judgments,[20] but it is yet to be signed, let alone ratified, by either the EU or the UK.[21]

Ultimately, this leaves a significant regulatory gap to be filled by the UK's national rules on enforcement.[22] Though the UK does have its own statutory regime for the registration of foreign judgments under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933, these apply to a closed list of countries. Moreover, both statutes tend to be interpreted in light of the common law definition of submission.[23] Whereas, under the EU regime, there were only two grounds on which international competence could be contested at the enforcement stage,[24] under English rules, there are only two bases of jurisdictional competence, of which submission is one. It is thus crucial to gain a proper understanding of the meaning and effect of foreign submission at common law.

1.2 The Scheme of the Thesis

The aim of this thesis is two-fold. First, to determine when a judgment debtor submits to the jurisdiction of the court of origin and ascertain why this act is capable of binding them at the enforcement stage. Secondly, to promote a greater balance between the interests of the judgment debtor and judgment creditor by reference to the principle of legitimate expectations.

Chapter Two is broadly divided into two parts, with the ultimate purpose of determining what is currently meant by foreign submission at common law. The first part looks at the literal and conceptual meaning given to 'submission', highlighting inconsistencies in the type of conduct treated as submission. In an attempt to bring clarity to this issue, the second half of the chapter traces the development of the concept of foreign submission. It explores

[19] 2005 Convention, Articles 8 and 9; see also Article 22 which permits the unilateral extension of recognition and enforcement provisions to non-exclusive jurisdiction agreements.
[20] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.
[21] HCCH, 'Judgments Section: Status Table' (*HCCH,* 17 November 2021) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> accessed 6 January 2022.
[22] Briggs, *The Conflict of Laws* (OUP 2019), Ch 3.
[23] *Rubin v Eurofinance* [2013] 1 AC 236 (SC), [5].
[24] Recast, Article 45(e).

how submission has flourished into an independent basis for the enforcement of foreign judgments. It also identifies three underlying conceptual and theoretical ambiguities to be addressed: first, the steps that a judgment debtor can take without being held to submit; secondly, the binding force of submission; and, finally, the role of foreign law.

In **Chapter Three**, the binding force of foreign submission is examined, with a particular focus on whether consent can or should form the basis of foreign submission at common law. The extent to which consent explains why conduct before the court of origin is relevant to the court addressed is doubted. It will also be queried whether an approach based on procedural presence or waiver and estoppel can better explain the effect of foreign submission.

Chapter Four then goes on to consider the role of foreign law within the concept of foreign submission. It looks at the potential benefits of giving greater deference to the law of the court of origin and analyses how this can be facilitated. Possible barriers and limitations to deferral are also examined.

1.3 Introducing Legitimate Expectations

Throughout **Chapter Three** and **Chapter Four**, foreign submission is analysed from a new perspective, centred on fulfilling the legitimate expectations of the parties. Meeting party expectations is frequently cited as one of the overarching goals of private international law,[25] This view has gained more traction in recent years, with a move away from a state-centric organisation of the subject in favour of maximising party interests.[26] The rationale for this approach is explained by Anton:[27]

> No explanation is needed for the recognition and enforcement of foreign judgments beyond that required for the upholding of any right existing under foreign law…Unless account is taken of the laws of foreign countries we risk defeating the

[25] Beaumont and McEleavy, *Anton's Private International Law* (3 edn, W Green 2011), [1.15]; Torremans (ed), *Cheshire, North & Fawcett: Private International Law* (15 edn OUP 2017), 3ff; Vischer, 'General Course on Private International Law (1992) 232 Recueil des Cours 8

[26] Reimann, 'Are there universal values in choice of law rules? Should there be any?' in Ferrari and Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Elgar 2019); but cf Mills, *Party Autonomy in Private International Law* (CUP 2018), 70.

[27] Anton, *Private International Law* (1 edn, W Green 1967), 572.

> legitimate expectations of parties who regulated their affairs with reference to those laws.

As such, though upholding the expectations of the parties is usually tied up with ideas of doing justice,[28] more pragmatic and tangible theoretical justifications can also be drawn out. If a litigant expects the court of origin to determine the dispute in accordance with a certain law, they can organise their behaviour on that basis. Moreover, if it is accepted that the autonomy of the individual holds an inherent value,[29] it can only be meaningfully exercised where there is some predictability of outcome.[30] In the foreign judgment context, this means that there must be some certainty in how the conduct of the litigants will interpreted. Otherwise, they are unable to efficiently and meaningfully regulate their affairs.

Upholding the legitimate expectations of the parties is thought to promote fairness in both the public and private sphere. As Ahmed and Perry describe the administrative law doctrine: 'it seems fair to ask that commitments be kept'.[31] This view also underpins Hart's 'principle of fair play':[32]

> 'When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission by those who have benefited by their submission'

In other words, where an individual expressly or impliedly commits to abide by a set of rules, it is fair to ask them to keep to this. In the context of litigation, it may be thought that parties who voluntarily conduct themselves according to the rules and practice of the court come under a moral obligation to abide by them, which the courts give legal effect. However, this does not mean that the parties hold a specific right to enforce the counterparty's obligation. Rather, they expect equal compliance, and this is upheld by the court.

It will thus be contended throughout **Chapter Two** and **Chapter Three** that the relationship between the litigants and the court gives rise to a dual expectation: first, that the court will apply its own rules; and, secondly, a reciprocal expectation that each litigant will comply with those rules, having participated on that basis. In turn, the court addressed does not

[28] Collins (ed), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell 2012), [1-005]-[1.007].
[29] cf Mills (2018), 70.
[30] Nygh, 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort' (1995) 251 Recueil des Cours 269, 294–296.
[31] Ahmed and Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73(1) CLJ 61, 79.
[32] Hart, 'Are There Any Natural Rights?' in David Lyons (ed), *Rights* (Wadsworth Publishing 1979), 21.

enforce an obligation emanating from the foreign proceedings, but rather protects the expectations of the parties, which arise out of the act of foreign submission.

Ultimately, it is argued that analysing the conduct of commercial litigants through the lens of party expectations can assist in determining *when* they have submitted and *why* they should be bound for the purpose of judgment enforcement.

CHAPTER 2: The Meaning of Foreign Submission

It is first necessary to understand what is meant by the term 'submission', especially having been criticised as an inaccurate label for the basis of enforcement it seeks to outline.[1] The chapter will review the literal definition of 'submission', so as to provide a starting point for an analysis of the conceptual meaning attached to the term. As with much of private international law, the influence of Dicey should not be understated, with Rule 43 of *Dicey, Morris & Collins on the Conflict of Laws* often treated by the English courts as setting out the instances in which conduct will constitute submission.[2] However, the extent to which Rule 43 accurately encapsulates the conceptual meaning of submission as it has evolved in practice will be questioned. This will be explored through a historical analysis of the development of the concept, with a view to ascertaining a clearer understanding of what conduct constitutes submission, as well as revealing the reason *why* that conduct justifies enforcement in the court addressed.

2.1 Literal Definition

'Submission' is defined by the Oxford English Dictionary ('OED') as *inter alia* 'the submitting of something to a higher authority for decision' and 'the submitting of oneself to another'.[3] The action of submitting, the root form of which is 'to submit', is defined as 'to bring (something) under a person's view, notice, or consideration' and 'to place oneself in a position of compliance.'[4]

The first instance of 'to submit' is commonly used in reference to the entering of documents or arguments before the court for review. In this context, there is no indication of an assumption of responsibility or any obligation. In contrast, the second instance of 'to submit', namely that a litigant places themselves in a position of compliance with the authority of a court, implies particular obligations such as adherence to the court's rules of procedure and conduct. The action of submitting in the first sense can lead to a conclusion that an individual has submitted in the second sense. For example, an individual may put

[1] Dickinson, 'Foreign Submission' (2019) 135 LQR 294, 300 and 320.
[2] Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15 edn, Sweet & Maxwell 2012), [14R-054]; see n 15 below.
[3] OED, http://www.oed.com/ (OUP March 2021), "submission, n."
[4] OED, http://www.oed.com/ (OUP March 2021), "submit, v."

documents forward for review and thereby institute proceedings before a court which, as will be seen, is treated by law as an implied submission to the jurisdiction of that court.

The thesis is concerned with the second instance, specifically the act of submitting oneself to the authority of a foreign court. It queries why placing oneself in a position of compliance with the court of origin results in an obligation which the English courts see fit to enforce. The OED provides further backdrop to both the transitive (reflexive) and intransitive uses of the verb in this context: 'to consent or condescend *to* do something'; 'to become subject, surrender oneself, or yield *to* a person.' This further promotes the idea that a litigant who submits has undertaken some form of obligation. However, whilst 'consent/condescend' suggests an active, deliberate undertaking, 'subject/surrender/yield' suggests more passive and perhaps inadvertent conduct. That said, under both instances, a general impression is created that the litigant will abide by the court's rules of procedure and conduct, as well as the outcome of the proceedings.

Having briefly considered the literal definition of the term, it will be used as a means of comparison to give texture to the conceptual and historical analysis of foreign submission throughout **Chapter Two**.

2.2 Conceptual Meaning

The concept of submission is utilised by the English courts at two stages: (1) when adjudging their own internal competence; and (2) when assessing the international competence of a foreign court.

Within stage (1), under English national rules, the term is used to explain the circumstance in which a defendant appears without maintaining a challenge to the jurisdiction of the court or after having unsuccessfully done so.[5] This is sometimes referred to as 'statutory submission' in the context of the Civil Procedure Rules 1998.[6] 'Common law submission' is also possible, but it is limited to circumstances in which the defendant has waived their jurisdictional challenge.[7] Submission might thus be inadvertent and does not operate as an

[5] CPR, r11 – this arises in two circumstances: (1) when service is acknowledged but a jurisdictional challenge is not entered timeously; and (2) when a defendant's challenge is unsuccessful, and they enter a further acknowledgment of service.
[6] *Hoddinott v Persimmon Homes (Wessex)* [2008] 1 WLR 806 (CA); *Deustche Bank AG London Branch v Petromena* SA [2015] WLR 4225 (CA).
[7] *SMAY Investments v Sachdev* [2003] EWHC 474 (Ch).

independent basis of competence; rather, it explains whether the defendant can contest the jurisdiction. Under the EU regime, a litigant could make an English court internally competent by virtue of their agreement, under Article 25 of the Recast, or by appearance, under Article 26. Both provisions come under the section of 'prorogation', which broadly means that the conduct of the litigants extends the jurisdiction of the member state.[8] They are also thought to share a common theoretical basis,[9] with Article 26 constituting a form of tacit consent.[10] Under that provision, a litigant who challenges jurisdiction and contests the merits does not submit.[11] However, this was but one of a series of grounds for jurisdiction under a detailed scheme and was subject to Article 24, which provides a basis of exclusive competence for member state courts. Moreover, Article 25 and Article 26 are not reviewable bases of jurisdiction when enforcement is sought in another member state.[12]

In contrast, in the enforcement context, a foreign judgment will only be enforceable where, in the eyes of the English court, the judgment debtor submitted to, or was present within, the jurisdiction of the court of origin.[13] This highlights the centrality of submission to the enforcement of foreign judgments. Moreover, the term has been used to explain a broader range of conduct, not limited to direct engagement with the court of origin. The 'Dicey Rule'[14] has been treated as setting out an exhaustive list of circumstances in which a judgment debtor will be bound by a foreign judgment and so is instructive here:[15]

> **First Case –** If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> **Second Case –** If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.
>
> **Third Case –** If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

[8] Case C-150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671, [8].
[9] ibid. Opinion of AG Gordon Slynn, 9.
[10] Case C-48/84 *Hannelore Spitzley v Sommer Exploitation SA* [1985] ECR 787, [15].
[11] *Elefanten*, [14].
[12] Recast, Article 45(e).
[13] *Rubin v Eurofinance SA* [2013] 1 AC 236 (SC), [6]; *Vizcaya Partners Ltd v Picard* [2016] Bus LR 413 (PC), [2].
[14] Dicey (15 edn, 2012), [14R-054].
[15] *Rubin*, [7]; *Vizcaya*, [35]; see also, for example: *Desarrollo Immobilario v Kader* [2014] EWHC 1460 (QB), [8]; *GFH v Haigh* [2020] EWHC 1269 (Comm), [46].

> **Fourth Case –** If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.

'Submission' is treated as an umbrella term for the Second, Third and Fourth Cases.[16] Whilst it might be argued, considering the literal definition above, that an individual present in the jurisdiction of the court of origin has placed themselves in a position of compliance and so can be described as having submitted, the courts have never adopted such a view.[17] Instead, presence tends to be treated as a separate basis of international competence and justified by notions of territoriality and comity.[18]

Regarding submission, Dicey's Second, Third and Fourth Cases are normally divided into two categories, with submission by agreement on the one hand, and submission by participation as claimant or defendant on the other hand (hereafter 'submission by participation'). The extent to which this distinction is simply a matter of timing, as Briggs suggests,[19] or the result of a more fundamental theoretical difference, as Dickinson argues,[20] is explored in **Chapter Three.** However, the thesis focusses on the meaning and effect of submission by participation and so references to jurisdiction agreements will be for the purpose of contextualising the discussion only.

Submission by participation encompasses a broad spectrum of conduct. Under Dicey's Second Case, the (counter-)claimant submits after taking the active the step of instituting proceedings. In this sense, it seems to fall more naturally within the active meaning of 'consent/condescend' discussed in the previous section. After having done so, a claimant may be held to have inadvertently submitted not only to determination of their original claim, but also related claims entered against them there. Whether there is a 'sufficient nexus'

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[16] See, for instance: Briggs, *Civil Jurisdiction and Judgments* (7 edn, Informa Law 2021), [34.09].
[17] But see *Adams v Cape Industries* [1990] Ch 433, 555, where the Court of Appeal explains the binding force of presence in terms of 'tacit consent'; see also Savigny, *A Treatise on the Conflict of Laws* (William Guthrie tr, W Stevens & Sons 1869), 152: 'The forum…depends on the voluntary submission of the parties, which, however, is generally indicated…in a tacit declaration of will'; but cf Dickinson, 'Schibsby v Westenholz and the recognition and enforcement of judgments in England' (2018) 134 LQR 426, 435ff.
[18] *Adams*, 458 (Scott J); Briggs, 'Recognition of foreign judgments: a matter of obligation' (2013) 129 LQR 87, 91–92.
[19] Briggs (2021), [34.09ff]
[20] Dickinson (2019), 319.

between the original and any subsequent claims is treated as a matter for the English court addressed.[21]

Under the Third Case, it would seem that only where a non-resident defendant voluntarily appears before the court of origin will they be held to submit. However, in practice, not every voluntary appearance has been held to amount to submission by the English courts. Instead, the purpose for which the judgment debtor appeared is examined. To ascertain the purpose of such an appearance, the courts have adopted the *Rein v Stein* test,[22] used initially to determine whether a challenge to the English courts' own internal competence had been waived:[23]

> You must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all.

Whether this step is adjudged by reference to English law or the procedural law of the court of origin is not altogether clear.[24] It includes steps taken not only to contest the merits, but also 'pre-defence' steps, such as 'an application for an injunction or other interim relief, an application for disclosure or for further information.'[25] An appearance 'by reason only of' contesting the jurisdiction is statutorily exempted by section 33 of the Civil Jurisdiction and Judgments Act 1982 ('CJJA 1982'), though it has been treated as varying the conceptual meaning of submission in some cases.[26]

Moreover, the English courts have inferred submission where the alleged judgment debtor has not voluntarily appeared but has taken steps outside of the courtroom. For example, an individual who procures another to appear in litigation on their behalf may be held to submit, justified on account of being the 'real plaintiff', in spite of the 'real' litigant never having engaged with, let alone subjected themselves to the authority of the court of origin.[27] Submission has also been implied by looking at the 'economic reality' of the relationship between the defendant and the party against whom enforcement is sought in the court

[21] *Swiss Life AG v Kraus* [2015] EWHC 2133 (QB), [65ff]; It is worth noting that court of origin may still lack international competence where procedural laws required the defensive step to be taken by way of counter-claim, see *GFH v Haigh* (*obiter*), [56].
[22] (1892) 66 LT 469.
[23] *Rubin*, [159]–[161].
[24] This is considered in Chs 2 and 3.
[25] *Certain Underwriters at Lloyd's London v Syria* [2018] EWHC 385 (Comm), [58].
[26] Discussed at 2.3.7.
[27] *Swiss Life,* [68].

addressed.[28] More complicated still, it has been held that a defendant who voluntarily appears in a non-court mandated insolvency procedure submits to the supervisory jurisdiction of the court of origin.[29] These instances of foreign submission do not clearly evince a deliberate undertaking in accordance with the literal definition set out above, suggesting that submission must be capable of occurring passively and inadvertently.

There thus seems to be a broader conceptual disparity existing between submission under the Dicey Rule, its literal definition as set out under **2.1**, and the meaning attached to the concept in practice. The Dicey Rule does not seem to accord with the conceptual meaning attached to the term in practice, for not every voluntary appearance constitutes submission and, as demonstrated, not every submission requires a voluntary appearance in the foreign proceedings. Not only does the inconsistency make it difficult for a litigant to determine whether their conduct will be treated as submission for the purpose of foreign judgment enforcement, but it also confuses the reason *why* the act of submission leads to an obligation enforceable in the court addressed. The next section deals with this ambiguity by tracing historical usage of the term.

2.3 Developing an Independent Concept of Foreign Submission

The purpose of this section is to gain a better understanding of the historical and theoretical foundations of the concept of foreign submission. It looks first at the introduction of presence as a single requirement of international competence into English private international law. This later shifts to procedural presence before that court by way of 'voluntary appearance'. The doctrine of obligation and Dicey's 'principle of submission' constitute key turning points. Submission transitions from a rhetorical device, explaining the consequence of a voluntary appearance, to a basis of enforcement, independent of presence. The rest of the chapter will look at the refinement of the meaning of submission throughout the twentieth and twenty-first centuries, with a greater focus on justifying *why* the act of submission leads to an enforceable obligation. This will inform the discussion of how foreign submission might be reconceptualised throughout **Chapter Three** and **Chapter Four**.

[28] *Cambridge Gas v Navigator* [2007] 1 AC 508, [8].
[29] *Rubin,* [167].

2.3.1 Presence, Competence and Natural Justice

The English common law was slow to develop rules on enforcement.[30] The English courts initially rationalised the effectiveness of foreign judgments in their own jurisdiction by reference to the 'law of nations',[31] and then increasingly on notions of comity.[32] The enforcement of foreign judgments was correspondingly viewed as a matter of respect for the sovereignty of other nations over their own territory.[33] As cross-border disputes became more commonplace, jurists and judges focussed on the presence of the litigants within the jurisdiction of the court of origin.[34] In that sense, competence remained heavily based on territoriality. This mirrored the English courts' approach to their own internal competence, which centred on the actual or constructive presence of the defendant in the jurisdiction as making them amenable to service of process.[35] The more difficult question that subsequently arose was whether – and if so when – a foreign judgment should be enforced against a defendant not present nor resident within the jurisdiction ('non-resident defendant').

The English courts focussed on whether the defendant had been actually or constructively present at some point, so that service of process complied with English notions of natural justice. Thus, in *Buchanan v Rucker*,[36] enforcement was refused where a defendant had never been present within the territorial reach of the court of origin and so could not be served in compliance with natural justice. In *Galbraith v Neville*, [37] contrastingly, a defendant who had departed Jamaica but left an attorney there with authority to accept service was treated as 'virtually present', making the court competent to hand down a binding judgment. The courts later focussed on the defendant having been given an opportunity to be heard, but the key question remained whether they had been properly served in accordance with natural justice.[38]

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[30] See, for instance: Beaumont and McEleavy, *Anton's Private International Law* (3 edn, W Green 2011), [1.28]–[1.30].
[31] *Wier's case* (1607) 1 Rolle's Abridgment 530; *Cottington's Case* (1678) 2 Swans 326.
[32] Story, *Commentaries on the Conflict of Laws* (1834), § 540 and 544.
[33] Comity is defined in *Hilton v Guyot* (1895) 159 US 113, 164: 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation'.
[34] *Gage v Lady Stafford* (1754) 2 Ves Sen 556; *Havelock v Rockwood* (1799) 8 Term Reports 268; Westlake, *Treatise on Private International Law* (W Maxwell 1858), § 381.
[35] See generally: Andrew Dickinson, 'Keeping Up Appearances: the Development of Adjudicatory Jurisdiction in the English Courts' (2017) 86(1) BYBIL 6.
[36] (1808) 9 East 192.
[37] (1789) 1 Dougl 6.
[38] *Molony v Gibbons* (1810) 2 Camp. 502; *Cavan v Stewart* (1816) 1 Stark 525*; Becquet v MacCarthy* (1831) 2 Barnewall and Adolphus 951; *Reynolds v Fenton* (1846) 3 CB 187; but cf *Don v Lippman* (1837) 6 Cl & F 1, 21; *Russell v Smyth* (1842) 9 Meeson and Welsby 810.

2.3.2 Fair Play

There then seemed to be a shift away from natural justice, which had focussed on the procedural fairness of the court of origin's service of the defendant, towards fair play between the litigants during the original proceedings and at the enforcement stage. This emerged from the English courts' treatment of non-resident claimants, unsuccessful in the foreign proceedings. In *Novelli v Rossi,*[39] an action had been raised in the English courts but, before the English judgment could be handed down, the claimant unsuccessfully raised the same claim before the French court. Lord Tenterden was critical of the claimant's conduct and considered the court of origin competent because the claimant had raised the action there: 'this is the consequence of his own act'.[40] A sense of fair play between the parties seemed to underpin the reasoning of the English court addressed, which was earlier highlighted as one of the key justifications for fulfilling the legitimate expectations of the parties.

A similar approach was taken in *Cammell v Sewell,*[41] where the plaintiffs were held bound because they 'thought fit to seek their legal remedy in what must be taken to be a foreign court of competent jurisdiction'.[42] The court went further still in *Barber v Lamb*,[43] with Erle CJ concluding that 'it would be manifestly contrary to reason and justice to allow the successful party to endeavour to obtain a better judgment in respect of the same matter from some other tribunal.'[44] This suggested that the claimant was obliged to abide by the foreign judgment because of their participation in the original proceedings, making it unfair to disregard the decision and allow the judgment debtor to evade enforcement. Again, fair play between the parties was central to the reasoning, preventing the plaintiff from disregarding the decision which they had invited the court of origin to make.

However, this transition in rationale – from presence and natural justice to notions of fair play – was not immediately observable in relation to the non-resident defendant. In *General Steam Navigation v Guillou*,[45] Parke B considered that a litigant should only be *prima facie* bound where there was some form of 'allegiance, or domicile, or temporary presence' or they chose to 'select the tribunal and sue as plaintiffs'.[46] By contrast, Parke B considered the

[39] (1831) 2 Barnewall and Adolphus 757 but cf *Smith v Nicolls* (1839) 5 Bingham New Cases 208.
[40] *Novelli,* 764.
[41] (1860) 3 Hurlstone and Norman 617.
[42] ibid. 647.
[43] (1860) 8 CB NS 95.
[44] ibid. 100.
[45] (1843) 11 Meeson and Welsby 877.
[46] ibid. 894.

non-resident defendants 'mere strangers, who put forward the negligence of the defendant as an answer, in an adverse suit, in a foreign country, whose laws they were under no obligation to obey.'[47] This suggested that a litigant should only be bound where they were present within or claimed before the jurisdiction of the court of origin. This was in spite of the defendants having actively defended the merits of the dispute and thus taken similar steps to the claimant in *Novelli, Cammell* and *Barber.* From a fair play perspective, the distinction between a non-resident claimant and a non-resident defendant who argues on the merits seems tenuous.

Nonetheless, in *De Cosse Brissac v Rathbone*,[48] the judgment debtor, having unsuccessfully contested the merits as a non-resident defendant in the court of origin, contended that:[49]

> A plaintiff chooses his tribunal, and if he is defeated he cannot question the merits in the Courts of this country. But a defendant is compelled to appear in the foreign Court in order to prevent his property being seized.

In a brief judgment, the Court of Appeal simply refused to engage with this argument, holding the judgment debtor bound.[50] It may, consequently, be inferred that the court was unconvinced that a defendant should be treated differently from a claimant at the enforcement stage. It thus seemed, in spite of *Guillou*, that participation and fair play between the parties were evolving into important aspects of judgment enforcement.

2.3.3 The Doctrine of Obligation

The approach of the English courts quickly changed with the adoption of the 'doctrine of obligation', first espoused in *Williams v Jones*,[51] by the Court of Appeal in *Godard v Gray*[52] and *Schibsby v Westenholz*:[53]

> Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained.[54]

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[47] ibid.
[48] (1861) 6 Hurlstone and Norman 301.
[49] *Rathbone*, 306.
[50] *Rathbone*, 308.
[51] (1845) 13 Meeson and Welsby 628.
[52] (1870-71) LR 6 QB 139.
[53] (1870-71) LR 6 QB 155.
[54] *Williams,* 633.

On this view, the foreign judgment was not enforced by virtue of natural justice or fair play, but because the judgment debtor had, by their conduct, undertaken a substantive private law obligation, owed to the judgment creditor, to satisfy the judgment debt.

At the outset, it is important to note that this shift in approach has been doubted. For Piggott, whilst the foreign judgment may result in a foreign-created obligation to abide by the judgment, this cannot explain why the English court addressed perceived itself as bound to enforce it.[55] This, Piggott contends, must still require some sort of comity in operation. More recently, Dickinson has criticised the decision to 'focus exclusively and rigidly upon a limited number of territorial connections',[56] arguing that the obligation to obey by the foreign judgment is actually given effect as a matter of natural justice.[57] Therefore, similar to Piggott, Dickinson does not consider that the doctrine adequately explains why the English courts uphold the obligation to satisfy the judgment debt.

In *Godard,* Hannen J considered the obligation to be intrinsically linked to the appearance of the judgment debtor in the original proceedings: 'the defendants, by appearing in the suit in France, submitted to the jurisdiction of the French tribunal, and thereby created a *prima facie* duty on their part to obey its decision.'[58] The use of 'submission' here, albeit as more of a rhetorical device, implied that the defendant, by appearing, had placed themselves under the authority of the court of origin and thereby come under an obligation to abide by its rules and the resulting obligation.

In *Schibsby*, Blackburn J definitively stated that a litigant present in the jurisdiction or claiming there would be bound:[59]

> If the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them…its laws would have bound them…If a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.

[55] Francis Taylor Piggott, *The Law and Practice of the Courts of the United Kingdom Relating to Foreign Judgments and Parties Out of the Jurisdiction* (W Clowes and Sons 1884), Ch IV.
[56] Dickinson (2018), 448.
[57] ibid. 445.
[58] *Godard*, 153.
[59] *Schibsby*, 161.

However, faced with the seemingly conflicting decisions of *Guillou* and *Rathbone,* Blackburn J refused to conclusively decide when a defendant who had appeared would be under such an obligation:[60]

> We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal.

The hesitation thus seemed to turn on whether the appearance was 'involuntary', compelled by 'property in the hands of the tribunal'.[61] Though the Court of Appeal in *Rathbone* had not actually engaged with the judgment debtor's argument on the voluntary nature of the appearance, Blackburn J nevertheless relied on that case as authority for the proposition that 'where the defendant voluntarily appears and takes the chance of a judgment in his favour he is bound'.[62] This created a distinct sense of fair play, familiar from the previous section, suggesting *Guillou* had not been fatal to that theoretical rationale.

2.3.4 The Importance of a *Voluntary* Appearance

The requirement that the defendant *voluntarily* appear in proceedings before the court of origin began to crystallise towards the end of the nineteenth century.[63] Its meaning and effect fell to be determined properly in *Voinet v Barrett*. At first instance,[64] Wills J considered *Guillou* and *Rathbone*, ultimately concluding that *Guillou* constituted a 'purely voluntary appearance' because the defendants had been free not to appear and so, after *Rathbone* and *Schibsby,* was no longer law. Wills J stated that seizure of property, actual or threatened, should not exempt the defendant 'from the duty of obeying the judgment of the Court if he has once submitted to its jurisdiction.'[65] Like Hannen J, Wills J used 'submit' as a rhetorical device to explain the obligation to abide by the foreign judgment. In that sense, a defendant acting voluntarily could not 'afterwards say that he [was] not bound to submit to a judgment obtained under those circumstances.'[66] Again, fair play between the litigants seemed crucial.

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[60] ibid.
[61] ibid.
[62] ibid.
[63] The voluntariness of an appearance was considered in passing in *Rousillon v Rousillon* (1880) 14 Ch D 351 and *Duflos v Burlingham* (1876) 34 LT 688.
[64] (1885) 54 LJQB 521.
[65] ibid. 525.
[66] ibid.

On appeal,[67] it was concluded that a compelled appearance should not bind the judgment debtor in the court addressed. However, a defendant would only be so compelled where the property was already 'in the hands of the foreign tribunal'[68], though the distinction between actual and threat of seizure was later queried as 'more apparent than real'.[69] Consequently, it seemed that a defendant who appeared other than to protect property already seized would be bound to abide by the foreign judgment.

Each judge approached the binding force of the judgment debtor's conduct in a slightly different way. Lord Esher MR described a compelled appearance as equivalent to not being formally present, thus corresponding with the territorial basis of judgment enforcement identified at **2.3.1**.[70] Cotton LJ preferred to frame the obligation in terms of fair play, focussing on the defendant who takes 'the chance of a judgment in their favour'.[71] This echoes the reasoning of the decisions set out in **2.3.2**. Bowen LJ cited the judgment of Hannen J in *Godard* with approval, holding that 'the stream of authority is to the effect that appearance, unless it be appearance under duress, is an election to submit to the jurisdiction from which the process has issued.'[72] The focus on the 'election' of the defendant seemed to put the defendant on an equal footing with the claimant who 'selects the tribunal'.[73]

Voinet did not consider whether a voluntary decision to appear under protest should affect the quality of the appearance and prevent the enforceability of the foreign judgment in the court addressed. This fell to be determined in *Boissiere v Brockner*.[74] The defendants had appeared before a French court 'under protest', first disputing the competence of the court and then, when unsuccessful, going on to successfully defend the merits. This was appealed and so, again, the respondents unsuccessfully raised an objection to the competence of the court. This time, however, they also lost on the merits. When the judgment came before the English court, the judgment debtors alleged that it was unenforceable because of the protest. In so contending, they argued that the obligation to satisfy a foreign judgment was consensual in nature, and that the protest nullified any consent. This was rejected by Cave J, holding instead that: 'if he enters into the litigation from those motives, intending to take advantage of the judgment if he wins, there is obviously a moral obligation on him to pay if

[67] (1885) 55 LJQB 39 (CA).
[68] *Voinet* (CA), 40.
[69] Read, *Recognition and Enforcement of Foreign Judgments* (HUP 1938), 163.
[70] See also *Boyle v Sacker* (1888) 39 Ch D 249.
[71] *Voinet* (CA), 42.
[72] *Voinet* (CA), 42.
[73] See n 59.
[74] (1889) 6 TLR 85.

he loses.'[75] This was justified on notions of fairness and fair play, with the defendant voluntarily appearing 'because on the whole he deems it his interest to submit to have the dispute decided by the foreign tribunal and to take his chance of winning the suit'.[76]

There was a lack of sympathy for the defendant who decided to appear voluntarily: 'he wishes to have the benefit without the burden'.[77] Cave J rejected the contention that a litigant could enter a voluntary appearance under protest at all, because 'a man protests against doing that which he is compelled to do under duress of some kind'.[78] In other words, a defendant who appeared voluntarily before the court could not argue that they were under duress. Therefore, it seemed that any voluntary appearance, irrespective of the purpose for which that appearance was made, would result in the defendant being bound to abide by the foreign judgment.

At the close of the nineteenth century, it was firmly established that a *voluntary* appearance would be required before a foreign judgment could be enforced against a non-resident defendant. However, the reason why such an appearance was relevant for the purpose of enforcement in the court addressed remained undetermined. Ideas of fair play and consent seemed to be coming to the forefront, moving on from treating a voluntary appearance as a subset of presence.

2.3.5 Dicey and the 'Principle of Submission'

Approaching the twentieth century, submission still had no clear, determined role beyond a rhetorical tool to explain the consequence of a voluntary appearance. Dicey sought to change this with the first edition of the *Conflict of Laws*.[79] Both internal and international competence were grounded within two principles: the 'principle of effectiveness'[80] and, key to the present discussion, the 'principle of submission'.[81] For Dicey, submission meant 'a

[75] *Boissiere*, 85.
[76] ibid. but cf *Turnbull v Walker* (1892) 67 LT 767, 760 (Wright J): '[International] jurisdiction…ordinarily depends on the allegiance of the party or his consent, or on some fact which is held to be equivalent to allegiance or consent.'
[77] *Boissiere*, 85.
[78] ibid.
[79] Dicey, *The Conflict of Laws* (1 edn, Stevens & Sons 1896).
[80] Dicey (1 edn, 1896), xliii: 'The sovereign of a country, acting through the courts thereof, has a right to adjudicate upon, or, in other word, has rightful jurisdiction over, any matter with regard to which he can give an effective judgment, and has no right to adjudicate upon, or has no rightful jurisdiction over, any matter with, regard to which he cannot give an effective judgment.'
[81] Dicey (1 edn, 1896), xliv: 'The sovereign of a country, as represented by the courts thereof, has a right to exercise jurisdiction, or, in other words, the courts of a country are courts of competent jurisdiction, over any person who voluntarily submits to their jurisdiction.'

person who voluntarily agrees, either by act or word, to be bound by the judgment of a given court' with the consequence that they have 'no right to deny the obligation of the judgment as against himself'.[82] This included where a party sued as plaintiff, voluntarily appeared as defendant, or contracted that disputed issues 'be referred for decision to the courts of a given country'.[83] Dicey did not consider an appearance by the defendant to protect property already seized by the court of origin (following *Voinet*) or under protest to jurisdiction (contrary to *Boissiere*) to amount to submission.[84]

The 'Dicey effect' was quickly apparent in *Guiard v De Clermont*.[85] There, the judgment debtor had argued that their appearance had been compelled by the seizure of goods under the execution of a default judgment. Before ultimately deciding that there was no compulsion on the particular facts,[86] Lawrence J explained that:[87]

> Where [the defendant] owes no allegiance to, and was not present within, the country of the Court…his appearance is the thing which causes him to have the duty to submit to the foreign judgment. According to English law he has such a duty if he voluntarily submits to the jurisdiction and takes his chance of getting a judgment in his favour.

In other words, it was viewed as fair that a defendant who submits to the jurisdiction of the court of origin also be obliged to submit to (or comply with) the resulting foreign judgment. Though no express reference is made to Dicey, there is a clear similarity with his 'principle of submission'.[88]

A meaning of submission reminiscent of Dicey's was also introduced under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. Under section 9(2)(b) of the 1920 Act, registration of a foreign judgment is prohibited where the judgment debtor did not 'voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court'. Similar wording is adopted in section 4(2)(a)(i) and (iii) of the 1933 Act. This not only confirmed the perception that a voluntary appearance was a means of submitting, but also its status as a basis of international competence.

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[82] Dicey, 'Criteria of Jurisdiction' (1892) 8 LQR 21.
[83] Dicey (1 edn, 1896), r80.
[84] Dicey, *The Conflict of Laws* (2 edn, Stevens & Sons 1908), 369ff.
[85] [1914] 3 KB 145.
[86] See Read (1938), 169.
[87] *Guiard*, 153.
[88] See n 81.

2.3.6 Defining Submission

Even so, the meaning of submission remained elusive. Dicey's proposition that an appearance under protest should not constitute foreign submission at common law did not find favour in *Harris v Taylor*. There, the judgment debtor had conditionally appeared to contest the court of origin's subject-matter and personal jurisdiction. Unsuccessful in their protest, the judgment debtor decided not to participate any further and the foreign judgment was handed down in 'default of appearance'.[89]

At first instance,[90] the judgment debtor argued that a conditional appearance should be treated as an appearance under protest for the purpose of enforcement and so, relying on Dicey, was 'in no way a submission to the jurisdiction'.[91] This was rejected by Bray J, emphasising that, according to evidence provided by Manx lawyers, there were no rules 'authorising or dealing with "conditional appearances"' under Manx law.[92] As such, Bray J applied the meaning of a conditional appearance under the equivalent internal English rules to conclude that it was a 'complete appearance subject only to the right reserved by the defendant to apply to set aside the writ'.[93] Consequently, the appearance was converted into an unconditional appearance and the judgment debtor held to have submitted, despite only raising a jurisdictional point.[94]

The judgment debtor appealed, maintaining that the appearance to contest jurisdiction entailed no submission and that the Manx court of origin must not have perceived it as such because the judgment was recorded as 'in default appearance'. Buckley LJ disagreed, criticising the conduct of the defendant for doing 'something he was not obliged to do'.[95] This bears resemblance to the reasoning of Lord Tenterden in *Novelli*,[96] that the litigant was bound 'by the consequence of his own act', and Cave J in *Boissiere*,[97] that a litigant could not take 'the benefit without the burden'. However, in both *Novelli* and *Boissiere* the judgment debtor had participated in the merits, thereby risking an unfavourable judgment in a way that the judgment debtor in *Harris* had not.

[89] [1915] 2 KB 580 (CA), 583.
[90] (1914) 111 LT 564.
[91] *Harris,* 566.
[92] ibid. 568.
[93] ibid.
[94] *Harris*, 568.
[95] *Harris* (CA), 587.
[96] See n 40.
[97] See n 77.

Nonetheless, the Court of Appeal considered that the judgment debtor had taken a step resulting in an 'obligation to obey the ultimate judgment of the Court.'[98] Again, the Court of Appeal referenced the position under Manx law, which did not recognise a conditional appearance as an available step, to conclude that the appearance had been treated as unconditional by the Manx court and so should be equally treated as such by the court addressed. It seemed to sidestep the argument of the judgment debtor that the default nature of the judgment was evidence that the Manx court had not treated them as unconditionally appearing. This brings in a new issue, not yet considered by the courts, as to the extent to which the procedural law of the court of origin should be relevant in determining whether steps taken amounted to a voluntary appearance and thus a submission according to the court addressed.

Harris was the subject of various criticisms,[99] resulting in 'ink and anger'.[100] It was described by Cheshire as 'troublesome'.[101] For Wolff, the decision was 'unfortunate'.[102] According to Dicey and Morris it was 'revolting to commonsense.[103] Some attempts were made to rationalise the decision, with Cheshire[104] and Caffrey[105] suggesting that the judgment debtor could be viewed, on a technicality, as having entered an argument on the merits when pleading no subject-matter jurisdiction. Collins contended that the real issue with *Harris* was that both the High Court and Court of Appeal had considered the meaning of an appearance under Manx law, rather than English private international law, and 'compounded the error' by applying English procedural rules when the foreign law could not provide an answer.[106] This, Collins contended, was a failure to distinguish between voluntarily appearing before the English courts and submitting to the jurisdiction of a foreign court in 'the international sense'.[107]

This frustration is evident in *Re Dulles' Settlement (No 2)*.[108] Despite no question of foreign submission arising there, Denning LJ undertook a scathing examination of *Harris.* Contrary to *Harris,* where the Court of Appeal had been satisfied that an appearance to contest the

[98] *Harris* (CA), 591.
[99] Read (1938), 166 and 170; Graveson, *The Conflict of Laws* (4 edn, Sweet & Maxwell 1960), 543.
[100] Smith, 'Personal Jurisdiction (1953) 2 ICLQ 510, 520.
[101] North (ed), *Cheshire's Private International law* (9 edn, Butterworths 1974), 638.
[102] Wolff, Private International Law (2 edn, Clarendon Press 1950), 259.
[103] Morris (ed), *Dicey and Morris on the Conflict of Laws* (9 edn, Stevens & Sons 1973), 996.
[104] Cheshire, *Private International Law* (3 edn, OUP 1947), 784ff.
[105] Caffrey, 'The Harris v Taylor Phoenix' (1980) 13 Vanderbilt Journal of Transnational Law 43, 45–46.
[106] Collins, 'Harris v Taylor Revived' (1976) 92 LQR 268.
[107] ibid. 286.
[108] [1951] Ch 842 (CA).

jurisdiction of the court of origin was sufficient, Denning LJ held that an appearance for this purpose only should not amount to submission:[109]

> If he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction.

This aligned with the view of Dicey, set out above,[110] that 'submission' meant appearing for the purpose of contesting the merits of the case. *Re Dulles'* was subsequently praised in Dicey,[111] as well as in Cheshire.[112] Again, there seemed to be an element of fair play involved, with a defendant who had voluntarily participated on the merits held bound.

The next case to consider *Harris, NV Daarnhouwer Handelmaatschappij v Boulous,*[113] adopted the reasoning of Denning LJ. Unlike *Re Dulles'*, this decision did relate to foreign submission. Megaw J described the legal position of the defendant in *Harris* as 'absurd', 'both procedurally and from the practical point of view.'[114] Though the two decisions were not in conflict, with *Harris* referring to foreign submission and *Re Dulles* discussing submission to an English court, Megaw J (improperly) preferred the latter.[115] On that basis, Megaw J concluded that there had been no submission because the merits had not been raised by the defendant. Again, this favoured Dicey's conception of submission.

However, less than ten years later, the Court of Appeal revived the principle of *Harris* in *Henry v Geopresco International*.[116] There, the defendant had pleaded *forum non conveniens* in the court of origin on the basis of an arbitration agreement. At first instance, the defendant successfully argued, relying on *Re Dulles'* and *Daarnhouwer*, that 'the true dividing line between a voluntary submission to the jurisdiction and a course of action which does not involve such a submission is to be found by considering whether the defendant has contested

[109] *Re Dulles'*, 850.
[110] See 2.3.5.
[111] Dicey (9 edn, 1973), 996–997.
[112] Cheshire (9 edn, 1974), 638.
[113] [1968] 2 Lloyd's Rep 259.
[114] ibid. 267.
[115] *Daarnhouwer*, 268.
[116] [1974] 2 Lloyd's Rep 536.

the merits.'[117] Willis J relied on the Canadian case of *Richardson v Allen*[118] in concluding that 'the steps taken were technical and procedural only and not "unequivocably referable to the issue on its merits" and amounted to no more than protesting the jurisdiction'.[119] Therefore, according to Willis J, there had been no submission.

The Court of Appeal reversed the decision,[120] with Roskill LJ sceptical of the view expressed in the ninth edition of Dicey, that *Re Dulles'* had freed 'this court from the supposed shackles of *Harris v Taylor*'.[121] *Harris* was described as authority for the proposition that a defendant, having invited the court to determine that it had no subject-matter jurisdiction, could not argue that the same court had no authority.[122] Roskill LJ then drew a distinction between the existence and exercise of jurisdiction, which has since been doubted,[123] so as to conclude that the defendant's plea of *forum non conveniens* amounted to a recognition of the Canadian court's ability to take jurisdiction.[124]

Re Dulles' was then criticised because it did not concern foreign judgment enforcement. Whilst Roskill LJ agreed that the principle underlying the decision in *Harris* should not be extended, he insisted that 'the law must be taken to be as laid down by the courts, however much their decisions may be criticized by writers of…great distinction'.[125] In turn, he considered the question of the effect of an appearance by a defendant for the *sole purpose* of protesting jurisdiction unresolved, from which it can be inferred that Roskill LJ understood the defendants in *Harris* and *Geopresco* to have done something more. Ultimately, Roskill LJ concluded that:[126]

> The dividing line between what is and what is not a voluntary submission and what is and what is not an appearance solely to protest against the jurisdiction is narrow and may often be difficult to draw satisfactorily.

This exemplifies the conceptual challenge highlighted at **2.2** – not every voluntary appearance will clearly represent a deliberate intention to place oneself in a position of

[117] ibid. 538.
[118] (1916) 28 DLR 134.
[119] *Henry*, 538ff.
[120] [1976] QB 726 (CA).
[121] *Henry* (CA), 742.
[122] ibid. 739.
[123] Collins (1976), 276; Caffrey (1980), 47.
[124] This may also be explained by the fact that *Geopresco* predates *Spiliada* [1987] AC 460 (HL), which formally adopted the doctrine of *forum non conveniens* into English law.
[125] *Henry* (CA), 746.
[126] ibid. 748.

compliance. It is certainly arguable, as *Geopresco* indicates, that if the defendant invokes the rules of the court so as to effectively contest the jurisdiction of the court of origin, they have placed themselves under the authority of the court of origin. This raises a separate question regarding the role of foreign law in assessing the conduct of the judgment debtor. On one view, submission to the international jurisdiction of the court of origin might transcend the rules of court; however, on the other hand, it seems that the significance of the judgment debtor's conduct cannot be properly ascertained without looking to the law of the court of origin.

Ultimately, *Harris* and *Geopresco* exposed the difficult question of when, if at all, a judgment debtor could voluntarily appear without being held to submit. Sections 32 and 33 of the CJJA 1982 were introduced in an attempt to clarify this. At the same time, the Brussels Convention was implemented under the CJJA 1982, with provisions governing the effect of a voluntary appearance under the EU regime. The influence of each development is considered in turn.

2.3.7 Legislative Intervention

2.3.7.1 *CJJA 1982*

Though the 1982 Act was primarily introduced into English law to implement the Brussels Convention, it was also seen as an opportunity to shift the direction of the law on the enforcement of foreign judgments, including foreign submission.[127]

The principle underlying section 32 was that dispute resolution agreements, designating the jurisdiction of the court(s) of a country or a court of arbitration, should be protected. It thus prevented foreign judgments handed down in breach of such agreements from being enforced. Section 32(1)(c) set out an exception for the defendant who submitted to a non-designated court in contravention of a prior agreement. In this instance, the protection of section 32 would fall away, and a defendant-judgment debtor would be bound by the foreign judgment. Therefore, in principle, the outcome in *Geopresco,* where the exercise of Canadian jurisdiction was in contravention of an arbitration agreement, would have stood.

Section 33 attempted to resolve this, setting out the circumstances in which a litigant should not be held to have submitted:

[127] Collins, *The Civil Jurisdiction and Judgments Act 1982* (Butterworths, 1983), Ch 7.

> '(1) For the purposes of determining whether a judgments given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely—
>
> (a) to contest the jurisdiction of the court;
>
> (b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;
>
> (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.'

These provisions directly correspond with issues left in contention throughout the nineteenth and twentieth centuries. The first exception was credited with reversing the principle laid down in *Harris*;[128] however, it is not obvious, when considering the way in which *Harris* was subsequently explained in *Geopresco* that it reveals anything more about the concept, given that Roskill LJ perceived the defendant as having gone 'much further' than a protest in *Harris*.[129] If that view is correct, section 33 does not necessarily conflict with nor override *Harris*.

The second exception deals with *Geopresco* and does in fact reverse the decision of the Court of Appeal. Again, however, it is not clear what a litigant may do in the court of origin without being held to submit. The use of the word 'only' suggests that anything more than requesting a stay would prevent a defendant from taking advantage of section 33.[130] It is worth restating the view of Willis J in the High Court in *Geopresco* that a litigant could take any step that was not 'unequivocably referable to the issue on the merits' before being held to submit by the English courts. On the face of it, this seems more generous than section 33(1)(b).

[128] Stone, The Civil Jurisdiction and Judgments Act 1982: Some Comments (1983) 32 ICLQ 477, 490.
[129] *Geopresco*, 747.
[130] *Tracomin SA v Sudan Oil Seeds Co Ltd (No 1)* [1983] 1 All ER 404; *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.

The third exception addresses the issue considered indirectly in *Rathbone* and directly in *Voinet* and *Guiard*. However, it is not a codification of those decisions as it removes the somewhat arbitrary distinction between actual and threat of seizure.[131]

Therefore, on a literal interpretation, sections 32 and 33 did not manifestly change the law on submission. Nonetheless, as will be seen, cases have since relied upon section 33 to deny a finding of submission in much broader circumstances than a strict interpretation would entail. The parallel influence of the Brussels Convention is considered next.

2.3.7.2 *Brussels Convention*

Under the Brussels Convention, jurisdiction could be prorogated by agreement, under Article 17, or an appearance before the court seised, under Article 18. Such an appearance has been interpreted as a form of consenting to the jurisdiction.[132] Though the English version of Article 18 provided that a litigant must appear for the *sole* purpose of objecting to the jurisdiction, *Elefanten* accepted that a defendant could appear to contest the jurisdiction and the merits concurrently.[133] This was influenced by the fact that some national laws required a defendant to set forth all of its arguments at the outset.[134] Consequently, section 33(1)(a) was not required as a safe-harbour because Article 18 permitted a litigant to enter arguments on the merits so long as their primary purpose was to contest the jurisdiction.

Nonetheless, the interpretation of Article 18 in *Elefanten* seemed to influence the interpretation of section 33. For example, in *Marc Rich v Società Italiana Impianti*,[135] the defendant had not *only* appeared to contest jurisdiction, but also to engage on the merits. Neil LJ relied upon *Elefanten* to conclude that there would be no submission, so long as it was made 'abundantly clear' that the defendant's *primary* purpose was to contest jurisdiction. Similarly, in *The Eastern Trader,*[136] the defendant had entered a defence on the merits, as well as counterclaiming, and yet there was held to be no submission. The court believed that a defendant – or subsequent counter-claimant – 'all the time vigorously protesting'[137] the jurisdiction of the court of origin should not be held to have submitted.

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[131] By way of reminder: threat of seizure was held insufficient to make the defendant's appearance involuntary in *Voinet*, as was actual seizure of a minimal sum in *Guiard.*
[132] See n 8–10.
[133] See n 11.
[134] This was codified into Article 24 of Brussels I, remaining unchanged under Article 26 of the Recast.
[135] [1992] ILPr 544 (CA).
[136] [1996] 2 Lloyd's Rep 585.
[137] *Re Dulles'*, 851.

Though this closely aligns with Article 18 and is clearly compatible with the European notion that consent forms the basis of jurisdiction under that provision, it is far removed from the literal meaning of section 33. This was acknowledged by Cooke J in *Motorola Credit Corp v Uzan*:[138]

> It is implicit in the wording of the section, and in the common law authorities which preceded the wording, that in order to take advantage of the exceptions given by the statute, the purpose for entering an appearance or taking steps must be solely for all or any of the purposes set out in the section.

Nonetheless, as will be seen, the strict *Motorola* interpretation has not been preferred. The consequence is a substantial dilution of the pre-1982 conception of submission, which had doubted whether a voluntary appearance could ever occur without resulting in submission. In turn, a defendant could now take various steps without being held to submit to the court of origin, so long as the protection of section 33 had been invoked by virtue of a jurisdictional challenge before the court of origin.

2.3.8 Refining Submission

The late twentieth century thus saw a significant shift in the conceptual understanding of foreign submission. Despite the consensual nature of the obligation to abide by the foreign judgment being rejected in *Boissiere*, a trend was emerging in which the English courts explained the binding force of submission in terms of consent. In *Adams v Cape Industries*,[139] for instance, consent was treated as the foundation of submission: 'jurisdiction on the ground of voluntary submission or of an agreement to submit is based upon consent.'[140] One explanation might be that the English courts were influenced by the consensual nature of competence under Article 18 of the Brussels Convention just explained.

Defendants were also permitted to go much further in their defence of the merits, quite apart from *Boissiere*, *Harris* and *Geopresco* and going over and above the exceptions recognised under section 33. The High Court in *Adams* overlooked Cave J's *dicta* in *Boissiere* in favour of that from *Rein v Stein*, discussed at **2.2.** Submission would only realise where the judgment debtor had 'taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all.'[141] The

[138] [2004] EWHC 3169 (Comm).
[139] See n 17.
[140] *Adams*, 458.
[141] *Rein*, 471.

centrality of waiving a jurisdictional challenge to a finding of submission had already been highlighted in other common law jurisdictions, such as Canada[142] and the United States.[143] However, the formulation adopted first in *Rein* and now *Adams* meant that a defendant could engage in a wide range of conduct without being held to have submitted, so long as it could be interpreted as necessary *or* useful to *both* a jurisdictional challenge and a submission on the merits. Again, the influence of Article 18 is apparent.

The courts also became less concerned with a litigant's actual appearance before the court of origin. In *SA Consortium General Textiles v Sun and Sand Agencies Ltd*,[144] it was considered possible that conduct outside of the court, such as telephone calls and letters with the plaintiff, could give rise to a submission to that court. Similarly, in *Akai Pty Ltd v People's Insurance Co Ltd*,[145] an application to the enforcing court for an anti-suit injunction against the continuation of proceedings in the court of origin was relevant in finding that there had been no submission. The point is well summarised in *Service Temps v McLeod*,[146] a Scottish decision in which the defendant had not formally appeared but sent letters to the court of origin. This was deemed sufficient to constitute submission. The English approach to international competence was relied upon to conclude that:[147]

> I do not accept that a person must appear or be represented in court before he is taken to have submitted to that court's jurisdiction. Were it otherwise, engaging in a court process, which involved only written submissions could never amount to submission. Nor am I persuaded that it is necessary that a court consider the merits of a person's submission.

This is the most extreme deviation from the earlier authorities considered, with the need for a voluntary appearance, at a point intrinsic to the jurisdictional competence of the court of origin, no longer fundamental to a finding of submission. Instead, submission seemed to require some sort of participation in the foreign proceedings, even informally.

At the same time, once the conduct was deemed sufficient to amount to foreign submission, that submission was accorded a broad scope. In *Murthy v Sivajothi*,[148] Evans LJ held that

[142] See n 118.
[143] Manfredi 'Waiving Goodbye to Personal Jurisdiction Defenses' (2008) 58 Catholic University Law Review 233.
[144] [1978] QB 279 (CA).
[145] [1998] 1 Lloyd's Rep 90.
[146] (2014) SLT 375.
[147] *McLeod*, [23].
[148] [1999] ILPr 320 (CA).

'different and unrelated claims should not be taken to be within the scope of the submission' but that 'it is impossible to say that claims which are directly concerned with the same subject matter should not', even if the new claimant had not been a party to the original proceedings.[149] This was based on the fairness of preventing a litigant from engaging with the court of origin as claimant but refusing to do the same as defendant. This was taken further still by Lord Hoffmann in *Cambridge Gas v Navigator*.[150] It was remarked *obiter* that the voluntary appearance of a corporate defendant could be extended to its subsidiary, though not formally participating in proceedings, because the 'company was the creature of the real parties in interest who were actively participating in the proceedings'.[151] This was in spite of the subsidiary never having appeared before the court of origin, further evincing the separation of the concept of submission from that of voluntary appearance. Again, fairness underpinned the interpretation of the scope of the corporate defendant's foreign submission.

The final element of the meaning of submission overhauled, moving into the twenty-first century, was the English courts' understanding of a **voluntary** appearance. In *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*,[152] the judgment debtor had been present within the jurisdiction of the court of origin, but the parties had previously agreed to submit disputes to arbitration. The procedural rules of the court of origin permitted that court to take jurisdiction where the judgment debtor was present within the country of origin, but the judgment debtor sought a stay on the basis of the arbitration agreement. When unsuccessful, rather than withdrawing from the proceedings safe in the knowledge that the judgment would not be effective extraterritorially, the judgment debtor argued on the merits. The Court of Appeal considered that the judgment debtor had 'no realistic option but to argue the merits if the court [was] unwilling to decline jurisdiction'.[153] Consequently, it was held that the judgment debtor was not acting voluntarily and so there could be no submission.[154]

[149] *Murthy*, 477.
[150] [2007] 1 AC 508 (PC).
[151] ibid. 515.
[152] [2011] 2 Lloyd's Rep 233 (CA); followed in *Exmek Pharmaceuticals SAC v Alkem Laboratories Limited* [2016] 1 Lloyd's Rep. 239, [37]; but cf *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd* [2015] EWHC 999 (Comm), [123].
[153] *AES,* [183]; see also *Navigators Insurance Company v Alkahtani Jlawi Mohammed* [2015] EWHC 1137 (Comm), [14] (citing Briggs, *Private international law in the English Courts* (OUP 2014), [6.170]).
[154] ibid. [200].

This clearly runs contrary to *Rathbone,*[155] *Voinet,*[156] and *Guiard*,[157] where the courts had adopted a very restrictive meaning of 'involuntary', with an appearance only capable of being compelled, in the eyes of the English courts, where the defendant's property had actually been seized.[158] It also goes against the general tenor of *Boissiere,* that a defendant should not be able to 'have the benefit without the burden',[159] and *Harris* and *Geopresco*, which did not think that a judgment debtor should be able to voluntarily submit arguments without being bound by the resulting judgment. Comparatively, the *AES* approach affords a much greater discretion to the defendant and thereby places the claimant at a disadvantage. This also seems at odds with the notions of fair play deemed important by earlier authorities.[160]

2.3.9 The Current State of Affairs

The picture developing was that a judgment debtor would not be bound to abide by a foreign judgment unless they, or someone on their behalf, had voluntarily participated in the court of origin's proceedings for the purpose only of defending the merits of the dispute. However, two significant cases regarding foreign submission complicate matters: *Rubin v Eurofinance* and *Vizcaya Partners v Picard*.[161]

2.3.9.1 *Rubin v Eurofinance*

Two cases, *Rubin* and *New Cap*, were heard on a conjoined appeal before the Supreme Court. The issue before the court of origin in both cases was whether companies – now subject to an insolvency process in which the defendants had proved as creditors – had granted unfair preferences to those defendants. It had been successfully argued before the Court of Appeal in *Rubin* that insolvency proceedings were *sui generis* in nature and thus outside the scope of the 'Dicey Rule'. This was rejected by the Supreme Court, with the traditional requirements for international jurisdictional competence of presence and submission endorsed.[162]

[155] See n 48–50.
[156] See n 64–74.
[157] See n 86–89.
[158] See 2.3.4.
[159] See also *Navigators Insurance Co v Mohammed* [2015] EWHC 1137 (Comm).
[160] See 2.3.2.
[161] See n 13.
[162] *Rubin*, [6].

Lord Collins, current editor of *The Conflict of Laws,*[163] handed down the leading judgment, finding that the judgment debtor in *New Cap* had submitted, despite refusing to appear before the court of origin,[164] by entering a *'*proof of debt' in a non-court mandated liquidation.[165] In reaching this conclusion, Lord Collins utilised the *Rein* waiver test, discussed above, to determine whether the judgment debtor had taken steps amounting to submission. Despite acknowledging that the judgment debtor had not taken 'any steps in the avoidance proceedings…which would be regarded either by the Australian court or by the English court as a submission',[166] Lord Collins regarded the proof of debt as a submission.

This was because, in his view, it constituted submission to insolvency proceedings over which the court of origin had supervisory jurisdiction and so the judgment debtor 'should not be allowed to benefit from the insolvency proceeding without the burden of complying with orders made in that proceeding.'[167] However, the entering of the proof had occurred in advance of any proceedings being entered against the judgment debtor and so it is difficult to see how it could be alleged that they had participated nor placed themselves in a position of compliance. This clearly contradicted the conceptual meaning of submission which had been developing thus far, where a judgment debtor had to engage with the merits in some way.

Rubin has been criticised,[168] but remains law.[169] In *Stichting Shell Pensioenfonds v Krys*,[170] the Privy Council considered that a creditor who submits a proof 'obtains an immediate benefit consisting in the right to have his claim considered by the liquidator and ultimately by the court'.[171] This echoed the earlier judgment of Cave J in *Boissiere* that a defendant could not enjoy the benefit of having the issues adjudged by the court without the 'burden' of being bound by the resulting determination.[172] It also bears a similar sentiment to Hart's principle of fair play, set out at **1.3.** The Board went on to explain submission as 'any procedural step consistent only with acceptance of the rules under which the court operates', suggesting a potentially consensual binding act. The resulting submission was also given a

[163] Dicey (15 edn, 2012).
[164] *Rubin*, [157].
[165] No such argument was made in the *Rubin* appeal and so this was not considered.
[166] *Rubin*, [164].
[167] *Rubin,* [167].
[168] See, for example: Briggs, *Civil Jurisdiction and Judgments* (Informa Law 2015), [7.53]; Briggs, 'Judicial assistance still in need of judicial assistance' [2015] LMCLQ 179; Chong, 'Recognition of Foreign Judgments and Cross-Border Insolvencies' [2014] 2 LMCLQ 241, 265.
[169] Applied in *Erste Group Bank AG v JSC 'VMZ Red October'* [2015] EWCA Civ 379.
[170] [2015] AC 616 (PC).
[171] *Stichting*, [31].
[172] See 2.3.4 above.

broad scope: 'rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim.'[173] This seemed to suggest that once a litigant had submitted to any one aspect of the insolvency process, they would have submitted in relation to any associated claim.

There have been attempts to explain *Rubin* as properly a case of an implied agreement to submit to the court of origin.[174] It has also been suggested that the meaning of submission might be broader in the insolvency context.[175] Others have endorsed the Court of Appeal's view of *Rubin,* that insolvency is *sui generis* and requires a new rule or the introduction of new legislation.[176] The new UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (2018) could provide such a route if the UK decided to ratify it. Nonetheless, so long as *Rubin* is good law, its impact on the meaning of submission, in particular to what and to whom a judgment debtor actually submits, should not be underestimated.

2.3.9.2 *Vizcaya v Picard*

Though *Vizcaya* deals with an implied jurisdiction agreement, coming under Dicey's Fourth Case, the judgment's analysis of submission serves to contextualise subsisting conceptual questions more generally. In that case, Picard sought enforcement of a New York judgment in Gibraltar on the basis that parties had agreed to submit to the jurisdiction of the New York courts. It was argued that such an agreement could be implied from the facts, in particular that contracts had been entered into and were due to be performed in New York; choice-of-law clauses had selected New York law; and Vizcaya had carried on business there. However, there was mixed authority on whether an agreement to submit could be implied at all, and so this fell to be determined by the Privy Council.

As with *Rubin*, Lord Collins delivered the advice in the case, concluding that an agreement could, in principle, be implied. Lord Collins rejected the view that a mere fact, such as 'membership of a partnership in a foreign country,' could constitute submission.[177] The real

[173] *Stichting*, [31].
[174] Chong (2014), 265; Dickinson (2019), 315.
[175] Segal, Harris and Morrison, 'Assistance to Foreign Insolvency-holders in the Conflict of Laws: Is the Common Law Fit for Purpose?' (2017) 30 Insolvency Intelligence 117, 123.
[176] See, for instance: Tan, 'All that glisters is not gold? Deconstructing Rubin v Eurofinance SA and its impact on the recognition and enforcement of foreign insolvency judgments at common law' (2020) 16(3) JPIL465.
[177] *Vizcaya,* [58].

question was whether 'the judgment debtor consented in advance to the jurisdiction of the foreign court.'[178] Whether consent had been given was to be determined by the proper law of the contract into which the agreement was allegedly being implied – New York law.[179] On the facts, Lord Collins considered that an agreement to submit could not be implied. Nevertheless, this express endorsement of the role of consent in the context of jurisdiction agreements raises a theoretical question as to the extent of its role regarding submission by participation.

2.4 Conclusion

Foreign submission is now firmly established as a basis of international competence, independent of presence. However, a historical analysis of the term revealed that its precise meaning, as well as its theoretical basis, remain in contention. Three key findings should be highlighted. First, the extent to which a defendant can participate in foreign proceedings without submitting has increased significantly over the last two centuries. Secondly, the rationale underpinning the binding force of foreign submission has shifted in that time and has undoubtedly influenced its meaning. Finally, the law by which the significance of the steps taken should be assessed is undetermined. Each of these findings is considered in turn.

2.4.1 Steps Taken

Earlier decisions were initially satisfied with actual or constructive presence within the jurisdiction, and then before the court of origin, in the form of a voluntary appearance. As the idea of foreign submission came to the forefront, due in no small part to Dicey and the doctrine of obligation, it was concluded that a compelled appearance should not give rise to a finding of submission, because the obligation was not voluntarily undertaken. The greater difficulty arose in deciding when, if at all, a voluntary appearance should not constitute submission. The aftermath of *Harris* and *Geopresco* led to a general consensus that an appearance for the *sole purpose* of contesting the jurisdiction of the court of origin did not amount to submission. This was supported by the introduction of section 33. However, the challenge with 'drawing the line' persisted.[180] Before the *Rein* waiver test, the appearance had to be for the purpose of contesting the merits. Now, this has shifted to steps *only* necessary or useful to a defence on the merits. This favours the defendant over the claimant

[178] ibid. [56].
[179] ibid. [73].
[180] *Geopresco*, 748.

and narrows the circumstances in which a participating defendant will be held to have submitted.

At the same time, cases like *Sun and Sand Agencies, Akai*, and *Rubin* suggest that steps taken outside of the courtroom can also constitute submission. This significantly divorces the concept of submission from ideas of voluntary appearance, suggesting that Dicey's Third Case no longer appropriately describes which conduct constitutes submission. That said, it was noted that *Rubin* stretches the meaning of submission quite far. It is not clear that the litigants in these factual patterns could be said to 'place themselves in a position of compliance' with the court of origin's procedural rules and practices, thereby distancing the concept from the literal definition set out above.

Either way, it would appear that the concept of foreign submission now turns on the act of participating, either directly or indirectly, in the proceedings before the court of origin. Submission by participation thus seems a more appropriate label than 'by voluntary appearance'. This is further compounded by the broad scope that has been attached to participating as a claimant. The extent to which participation in insolvency proceedings can be accommodated within this analysis remains to be seen and will be examined throughout the thesis.

2.4.2 Binding Force: a Role for Consent?

The relationship between the rationale for enforcement and the conduct of the judgment debtor has also grown closer over the last two centuries. In its earliest stages, enforcement was justified on grounds of territoriality and comity, and then natural justice compliant service. Within that framework, actual or constructive presence would suffice. Ideas of fair play between the parties were then introduced, attaching significance to the conduct of the parties within the jurisdiction of the court of origin. The act of voluntarily appearing was then treated as giving rise to a substantive private law obligation to abide by the foreign judgment in *Godard* and *Schibsby*.

From this point on, the rationale for judgment enforcement, namely that the litigant had undertaken an obligation to abide by the foreign judgment, was intrinsically linked to the international competence of the court of origin and, consequently, the concept of foreign submission. However, the reason *why* submission carries binding force has remained unclear. Whilst *Boissiere* spoke of morality and many decisions have relied on ideas of fair play, equating submission with or resulting in consent has gripped many cases since the 1982 Act and the Brussels Convention. This is explored in the next chapter.

2.4.3 Role of Foreign Law

The question of which law should determine whether the steps taken before the court of origin amount to submission has mostly been passed over by the courts. There was some speculation by Collins that *Harris* was influenced by the procedural law of the court of origin. The High Court in *Henry* also seemed persuaded by the position under Canadian law. However, in *Rubin,* both English and foreign ideas of submission were set to one side, with Lord Collins suggesting that submission to international competence was wholly unique. This leads one to query whether, and if so, to what extent foreign law is relevant to the question of foreign submission. This issue is considered in **Chapter Four**.

CHAPTER 3: The Binding Force of Submission: a Role for Consent?

Tracing the historical development of the concept of foreign submission in the previous chapter exposed several lacunae. In particular, the reason why the act of submission is perceived as justifying enforcement remains obscure. It is often stated that a judgment debtor who submits to the jurisdiction of the court of origin undertakes an obligation or a duty to abide by the resulting foreign judgment.[1] This perception is due in no small part to the 'doctrine of obligation', as discussed in **Chapter Two**.[2] However, this theory has been criticised as incapable of explaining why a foreign-created obligation is enforceable in the English court addressed.[3] More recently, there have been attempts to explain this by equating the act of submission with consent. On this view, the court addressed enforces a substantive, consensual obligation to satisfy the judgment debt. This can be contrasted with earlier authorities, which relied upon comity, and then ideas of natural justice and fairness to justify enforcement.[4]

Accordingly, the chapter begins by exploring the viability of a consent-based analysis of the act of submission. The role of consent under other enforcement regimes is considered, which are then contrasted with the competing views of Briggs and Dickinson on the English approach. Whilst Briggs is a strong advocate for the consensual nature of the act of submission, Dickinson doubts its utility. Two alternatives, identified through the historical analysis of **Chapter Two,** are then considered: procedural presence and waiver/estoppel. After this examination, the thesis moves on to consider how the fulfilment of party expectations can enhance the theoretical understanding of the binding force of foreign submission, asking when a judgment debtor should legitimately expect to be bound as a result of their submission. On this view, the court addressed would not enforce a substantive obligation, but rather uphold legitimate expectations arising out of the foreign proceedings.

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[1] *Adams v Cape Industries* [1990] Ch 433*,* 555; Briggs, *Civil Jurisdiction and Judgments* (Informa Law 2015), [7.51]; Briggs, 'Recognition of foreign judgments: a matter of obligation' (2013) 129 LQR 87, 94; Torremans and others (eds), *Cheshire, North & Fawcett: Private international law* (15 edn, OUP 2017), 526.
[2] See 2.3.3.
[3] ibid.
[4] See 2.3.1 and 2.3.2.

3.1 Consent in Context

As highlighted in **Chapter Two**, there is a growing trend to treat submission as a subset of or synonymous with consent to the jurisdiction of the court of origin.[5] It was speculated that this was a consequence of the EU regime. Under the Brussels Convention, Article 17, relating to jurisdiction agreements, and Article 18, relating to submission by participation, have both been interpreted as manifestations of consent:[6]

> Articles 17 and 18…represent two ways in which a party may consent to jurisdiction, the one by contract, the other by the act of entering an appearance.

This view has remained substantially intact under the Recast. However, the role of consent is limited to the court of origin's assessment of its own jurisdiction. It cannot be reviewed when enforcement is sought in the court addressed.[7]

In contrast, under the Judgments Convention, though it is yet to come into force, the court addressed does review the competence of the court of origin in terms of consent. Under Article 5(1)(f), if a defendant argues the merits of a case before the court of origin, that court will be treated as internationally competent, and the conduct of the defendant will justify enforcement. This provision is described in the explanatory report as a form of 'implied consent'.[8] In this context, consent not only explains the amenability of the judgment debtor to the jurisdiction of the court of origin from the perspective of the court addressed, but it also provides the basis for enforcement. That said, the reason *why* the judgment is enforced is because of the reciprocal nature of the convention.

The Scottish courts have long recognised consent as a basis of jurisdictional competence at both the adjudicatory and enforcement stage.[9] The rationale behind this approach is explained by Anton as:[10]

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[5] See also Monestier, 'Whose Law of Personal Jurisdiction? The Choice of Law Problem in the Recognition of Foreign Judgments' (2016) 96 Boston University Law Review 1729, 1768; Saumier, 'Submission as a Jurisdictional Basis and the HCCH 2019 Judgments Convention' (2020) 67 Netherlands International Law Review 49.

[6] Case-150/80 *Elefanten Schuh Gmbh v Jacqmain* [1981] ECR 1671, Opinion of AG Gordon Slynn, 9.

[7] Recast, Article 45(2)-(3); the only grounds on which jurisdiction can be reviewed are set out under Article 45(1)(e).

[8] Garcimartín and Saumier, 'Explanatory Report of the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' (HCCH publications 2019), 94.

[9] *Maxwell v Laird of Minto* (1628) Mor 7306; *Thompson v Whitehead* (1862) 24 D 331; *Bank of Scotland v Gudin* (1886) 14 R 213.

[10] Anton, *Private international law* (1 edn, W Green 1967), 578.

> Founded upon the equity that, if a person not otherwise subject to the jurisdiction of a court expressly or impliedly submits to its adjudication of a dispute, that person cannot afterwards be heard to say that that court's judgment is not binding upon him.[11]

In other words, though jurisdiction may be conferred by virtue of consent, the judgment itself is enforced by virtue of notions of fair play. In this sense, it bears a similarity to the rationale highlighted at 2.3.2 and in decisions like *Boissiere*.[12] On this view, consent does not explain the enforcement of the foreign judgment, but rather clarifies why it is fair to do so.

3.2 Competing Views on Consent in England

Whilst the role of consent under the regimes just set out is well-established, it remains a source of contention in English private international law. Briggs has argued that 'consent to the jurisdiction of the foreign court, and that alone, is what gives the judgment its passport to international enforceability'.[13] According to Briggs, the participation of the litigant can provide a basis for enforcement, which is:[14]

> The agreement, whether tacit or actual, or the consent, of the party to be bound by the decision of the foreign court. Such agreement or consent may be found in a bilateral agreement made with the other party to the proceedings, made before the proceedings were instituted, or inferred from unilateral conduct in the face of the court which makes plain the willingness of the defendant to be bound by the outcome.

On this approach, there is no significant difference between submission by agreement and submission by participation. In both contexts, it is the underlying agreement, Briggs argues, which is enforced, not a foreign-created obligation arising out of the judgment debtor's relationship with the court of origin.

[11] See also *Elderslie Steamship Co v Burrell & Son* (1895) 32 SLR 328, 395 (Lord Trayner).
[12] Discussed at 2.3.4.
[13] Briggs (2015), [7.62].
[14] Briggs, *Agreements on Jurisdiction and Choice of* Law (OUP 2008), [2.52]; see also Briggs, *Civil Jurisdiction and Judgments* (7 edn, Informa Law 2021), [34.08].

Quite apart, Dickinson states that the role of consent is, at most, subsidiary,[15] rejecting Briggs' view:[16]

> Even if submission by formal participation is best analysed as founded upon consent alone, the parties' consent is manifested towards the court and generates (in a simple two party case) a triangular relationship between the court and the two litigants. As between the court and each litigant, there arise mutual obligations to observe the court's procedural rules and an obligation on the part of the litigant to abide by the court's orders and judgments.

Instead, Dickinson supposes that the significance of the conduct of the judgment debtor can be better explained by reference to ideas of natural justice:[17]

> Having invited the court to exercise its adjudicatory jurisdiction, natural justice demands that each party should be bound by the judgment whether it wins or loses. For over a century, English judges emphasised that a defendant who "takes a chance" on a favourable judgment should be bound.

As such, Dickinson clearly doubts the utility of a consent-based analysis as a whole and considers its role within the English common law unsettled.

Whichever view is preferred, if consent is to explain the binding force of foreign submission, its precedential basis must be established, as well as the standard of consent that might be required before a foreign judgment will be enforceable. After this is determined, the viability of the approach will be examined in the context of consent between litigants and consent directed at the court.

3.3 A Consent-Based Approach

There is some express support for the significance of consent in the case law. Both *Turnbull v Walker*[18] and *Adams v Cape Industries*[19] identified consent, alongside presence, as the basis of international competence within English private international law. Some implied

[15] Dickinson, 'Foreign Submission' (2019) 135 LQR 294, 319.
[16] Dickinson (2019), 317.
[17] Dickinson (2019), 317.
[18] (1892) 67 LT 767.
[19] [1990] Ch 433.

support can also be drawn out from earlier cases such as *Barber v Lamb*[20] and *Schibsby v Westenholz,*[21] where the plaintiff was described as selecting the court. If consent is a necessary basis of the *ex ante* selection, as confirmed in *Vizcaya v Picard*,[22] it is reasonable to suggest that it should be considered the basis of an *ex post* choice. Moreover, the English courts have referred to submission as the act of accepting the jurisdiction of the court of origin which,[23] in the words of Dickinson, 'points strongly to a consensual basis for submission'.[24]

On the other hand, an argument made by the defendant based on consent was rejected in *Boissiere v Brockner*:[25]

> 'No one supposes that when a man appears…he does so because he likes it… he deems it his interest to submit… if he enters into the litigation from those motives, intending to take advantage of the judgment if he wins, there is obviously a moral obligation on him to pay if he loses'

Instead, Cave J considered the judgment debtor to be under a moral obligation, which the court addressed should give legal force. This reasoning also better aligns with early authorities like *Buchanan v Rucker*,[26] where the focus was on the judgment debtor's opportunity to be heard and compliance with English notions of natural justice.[27]

Nevertheless, if consent is to explain why foreign submission results in an obligation to abide by a foreign judgment enforceable in the English court addressed, the standard of consent required must be determined. The most detailed consideration of this issue can be found in the judgment of Scott J in *Adams*, who required a 'clear indication of consent to the exercise by the foreign court of jurisdiction.'[28] In *Vizcaya*, albeit in the context of jurisdiction agreements, Lord Collins indicated that 'consent to submit to the jurisdiction of the foreign court' should be 'actual'.[29] This suggests that there must be a clear, actual intention, though

[20] (1860) 8 CB NS 95.
[21] (1870-71) LR 6 QB 155.
[22] [2016] Bus LR 413 (PC).
[23] *Murthy v Sivajothi* [1999] ILPr 320 (CA), 477; *Stichting Shell Pensioenfonds v Krys* [2015] AC 616 (PC), [31].
[24] Dickinson (2019), 315.
[25] (1889) 6 TLR 85, 85.
[26] (1808) 9 East 192.
[27] See also *Reynolds v Fenton* (1846) 3 CB 187.
[28] *Adams*, 466.
[29] *Vizcaya,* [56].

tested objectively, on the part of the litigants to be legally bound by the judgment of the court of origin. In other words, the consent must be knowingly and voluntarily given.

There is thus at least mixed support in more recent cases for the consensual basis of foreign submission. It must thus be considered whether and, if so, how the consensual obligation operates in practice. As explained above, two perspectives are examinable: from one litigant towards another, as advocated by Briggs; or, from the litigant to the court, as preferred by Dickinson (if he views any role for consent).

3.3.1 Consent Between Litigants

According to Briggs, the act of submitting to the jurisdiction of the court of origin, both by the claimant and the defendant, creates a mutual understanding that they will abide by the foreign judgment.[30] He interprets this as giving rise to a bilateral agreement, formed by virtue of each litigant's participation in the foreign proceedings,[31] enforceable in the court addressed. On this view, mutually enforceable obligations arise for which there must also be correlative rights for the purpose of enforcement.

If the effect of participation were to be interpreted in this way, the requirements for enforcement could become simpler, as there would no longer exist a need to distinguish between submission by agreement and by participation. As Briggs suggests, this might mean that the categories of submission are merging into a broader concept, founded on the bilateral agreement of the parties.[32] Some support for consent as the unifying basis of submission is extractable from *Adams* and *Turnbull*, which speak of consent generally as a basis of international competence.[33]

However, the potentially consensual nature of the litigants' conduct was described as an 'acceptance of' or 'consent to' the jurisdiction of the court of origin in the cases discussed above,[34] suggesting that the English courts conceive of the conduct of the judgment debtor as directed at the court of origin, not the counterparty. It thus seems at odds with the objective intentions of the parties to suggest that they intended to enter into a bilateral agreement. This can be contrasted with the English approach to jurisdiction agreements, where it has been

[30] See n 14.
[31] ibid.
[32] Briggs (2013), 92.
[33] See n 18–19.
[34] See n 18–24.

suggested that it *is* the underlying bilateral agreement to submit which is enforced, rather than the foreign judgment.[35]

Moreover, determining whether foreign submission has occurred does not involve an exercise of discretion on the part of the court addressed.[36] As such, stating that participation leads to mutually enforceable obligations capable of forming the basis of an agreement does not explain why the court addressed perceives itself as obliged to uphold an agreement *inter partes*. It is also questionable whether the judgment creditor can be said to hold a 'right' to enforce the foreign judgment, because this depends on satisfaction of various requirements according to the court addressed,[37] not just an agreement.

Furthermore, whilst it is a prerequisite to the validity of a jurisdiction agreement that there be *consensus ad idem,*[38] this will not always be present by virtue of submission by participation. There may be some cases in which the parties demonstrate a genuine agreement, such as in *Adams* where the parties had joined a consent order to proceed. Even so, this seems an unlikely conclusion where 'harder cases' are concerned, such as where the judgment debtor has contested the jurisdiction, taken 'pre-defence steps',[39] or not actually appeared before the court of origin. Even in the case of a claimant who refuses to participate in the proceedings of a counter-claim, it is difficult argue that the claimant and defendant share a mutual understanding that they are obliged to comply with the rules and resulting judgment of the court of origin in relation to subsequent counter-claims.

All of this suggests that the conceptual difficulties that arise with characterising the act of submission as resulting in a bilateral agreement outweigh any possible benefits that can be drawn from Briggs' approach. This does not, however, exclude the possibility that the conduct of the judgment debtor might amount to a consent directed at the court of origin.

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[35] See, for example, *Copin v Adamson* (1873-74) LR 9 Ex 345, 354 (confirmed on appeal: *Copin v Adamson* (1875) 1 Ex D 17), but cf *Vizcaya v Picard* where Lord Collins asked whether the parties had 'consented in advance to the jurisdiction of the court'; it might then also be queried whether the agreement of the parties to the original proceeds can actually be interpreted as extending the enforcement of the judgment in another jurisdiction, Briggs considers this briefly: Briggs, 'Crossing the River by Feeling the Stones' (2004) 8 Singapore Yearbook of International Law 1, 7.

[36] *Golden Endurance Shipping SA v RMA Watanya SA* [2016] EWHC 2110 (Comm), [46].

[37] See, generally: Briggs (2021), Ch 34.

[38] *Mackender v Feldia* [1967] 2 WLR 119 (CA).

[39] See, for example: *Certain Underwriters at Lloyd's London v Syria* [2018] EWHC 385 (Comm), [58]: 'an application for an injunction or other interim relief, an application for disclosure or for further information, or an acknowledgment of service indicating an intention to defend the claim and not indicating an intention to contest jurisdiction.'

3.3.2 Consent Directed at the Court

There is some support for the view that a clear indication of consent directed towards the court of origin will make it competent. This has found favour under the EU regime, but how does it accord with the conduct of the litigants during the foreign proceedings?

In the simple case of a litigant appearing in the court of origin, as either claimant or defendant pleading the merits, this conduct could expressly or implicitly evince 'actual consent'. These sorts of ideas have long been considered relevant to a plaintiff who 'selects' their tribunal.[40] A defendant who participates on the merits, without imposing any condition, also seems to satisfy the condition of 'actual consent'. Again, however, the difficulty lies in the 'harder' cases.

This is best illuminated by asking 'to what' the judgment debtor consented. By claiming, a litigant may indicate consent to the jurisdiction of the court of origin for the purpose of their own claim. Nevertheless, the scope of a claimant's submission has been interpreted as much broader in effect, going far beyond that 'actual consent', extending to counter-claims subsequently entered against them.[41] This suggests that consent cannot explain the force of submission alone. The same issue arises when considering the conduct of the defendant if a claim is amended or a new claimant is joined to the dispute. If the defendant refuses to continue, it is not clear that any alleged consent given to the original proceedings could extend to the new or amended proceedings.

Moreover, whilst a defendant who actively contests the merits might clearly evince consent, **Chapter Two** emphasised the difficulty the courts have experienced with drawing a line between contesting the merits and jurisdiction.[42] This has led the English courts to adopt the *Rein v Stein* test to ascertain when steps taken by the defendant should amount to submission.[43] There are two difficulties with this approach. First, any conduct which is necessary both to contest the jurisdiction and the merits will not give a clear indication of consent. Secondly, unequivocal conduct relates to the waiver of the challenge, and so the act of submission might be inadvertent. It may thus be doubted whether the lack of an active

[40] See n 20–22
[41] *Murthy*, [30].
[42] See 2.3.6 and 2.4.1.
[43] (1892) 66 LT 469.

step to submit prevents the alleged consent from being 'knowingly and voluntarily' given. In turn, it might be insufficient according to the standard set out in *Adams* and *Vizcaya*.[44]

The picture becomes even more confused when considering conduct which occurs outside of the courtroom. Looking at *Rubin v Eurofinance,*[45] a defendant who participates in a non-court mandated insolvency process does not *actually* consent to proceedings later raised in the court of origin. The difficulty here, as Chong describes it, is that '"implied" too often shades into "imputed" and it need hardly be pointed out that imputed consent does not involve any tangible form of consent at all'.[46] Again, this conduct seems to fall short of the 'actual consent' required in *Adams* and *Vizcaya.*[47]

Nonetheless, the decision of the Supreme Court in *Rubin* to imply submission by participation from the entering a proof of debt in an insolvency process has been widely criticised.[48] Might framing the binding force of submission in terms of consent limit the effect of *Rubin* going forward? Submission to insolvency proceedings certainly seems unlikely to suffice. However, a consent-based approach allows defendants greater leeway in the steps they can take, thereby forcing further expenditure on the part of the claimant, without being held to submit. Moreover, it does not explain why a foreign-created consensual obligation should carry any effect in the court addressed. These broader issues are considered next.

3.3.3 Issues with a Consent-based Approach

3.3.3.1 *Excessively Defendant-friendly*

If a defendant can participate on the merits of a case, whilst maintaining a challenge of the jurisdiction of the court of origin, there is unlikely to be a clear indication of consent. Therefore, if successful on the merits, the defendant would be able to seek enforcement of the foreign judgment on the basis of the claimant's participation, but, if unsuccessful, rely on the challenge. Dickinson has criticised this approach as allowing the judgment debtor to 'have it both ways'.[49] Even Briggs admits that this gives the defendant 'two bites of the cherry'.[50]

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[44] See n 28–29.
[45] [2013] 1 AC 236 (SC).
[46] Chong, 'Recognition of foreign judgments and cross-border insolvencies' [2014] LMCLQ 241, 266.
[47] See n 28–29.
[48] See 2.3.9.1.
[49] Dickinson (2019), 312.
[50] Briggs (2008), 314ff.

AES Ust-Kamenogorsk Hydropower Plant LLP exemplifies this problem.[51] In that case, as explained at **2.3.8**, the judgment debtor, who was also present within the jurisdiction of the court of origin, was able to evade enforcement by claiming that their conduct was not voluntary and that they had 'no realistic option' but to participate in the foreign proceedings.[52] This was despite the judgment debtor having gone through the whole course of proceedings, contesting the merits.

When this argument had been brought before Cave J over 100 years earlier in *Boissiere*, it was rejected. Cave J perceived the defendant as attempting 'to take all the advantage he hopes to gain by appearing and by a protest to relieve himself from the disadvantage.'[53] A similar tenor can be deduced from *Harris v Taylor* and *Henry v Geopresco.*[54] However, Smith criticised *Boissiere*,[55] arguing that a defendant should be permitted to mitigate the risk of an unfavourable judgment by defending the merits, which would be territorially effective, whilst minimising its effectiveness extraterritorially through a protest.

Though that might be the case, it leaves the defendant in the privileged position of fighting the merits, safe in the knowledge that the objection to jurisdiction will protect them from extraterritorial enforcement. It thus seems open to exploitation by a defendant before the court of origin, especially if they are aware that enforcement will be necessary to recover sufficient assets. In contrast, a claimant is required to spend time and resources fighting the merits in the court of origin, with the uncertain risk of having to go through the same process again in the court addressed. This highlights the imbalance existing within a consent-based approach.

3.3.3.2 *Rationale for Enforcement*

As Piggott highlighted after *Schibsby* endorsed the doctrine of obligation,[56] recognising that there is a foreign-created consensual obligation still does not explain why it is enforceable in the court addressed.[57] This is a wider problem, which permeates the doctrine of obligation as a whole, irrespective of whether the consent is taken as directed at the counter-party or the court of origin.

[51] [2011] 2 Lloyd's Rep 233 (CA).
[52] ibid. [167].
[53] *Boissiere*, 85.
[54] See 2.3.6.
[55] Smith, 'Personal Jurisdiction (1953) 2 ICLQ 510, 520.
[56] See 2.3.3.
[57] Piggott (1884), Ch IV.

As highlighted above,[58] stating that submission leads to a consensual bilateral agreement between the parties does not explain why the court addressed perceives itself as bound to enforce it. Similarly, if consent is directed at the court of origin, there is no clear explanation why the resulting obligation, owed to that court, must be enforced by the court addressed, nor why it can be relied upon by the claimant for the purposes of enforcement. Dickinson raises a similar point in his critique of *Adams*:[59]

> Difficult questions…arise as to the law applicable in determining the existence of consent, or…why a person not party to the consensual arrangement (the claimant) is entitled to benefit from it.

This makes clear that, even if the conduct of the judgment debtor *might* amount to consent, it does not adequately explain the binding force of foreign submission. Instead, some other explanation for its significance must be drawn out. Two alternatives are considered: submission as procedural presence; and a theory of waiver and estoppel.

3.4 Alternatives to a Consent-based Approach

3.4.1 Procedural Presence

As identified in **Chapter Two**, the English courts initially enforced foreign judgments because of a defendant's actual or constructive presence within the jurisdiction of the court of origin.[60] The main question for the court was whether service complied with English notions of natural justice. If submission were treated but as a type of procedural presence before the court of origin, it might be contended that the theoretical justifications which bind a judgment debtor due to their presence might equally apply to foreign submission.

For Briggs, the binding force of presence arises not out of 'the perceived strength and durability of the physical connection…with the territory of the foreign court', but rather 'the respect which the common law accords to exercises of sovereignty over things'.[61] On that basis, the obligation to abide by the foreign judgment is tied to the territorial reach of the

[58] See 3.3.1.
[59] Dickinson, 'Schibsby v Westenholz and the recognition and enforcement of judgments in England' (2018) 134 LQR 426, 436.
[60] See 2.3.1 and 2.4.2.
[61] Briggs (2013), 91.

court of origin and notions of comity.[62] Taking this approach, Briggs considers the court of origin competent to impose an obligation on the would-be judgment debtor.[63] This brings the binding force of foreign submission into line with Piggott's theory, who heavily doubted that a foreign-created obligation could be of any effect absent considerations of comity.[64]

Dickinson's view may be accommodated within this approach, basing the enforceability of the foreign judgment on the voluntary nature of the formal appearance before the court of origin.[65] On this approach, the participation of the parties gives rise to 'a common law obligation founded on the multipartite relationship of the litigation parties and the court on considerations of justice'.[66] Therefore, under Dickinson's framework the obligation is a product of English private international law, founded on English notions of natural justice. This bears resemblance to Anton's argument, set out at **3.1**.

That said, there are certain drawbacks to framing the binding force of foreign submission in terms of procedural presence. First, presence, as just explained, has been doubted as capable of providing a connection sufficient to justify the extraterritorial effect of a foreign judgment. Arguably, however, earlier decisions such as *Galbraith v Neville,*[67] recognised this and perceived procedural presence as the most effective manner of evincing compliance with English principles of natural justice.[68] Secondly, and perhaps more exigent, relying on procedural presence does not seem to adequately explain the nuance with which conceptions of foreign submission have developed in English law. On the one hand, the courts frequently permit a defendant to take various steps without being held to submit to the jurisdiction of the court of origin.[69] On the other hand, the English courts have interpreted conduct as submission without their procedural presence before the court of origin.[70] In this sense, relying on procedural presence to explain the significance of foreign submission is both too narrow and too broad.

[62] This view finds support in the Privy Council case of *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 (PC), 683 (Lord Selborne): 'all jurisdiction is properly territorial'.
[63] Briggs (2013), 91.
[64] Piggott, *The Law and Practice of the Courts of the United Kingdom Relating to Foreign Judgments and Parties Out of the Jurisdiction* (W Clowes and Sons 1884), Ch IV.
[65] Dickinson (2019), 312.
[66] ibid. 318.
[67] (1789) 1 Dougl 6; see also 2.3.2.
[68] See 2.3.1.
[69] But see *Boyle v Sacker* (1888) 39 Ch D 249, a case on the internal competence of the English courts, where an appearance under protest was described as stating 'we are not properly here'.
[70] For example, in *Rubin*.

This represents a wider issue within the concept of foreign submission, identified in **Chapter Two**,[71] and so it is arguable that a presence-based approach could mark a return to a strict approach in which the defendant must formally appear before such a question can arise. This would create greater consistency in the interpretation of the concept. However, this would require a detailed examination of the procedural rules of the law of the court of origin and appropriate limitations for when those rules are thought to conflict with English principles of natural justice. This is considered in **Chapter Four**.

3.4.2 Waiver and Estoppel

Another possibility might be to view the act of submitting as a waiver of the 'right' to contest the jurisdiction of the court of origin**.** As explained in **Chapter Two,** and again above, the test first set out in *Rein v Stein* has become of increased importance to the question of foreign submission.[72] The court addressed asks whether the judgment debtor took 'some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all.'[73] *Adams* was the first English case to categorically endorse the use of a 'waiver' test in the enforcement context.[74] However, Scott J did not make clear whether he considered the waiver to equate to submission, to be the result of a submission, or a prerequisite to a finding of the same. Similarly, what exactly the defendant was waiving and why it was of any relevance to the court addressed were not considered.

There are two main difficulties with this approach: first, it is unclear whether the waiver should be judged against English law or the law of the court of origin; and, secondly, it is unclear what exactly is being waived.

On one view, which takes some support from Briggs,[75] the question being asked is whether the defendant has waived an objection to the international jurisdiction of the court of origin. The relevant question is whether the defendant had waived their challenge to jurisdiction according to English law.[76] However, as Dickinson highlights, this does not explain why it can waived by 'steps taken in a foreign court that has no standing (or reason) to determine that question in advance of any proceedings before an English court'.[77] Moreover, there is a certain fictionality in suggesting that a defendant intends to contest the international

[71] See 2.4.1.
[72] See 2.3.8.
[73] *Rein*, 471.
[74] But see *Henry v Geopresco International Ltd* [1974] 2 Lloyd's Rep 536 (Bray J).
[75] Briggs (2008), [2.53].
[76] *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.
[77] Dickinson (2019), 318.

jurisdiction of the court of origin by taking steps given effect by virtue of the procedural law of the court of origin.

Alternatively, submission could be perceived as a waiver of the jurisdictional challenge to the court of origin's adjudicatory jurisdiction. This view was adopted by the High Court in *Starlight International v Bruce*.[78] However, it raises a difficult question, identified by Andrews J in *Desarrollo Immobilario* and discussed in **Chapter Four**, as to the role of foreign law in assessing the conduct of the judgment debtor. According to Andrews J, the waiver was a matter for foreign law but that, consequently, it should not be determinative in finding foreign submission according to English rules of private international law.[79]

Moreover, the waiver does not result in a correlative obligation and so it cannot explain the binding force of the act of submission alone. Briggs suggests that the waiver could be treated as giving rise to an estoppel.[80] The courts of the United States have taken a similar approach, relying upon a theory of waiver and preclusion.[81] It also seems to align with Dicey's 'principle of submission', where he contended that: 'a person who voluntarily agrees, either by act or word, to be bound by the judgment of a given court or courts has no right to deny the obligation of the judgment as against himself'.[82]

However, a judgment debtor could argue that the specific issue raised in the court of origin is different to that being raised before the court addressed. This occurred in *Desert Sun Loan Corp v Hill*,[83] where the court addressed held that it was 'not sufficiently clear' that the judgment debtor, who had unsuccessfully argued in the court of origin that the attorney did not have capacity to act on their behalf, was raising the same exact point again.[84]

Furthermore, as highlighted at **3.4.2**, the waiver approach still favours the defendant-judgment debtor excessively as it only attaches to unequivocal conduct, meaning that a defendant may carry on as in *AES* without being estopped, so long as the challenge is maintained throughout.[85] It also does not address why a defendant who does not actually appear and contest the merits should be held to submit and be bound by the foreign judgment, nor how a claimant would be bound by the foreign judgment, given that they would not hold

[78] [2002] EWHC 374 (Ch).
[79] [2014] EWHC 1460 (QB), [65].
[80] Briggs (2008), [2.53].
[81] Manfredi 'Waiving Goodbye to Personal Jurisdiction Defenses' (2008) 58 Catholic University Law Review 233.
[82] Dicey, 'Criteria of Jurisdiction' (1892) 8 LQR 21.
[83] [1996] ILPr 406 (CA), [60].
[84] ibid. [48].
[85] See 3.3.3.1.

a ‘right’ to contest the jurisdiction of the court of origin. This suggests that a waiver/estoppel approach cannot explain the binding force of submission by participation.

3.5 Upholding Party Expectations

Neither a consent-based nor a waiver/estoppel-based approach can adequately explain the binding force of foreign submission. They also create an imbalance between the litigants because a defendant can simply challenge jurisdiction whilst taking various steps to advance an argument on the merits. This section queries whether an approach focussed on fulfilling the expectations of the parties may improve this balance, as well as explaining why participation in foreign proceedings leads to an enforceable judgment. On this view, the court addressed is asked to uphold those expectations arising out of the proceedings before the court of origin, rather than enforce a foreign-created substantive obligation.

Fulfilling the legitimate expectations of the parties can ensure fair play between the parties and the effective regulation of their affairs.[86] As highlighted at **2.3.2**, a sense of fair play can be drawn out from earlier cases like *Novelli v Rossi*,[87] *Barber v Lamb,*[88] and *Cammell v Sewell,*[89] where enforcement was viewed as the consequence of seeking a legal remedy from the court of origin. Having made a commitment to abide by the rules of the court and the dispute determined by that court, the litigant was held bound. A similar sentiment appears later in *Boissiere* and then *Rubin* where the courts criticised the judgment debtor for attempting to benefit from the judgment creditor’s participation in the foreign proceedings without the burden of complying with an outcome not in their favour.[90] The same is true of *Re Dulles’ Settlement (No 2)* where Denning LJ made clear that a defendant could not 'accept the decision on the merits if it is favourable to him’ but ‘not submit to it if it is unfavourable’.[91]

However, whilst these cases demonstrate a theoretical justification in common with the upholding of legitimate expectations, it does not reveal the source of the expectation, nor explain why it should be considered legitimate. These questions must be dealt with if reliance

[86] See 1.3.
[87] (1831) 2 Barnewall and Adolphus 757.
[88] (1860) 8 CB NS 95.
[89] (1858) 3 Hurlstone And Norman 617.
[90] See 2.3.8.
[91] [1951] Ch 842 (CA), 850.

on legitimate expectations is not to be regarded as 'analytical mush'.[92] Two cases are instructive: *Adams*, discussed in detail above, and *Agbara v Shell Petroleum Development Co of Nigeria Ltd*.[93]

In *Adams*, the court of origin had applied a rule for the assessment of damages not recognised under its own procedural law. The High Court held that 'the requirements of substantial justice in a particular case cannot […] be divorced from the legitimate expectation of both the plaintiff and the defendant in the context of the procedural rules applicable to the case.'[94] This was generally endorsed on appeal, with the Court of Appeal clarifying that the question was what an individual in the position of the litigants could reasonably have expected. Approaching the question of legitimate expectations in this way limits the extent to which the expectations of the claimant and defendant can conflict. Both the High Court and the Court of Appeal seemed to view the law of the court of origin as making legitimate the expectation that damages would be assessed according to its procedural rules (albeit not how they should be applied). Consequently, disregarding those rules had undermined the way in which the judgment debtor had 'regulated their affairs' in the court of origin and defeated the legitimate expectation that the court of origin would apply the *lex fori*.[95]

Adams was followed in *Agbara*.[96] In that case, it was argued that the judge in the court of origin had deviated from the procedure expected both in law and practice. The High Court relied on *Adams* in concluding that:[97]

> It is a fundamental tenet of natural justice that both sides of a dispute should have an opportunity to be heard…A defendant, even one who has not appeared in the proceedings, is entitled to expect, as a facet of natural justice, that damages will be assessed by the Court on the evidence before it.

Again, the idea here seems to be that the court of origin's rules and practice are held out in such a way so as to create a legitimate expectation that they will be applied by that court. In this sense, though a private right, enforceable against the court of origin, never crystallises,

[92] Whincop, 'A Relational and Doctrinal Critique of Shareholders' Special Contracts' (1997) 19 Sydney Law Review 314; see also Whincop and Keyes, *Policy and Pragmatism in the Conflict of Laws* (Ashgate 2001), 24 and 103ff; Mills, *The Confluence of Public and Private International Law* (CUP 2010), 9ff; Mills, *Party Autonomy in Private International Law* (CUP 2018), 70ff.
[93] [2019] EWHC 3340 (QB).
[94] *Adams,* 500.
[95] Anton (1967), 572.
[96] *Agbara*, [47].
[97] ibid.

the expectation arising out of the rules is upheld in order to ensure fair play between the parties and facilitate the effective regulation of their affairs.

Could this idea extend to the relationship between the claimant, defendant, and the court? It is arguable that the expectations of the parties are only protectable in so far as they relate to the court of origin because it is that court which holds out its rules and practices and creates the expectation. However, returning to Hart's principle of fair play can assist, suggesting that the proceedings result in a dual expectation. If both parties defend the merits of the case, they are engaging according to a joint set of rules, those of the court of origin, and restrict their liberty to seek determination of the dispute elsewhere. Therefore, when the litigants participate in the foreign proceedings, a reciprocal expectation that both parties will abide by their commitment to the rules and the resulting foreign judgment arises. Fair play, as cases like *Novelli, Boissiere* and even *Re Dulles'* recognised, demands upholding those expectations. It can thus be said that the parties hold a dual expectation that the court will apply and the litigants will abide by the rules and outcome of the proceedings. In this sense, it is exactly because of the tripartite relationship between the parties and the court of origin, that a judgment creditor expects their counterparty to comply, and this is made legitimate by the procedural law of the court of origin and the sociolegal nature of the relationship.

Notwithstanding, is the question of legitimate expectations only relevant as a defence, rather than as capable of affecting the competence of the court of origin? Both *Adams* and *Agbara* relied upon natural/substantial justice, a defence to enforcement,[98] so as to justify upholding the expectations of the parties. However, **Chapter Two** demonstrated that the courts have not always delineated between the question of international competence and compliance with English principles of natural justice in the way that is familiar today.[99] As such, it is suggested that the relationship of legitimate expectations with natural justice should not form a barrier.

On that view, the principle of legitimate expectations may also be treated as a variation of Dickinson's argument set out above, namely that 'having invited the court to exercise its adjudicatory jurisdiction, natural justice demands that each party should be bound by the judgment whether it wins or loses'.[100] If it is accepted that upholding legitimate expectations is a facet of natural justice, as *Adams* suggests, the argument of the thesis can also be

[98] See, for instance: *Cheshire* (15 edn, 2017), 576–579.
[99] See 2.3.1.
[100] Dickinson (2019), 317.

accommodated within Dickinson's framework: having invited the court to exercise its adjudicatory jurisdiction, the litigant legitimately expects to be bound by the result.

The final question to consider is when an expectation to comply with the foreign judgment will arise. Considering Hart's principle of fair play, when a claimant enters a claim, they undertake a commitment to comply with the court of origin's procedural rules and, consequently, the resulting judgment. In turn, if the defendant participates on the merits, they will come under an equal obligation to comply. Here, the benefit is the opportunity to be heard and have the dispute determined.[101] As such, whichever party is successful will seek to hold the unsuccessful party to the judgment on the basis that they similarly restricted their liberty and would have kept the commitment were the roles reversed. Upholding this expectation is not only fair, but also respects the autonomous choice of the individual to have the dispute determined before that court.

How should a defendant who appears to contest the jurisdiction of the court of origin be accommodated within this analysis? Surely, a defendant who appears *solely* to contest the jurisdiction does not restrict their liberty in the way just detailed? Consequently, no expectation is created that they will subsequently abide by the judgment handed down. Where the defendant goes further than this, the expectation will depend upon the procedural rules of the court of origin. The same is true of a claimant against whom a counter-claim is entered. Such an approach has already been contemplated by the High Court in *Swiss Life AG v Kraus*, where it was asked whether a litigant in the position of the individual against whom enforcement was sought would have expected to be treated as a unit with the company who had submitted to the court of origin.[102] Conduct which amounts to an indirect engagement with the court of origin may create an expectation of compliance, but this should depend upon the law of the court of origin.

On this view, the act of submission does not necessarily lead to a substantive obligation directly enforceable in the English courts; instead, it looks at whether the combined effect of the conduct of the litigants and the procedural rules of the court of origin are such that the parties legitimately expected to abide by the outcome of the proceedings. In the words of Cave J, the parties need not 'like it', but it is the consequence of their actions and so they should expect to be bound. Within this framework, the principle of legitimate expectations may operate independently or be utilised as more of a 'meta-value' in relation to the other approaches outlined in the chapter. On a consent-based analysis, considering the

[101] This view is endorsed in *Stichting*, [160].
[102] [2015] EWHC 2133 (QB), [67], [79]–[80].

expectations of the parties may improve the balance between the judgment debtor and judgment creditor and explain why the court addressed enforces such an obligation. Both a presence-based and waiver/estoppel-based approach could also be accommodated, though they must necessarily be determined in light of the law of the court of origin.

3.6 Conclusion

The chapter looked at four bases on which the binding force of foreign submission could be explained: consent; presence; waiver/estoppel; and the principle of legitimate expectations. Whilst it might be possible to analyse the conduct of the judgment debtor in terms of consent directed towards the court of origin, it would further narrow the circumstances in which a foreign judgment could be enforced in England. Both on a consent-based and waiver/estoppel analysis, the defendant in the proceedings of the court of origin is placed at an advantage and can attempt to have 'two bites of the cherry' by maintaining a challenge of jurisdiction alongside their defence of the merits. An approach which focuses on the procedural presence of the parties would offer a greater balance between the litigants, but limits the instances in which foreign submission can be established.

Adopting an approach centred on upholding the legitimate expectations allows proper recognition of the relationship which the parties enter into with the court when they participate in proceedings. In essence, the court is holding the judgment debtor to the commitment made before the court of origin by virtue of their submission. A judgment debtor cannot evade enforcement by claiming that they did not consent to the jurisdiction. Instead, their conduct is objectively appraised so as to determine whether they should legitimately expect to be bound by the foreign judgment according to the rules under which they participated in the foreign proceedings. This maintains a more effective balance between the parties and allows the parties to efficiently regulate their affairs in accordance with those rules.

That said, a repeated theme throughout the analysis was the importance of the court of origin's procedural rules and practices to the creation and legitimacy of the expectation. This is emphasised in both *Adams* and *Agbara*. However, **Chapter Two** demonstrated that the courts have not developed a consistent approach to the role of the law of the court of origin. As such, it is necessary to examine the current approach of the courts to the role of foreign law and consider whether a revision is necessary for the legitimate expectations of the parties to be properly upheld.

CHAPTER 4: The Role of Foreign Law

This chapter examines the role of foreign law within the concept of foreign submission. As established in **Chapter Three**, if the binding force of foreign submission is to be explained through the lens of upholding party expectations, it is important to acknowledge the likely impact of the court of origin's rules and practice. This seems particularly prudent for a defendant who is trying to decide whether and, if so, to what extent they should participate in the foreign proceedings. Nonetheless, the courts have not adopted a uniform approach to the role of foreign law in this context.

The chapter begins by tracking the common law's treatment of the law of the court of origin. The rationale for deferring to foreign law is then explored. Whilst legitimate expectations have been and will continue to be advocated for as a key reason for adopting this approach, it is important that other, potentially competing considerations are taken into account. Two are discussed here: comity and efficiency. The challenge that the apparently procedural nature of foreign submission may present in the context of a choice-of-law analysis will also be dealt with. Having argued in favour of a greater deference to the law of the court of origin, the final part of the chapter sets out when the role of foreign law should be limited. Ultimately, the chapter aims to lay out a framework for when and how foreign law should be examined within the concept of foreign submission.

4.1 Establishing the Common Law Approach: Muddied Waters?

It has long been established that the court addressed will not consider the grounds on which the court of origin assumed jurisdiction when determining its competence for the purpose of enforcement.[1] Instead, the question is whether the court of origin had jurisdiction in the 'international sense', which can be established by presence or submission.[2] The rationale of this approach was explained in *Pemberton v Hughes*. In that case, a procedural irregularity meant that the court of origin had not properly established jurisdiction under its own local laws. Rigby LJ contended that the Court of Appeal had 'no right…to inquire into the question whether or not the Court of Florida did or did not act upon a correct view of the law and procedure of its own State'.[3] To get around this, the Court of Appeal instead considered

[1] *Pemberton v Hughes* [1899] 1 Ch 781, 791. This development has been criticised by Dickinson, see Dickinson, 'Schibsby v Westenholz and the recognition and enforcement of judgments in England' (2018) 134 LQR 426.
[2] Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15 edn, Sweet & Maxwell 2012), [14R-054].
[3] *Pemberton*, 794 (Rigby LJ).

the 'international jurisdiction' of the Court of Florida,[4] with the exclusion of foreign law from the analysis of the court of origin's competence, at least in part, based upon a reluctance from the court addressed to interfere with the rules or reasoning of that court.

Post-*Pemberton,* the law of the court of origin has received mixed treatment by the court addressed. As discussed at **2.3.6** and **2.4.3**, foreign law was considered in *Harris v Taylor*[5] and in the High Court decision of *Henry v Geopresco International Ltd.*[6] In *Harris*, both the High Court and the Court of Appeal deemed the procedural rules of the court of origin relevant to the assessment of submission. However, where that law was silent on the procedural effects of the steps taken, at least on the evidence, the courts looked to their would-be effect under English procedural law. The position under the law of the court of origin was also persuasive in the High Court decision of *Geopresco,* concluding that requesting a stay on grounds of *forum non conveniens* should not amount to submission.[7] Nevertheless, when the case came before the Court of Appeal, the procedural effect given to the steps taken by the court of origin was deemed 'irrelevant' and it was held that the judgment debtor had submitted.[8]

The High Court in *Adams* seemed to take a more flexible approach to the question of foreign law:[9]

> If the steps would not have been regarded by the domestic law of the foreign court as a submission to the jurisdiction, they ought not…to be so regarded here, notwithstanding that if they had been steps taken in an English court they might have constituted a submission. The implication of procedural steps taken in foreign proceedings must, in my view, be assessed in the context of the foreign proceedings.

In other words, if the judgment debtor participates in the foreign proceedings, taking a step with a procedural consequence under that court's rules, the significance of those steps can only be understood by reference to the law of the court of origin. If the extent of participation was not sufficient to make the litigant amenable to the jurisdiction of the court of origin under its own rules, the litigant should not be regarded as having submitted in the eyes of the English court. Therefore, Scott J sought to examine the English requirement of foreign

[4] *Pemberton*, 790 (Lindley MR).
[5] (1914) 111 LT 564; [1915] 2 KB 580.
[6] [1976] QB 726 (CA).
[7] See 2.3.6 on this point.
[8] *Geopresco* (CA), 734 – this was statutorily reversed by s33 of the 1982 Act on a different point, see 2.3.7; see also *Tracomin SA v Sudan Oil Seeds Co Ltd (No 1)* [1983] 1 All ER 404.
[9] *Adams v Cape Industries* [1990] Ch 433, 461.

submission *in light of* the law of the court of origin. However, the basis upon which Scott J deferred to foreign law was less clear. As highlighted in **Chapter Three**,[10] Scott J treated submission as a form of consent and so traditional choice-of-law rules relevant to jurisdiction agreements may be applicable by analogy. This is explored at **4.3.1**.

A similar approach was adopted in *Akai Pty Ltd v People's Insurance Co Ltd*,[11] where it was alleged that the judgment debtor had submitted to the court of origin, in spite of an English jurisdiction clause. In considering the *dicta* of Scott J, Thomas J stated that:[12]

> In such cases the effect of the law of the foreign court may well be decisive; there would be some illogicality in an English court finding a person had submitted to the jurisdiction of the foreign court in circumstances in which that court would find he had not submitted.

Therefore, the court addressed could give effect to the decision of the court of origin where it concluded that there had been no submission. However, Thomas J did not consider that the rules of the court of origin should carry the same effect where the judgment debtor had been treated as having submitted. Thomas J relied upon section 32(3) of CJJA 1982, which states that a judgment shall not be enforced where it was handed down contrary to a jurisdiction or arbitration agreement, unless the judgment debtor otherwise submitted to the jurisdiction of the court of origin,[13] to justify that conclusion:[14]

> The converse is not necessarily the case. Section 32(3) makes it clear that the English court is not bound by the decision of the foreign court that a person had submitted; it must follow that an English court is not bound by the characterisation of a step as a submission merely because the law of the foreign court would regard it as a submission.

Though Thomas J was correct not to consider himself bound by the decision of the court of origin on account of section 32(3), the scope of the provision is stretched quite far. On a literal reading, that section only applies where the judgment debtor submitted to the court of origin in breach of a dispute resolution agreement in favour of another court. It does not speak to other instances of submission.

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[10] See 3.3.
[11] [1998] 1 Lloyd's Rep 90.
[12] *Akai Pty*, [34].
[13] See 2.3.7.1.
[14] ibid. [35].

Nevertheless, *Akai* was cited with approval by the Supreme Court in *Rubin v Eurofinance SA*.[15] In the *New Cap* appeal, the judgment debtor had not, according to the court of origin, submitted. However, the Supreme Court made clear that the question of foreign submission should be determined in accordance with English law.[16] The relationship between the common law conception of submission and that of the foreign court was then set out:[17]

> The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them.

The reference to the 'international context' bears similarities to the views expressed in *Adams* and *Akai*, but the approach of the Supreme Court then begins to deviate:

> Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts.

This understanding of the significance of foreign law seems at odds with that of *Akai,* in that Thomas J had considered it an 'illogicality' to find submission where the court of origin had not. Though the reference to 'international context' distanced the decision from the orthodoxy of *Pemberton* to an extent, *Rubin* is inconsistent with the spirit of both *Adams* and *Akai*. It can also be contrasted with the approach of the courts in *Harris*, which gave significant thought to the position under the law of the court of origin.

The decision in *Rubin* was surprising to many,[18] including Judge Barrett, the judge who decided the *New Cap* case in the court of origin:[19]

> I was unaware that the defendants had submitted to the jurisdiction until…the decision of the UK Supreme Court. The case…at all times proceeded on the very

[15] [2013] 1 AC 236 (SC).
[16] *Rubin*, [161].
[17] ibid.
[18] See, for instance: Briggs, *Civil Jurisdiction and Judgments* (Informa Law 2015), [7.53].
[19] Barrett, 'Commentary on "cross-border insolvency – judicial assistance in the post-hoffman era"' (2013) http://www.austlii.edu.au/au/journals/NSWJSchol/2013/26.pdf accessed 6 January 2022.

> clear footing that there had been no submission to the jurisdiction. The liquidators never sought to argue otherwise.

This highlights the peculiarity which arises out of *Rubin*. In the *New Cap* appeal, the judgment debtor had done everything right, so to speak. They had conducted themselves in such a way so as to avoid being found to submit to the jurisdiction court of origin, assured by its rules and practice. This was enough for the court of origin, but not for the court addressed. In that regard, it seems that at least part of the issue is that section 32 was stretched too far in *Akai* and, in turn, *Akai* was stretched too far in *Rubin.* This seems to reduce the significance of the court of origin's perspective, with arbitrary references to foreign law and increased uncertainty for all parties.

Within this framework, minimal regard seems is given to the legitimate expectations of the litigants, who are left in the difficult position of determining how their conduct will be determined if enforcement is sought and unable to properly 'regulate their affairs' as a result. Therefore, *Rubin* raises the question of when, and if so how far, the court addressed should go in taking account of procedural law of the court of origin.

4.2 Justifying deference to the law of the court of origin

At least since *Pemberton,* the courts have agreed that the *lex fori* of the court addressed should set the parameters for when the court of origin will be considered competent.[20] However, that does not prevent the court addressed deferring or, at least, referring to the law of the court of origin within those parameters.[21] Accordingly, it is important to understand the rationale behind any reference to that law. Though the thesis focuses on the legitimate expectations of the parties, the potentially competing values of comity and procedural efficiency are also considered here.[22] Ultimately, the aim is to determine why the court addressed should or should not defer to the law of the court of origin when analysing the conduct of the judgment debtor.

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[20] *Rubin*, [161].

[21] Discussed at 4.3.

[22] See Fentiman, 'Realism in Private International Law' (*University of Cambridge* 2018) < https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.law.cam.ac.uk/documents/realism_in_private_international_law.pdf> accessed 6 January 2022, where justice, comity and efficiency are identified as 'first-order values' of private international law.

4.2.1 Respecting the Parties' Legitimate Expectations

As explained,[23] fulfilling the legitimate expectations of the parties can promote fair play between litigants and lead to an effective organisation of their affairs. In the choice-of-law context, the court in question strives to apply the law which the parties would have reasonably expected to apply to the issue at hand. This may be done directly, as was the case in *Stichting Shell Pensioenfonds v Krys*, where it was asked which law a reasonable investor in the position of the litigant would have expected to apply.[24] It may also be achieved indirectly, through the application of a specific choice-of-law rule.[25]

Fundamentally, the court should consider which law a reasonable person in the position of the litigant would have expected to apply at the time of the proceedings. In the context of submission, this means asking which law the parties reasonably expected their conduct to be measured against. This issue was considered by Lord Tenterden CJ in the case of *De la Vega v Vianna*,[26] where he stated that 'a person suing in this country must take the law as he finds it'.[27] It can be argued, in the context of foreign submission, that a claimant reasonably expects the *lex fori* to apply to the procedure of the proceedings and that their conduct will be adjudged by that law as a result. However, that is not to say that a reasonable defendant will hold the same expectations. There is evidently a distinction to be drawn between a claimant who selects their tribunal in anticipation of that law applying and a defendant who is called to defend the claim. In fact, the claimant may well have identified the *lex fori* as more favourable to their position. The same cannot be said of a defendant, especially a non-resident defendant who is summoned into the jurisdiction of the court of origin. When, then, will a reasonable defendant expect the law of the court of origin to determine the procedural effects of their conduct?

The approach of Scott J to the expectations of the parties in *Adams* is instructive here. He contends that 'the implication of procedural steps taken in foreign proceedings must…be assessed in the context of the foreign proceedings'[28] and the procedural rules of the court of origin influence 'the legitimate expectation of both the plaintiff and the defendant'. As argued at **3.5**, this expectation is made legitimate by a combination of the procedural law of

[23] See 1.3.
[24] [2015] AC 616 (PC), [43].
[25] Nygh, 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort' (1995) 251 Recueil des Cours 269.
[26] (1830) 1 Barnewall and Adolphus 284.
[27] ibid. 793.
[28] See n 9.

the court of origin and the relationship between the litigants and the court of origin, under which the rules and practices of that court are treated as a commitment that should be kept. On this view, it can be said that when a reasonable defendant participates in proceedings, they should expect their conduct to be adjudged according to its procedural rules and practices. It is that participation which will justify deference to foreign law. The question must then become what level or nature of participation is necessary before a legitimate expectation will arise.

A reasonable defendant who has never engaged with the court of origin, formally or informally, directly or indirectly, would not expect their conduct to be assessed under that law. Conversely, a defendant who engages on the merits unreservedly indicates an intention to have their argument adjudged under the law and procedure of that court and thus reasonably expects the same. What about the 'harder' cases in which the defendant's conduct is more equivocal? The facts of *Harris* and *Akai* are examined by way of example.

In *Harris*, the defendant took the step of entering a conditional appearance to contest the jurisdiction of the court of origin. From a subjective perspective, it could be argued that the defendant did not expect the law of the court of origin to apply, since they specifically contested that eventuality through the objection. However, from an objective perspective, a reasonable defendant who has participated in the foreign proceedings, relying on the procedural effects of objecting to the jurisdiction of the court of origin under the rules of that court, must reasonably expect their conduct to be measured against the *lex fori*, to the extent that those consequences are foreseeable.

Similarly, in *Akai*, the defendant filed a notice of appearance before the court of origin to request a stay of proceedings on the basis of an English jurisdiction clause. The procedural rules of the court permitted a defendant to request a stay without formally appearing and so the formal appearance was treated as a submission by the court of origin. Again, it could be argued that, subjectively, the defendant expected their conduct to be measured against the English *lex fori*, as the English courts were designated in the agreement. However, from an objective perspective, a reasonable defendant who files an appearance under the rules of the court to facilitate the request must surely expect that step to be adjudged 'in the context of the foreign proceedings' and thus by reference to the procedural law of the court of origin? Therefore, in *Akai*, the defendant should have expected their filing to be treated as a submission according to the procedural law of the court of origin. Notwithstanding, in *Akai*, the High Court relied upon section 32 and 33 of the CJJA 1982 to conclude that the step taken should not be regarded as a submission. Therefore, if, as is argued, it is correct to

contend that a reasonable defendant would expect the law of the court of origin to determine the procedural effects of their steps, it raises a key question, considered below, as to when and how, in spite of the legitimate expectations of the parties, the role of foreign law should be limited.

What about in a situation such as *Rubin*, where the defendant had participated in the insolvency proceedings but refused to formally participate in the proceedings before the court of origin? The defendant did informally engage by entering written comments to that court, but was careful not to enter a formal appearance under the court of origin's *lex fori*. The logic of Scott J in *Adams* can thus equally apply here, with it being necessary to analyse the implications of the defendant's steps 'in the context of the foreign proceedings'. Moreover, by analogy with *Stichting*,[29] it is arguable that a reasonable defendant who has participated in the insolvency process according to the law of the jurisdiction would similarly expect the avoidance proceedings in the same jurisdiction to be governed by the same law. In this sense, the participant in the insolvency remains sufficiently connected to the law of the court of origin to reasonably expect its application.

On this approach, a reasonable defendant will legitimately expect the law of the court of origin to apply to steps taken, directly or indirectly, in relation to the foreign proceedings. The consequence of taking this approach, as explained above and in the previous chapter, is that both the claimant and the defendant are able to determine how their conduct will be interpreted by reference to that foreign law. This will allow the parties to effectively regulate their affairs before the jurisdiction of the court of origin and limits the extent to which a party, in particular a defendant, can escape the effects of the rules of that court through a challenge to jurisdiction. This challenge should be given effect in the context of the foreign proceedings, whether this results in a finding of submission or not.

4.2.2 Comity

Comity has been described as 'notoriously elusive'[30] and 'employed in a meaningless or misleading way'.[31] This might suggest that comity is too vague a concept to advance an argument on why the court addressed should defer to the law of the court of origin. However, there is growing support for comity as an underlying policy consideration which can

[29] See n 23.
[30] See Fentiman (2018), 3.
[31] Torremans (ed), *Cheshire, North & Fawcett: Private international law* (15 edn OUP 2017), 4 and 527.

motivate a shift in the approach to the enforcement of foreign judgments.[32] In this context, comity can '[play] a more general role in determining the appropriate scope of the applicable law and judicial power'.[33]

Therefore, within the context of foreign submission, judicial comity should factor into the calculation of which law most appropriately applies. This means giving due regard to the court of origin's ability to apply its own laws correctly and regulate its own affairs, as well as its territorial reach and power over the litigants before it. In that framework, the effect of the steps taken will have already been determined by the court of origin in the original proceedings. If comity means respecting the sovereignty of other states, including its exercise by the courts of the country, the court addressed should take account of the perspective of the court of origin.

Interestingly, in *Pemberton*, the Court of Appeal considered that it risked undermining the court of origin by re-examining the application of the court of origin's own law. However, a distinction can and should be drawn between reviewing and criticising the court of origin's application of the law to the merits and referencing its procedural rules and practice so as to properly understand the conduct of the judgment debtor. Ignoring foreign law in the latter instance seems to fall on the side of disregard for the competence of the court of origin.

Therefore, if the court of origin, in the regulation of its own proceedings, does not consider the defendant to have engaged its jurisdiction, comity suggests that this determination should be upheld. Similarly, if the defendant has taken steps before that court, comity indicates that they should be given their true procedural effect in accordance with the law of the court of origin. As with the principle of legitimate expectations, comity favours examining the judgment debtor's conduct 'in the context of the foreign proceedings'.

[32] See, for instance: Chong, 'Recognition of foreign judgments and cross-border insolvencies' [2014] LMCLQ 241, 250; Adrian Briggs, 'The Principle of Comity in Private International Law (2012) 354 Recueil des Cours 65, Ch I and IV; Ho, 'Policies underlying the enforcement of foreign commercial judgments' (1997) 46 ICLQ 443, 450ff.

[33] Schultz and Mitchensen, 'Rediscovering the Principle of Comity in English Private International Law' (2018) 3 European Review of Private Law 311, [11].

4.2.3 Efficiency

Efficiency was an essential benefit of EU rules on jurisdiction and enforcement,[34] and a key motivator in the evolution of the HCCH's new Judgments Convention.[35] It should thus remain an important value post-Brexit. However, the choice-of-law process is sometimes said to go against considerations of efficiency generally, because taking and examining evidence on a law with which the judge is unfamiliar can extend the duration of the proceedings and result in greater costs for both litigants.[36] This is a particularly popular school of thought regarding foreign procedural law.[37] Therefore, in the context of foreign submission, it could be argued that efficiency should prevent the procedural law of the court of origin being deferred to. In turn, the ad hoc role given to foreign law in *Rubin* might be viewed as the most efficient because it limits the need to refer to this law altogether.

However, the approach of *Rubin* can (and did) produce an unpredictable outcome for the defendant who chooses not to participate. It can also result in an inefficient use of resources because the litigants do not know the extent to which the law of the court of origin will be referred. It may thus be contended that deference to the foreign law is in the interests of justice, even if it impacts on the overall efficiency of the enforcement proceedings. Moreover, a key aspect of efficiency under both the EU and the HCCH regimes is the free circulation of foreign judgments, which is considered to provide a tangible economic benefit. The current approach of the English courts places a strain on the free flow of judgments, with foreign submission permitting the judgment debtor to take more steps, considered submission under foreign law, without being held to submit. This, in turn, has an impact on the enforceability of foreign judgments and reduces efficiency overall.

4.2.4 The Rationale for Deferral

Overall, there is a clear case for greater deference to the law of the court of origin. A reasonable litigant who participates in the original proceedings should expect their conduct to be adjudged by the court of origin's rules and practices. Similarly, comity, as a policy consideration, can highlight the value of including foreign law in the assessment of the

[34] Mills, 'Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?' (2016) 65 ICLQ 541, 549 and 550.

[35] Garcimartín and Saumier, *Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (The Hague Conference on Private international law– HCCH Permanent Bureau 2020).

[36] But Fentiman has consistently argued that this process can be made more efficient, see, for instance: Fentiman, *Foreign Law in English Courts* (OUP 1998), Ch VII.

[37] Cheshire (15 edn, 2017), 73; Garnett, *Substance and Procedure in Private international law* (OUP 2012), [2.09].

litigants' alleged foreign submission. Balanced against these factors, though considerations of efficiency may favour the English *lex fori*, fully eliminating foreign law from the assessment of the judgment debtor's conduct would undermine legitimate expectations of the parties and diminish the court of origin's ability to regulate its own affairs.

Nonetheless, as mentioned, the English courts have traditionally avoided the application of the procedural law of other states, justified in part on considerations of efficiency. Therefore, it is necessary to consider whether foreign submission is properly a matter of procedure and if this is a barrier to deferral.

4.3 Submission as a Matter of Procedure: a Barrier to Deferral?

Matters of procedure have typically been reserved for the *lex fori*, with the consequence that the English courts will not apply the procedural laws of another country,[38] even if the question would be characterised as a matter of substance at common law. This presents a key challenge for the thesis being developed here. If a distinction is drawn between submission to the local adjudicatory jurisdiction of the court of origin and its international jurisdiction, the former is clearly governed by the *lex fori* of that court at the time of proceedings but the latter, as a concept of common law, is a matter for the *lex fori* of the court addressed. This means that, either way, the procedural law of the court of origin appears to be excluded from the analysis. Not only does this risk defeating the legitimate expectations of the parties and go against comity, but it also does not accord with judicial practice. It was demonstrated at **4.1** that the court addressed does, to a degree, consider the law of the court of origin so this shows that the characterisation of matters as substantive or procedural is not, in practice, so rigid a process.[39]

The unravelling of this classical distinction between substance and procedure can also be noted more generally. For example, there has been a growing trend in favour of characterising issues as substantive so as to justify deference to a foreign law.[40] In the alternative, the English courts have indirectly taken account of foreign law by applying the *lex fori* with a 'broad, internationalist spirit'.[41] As such, there are two related avenues by

[38] *Harding v Wealands* [2007] 2 AC 1 (HL); Cheshire (15 edn, 2017), 77.
[39] *Akai* is interpreted similarly in Garnett, *Substance and Procedure in Private International Law* (OUP 2012), [6.82].
[40] Fentiman, 'Foreign law in National Courts: a common law perspective' in Andenas and Fairgrieve, *Courts and Comparative Law* (OUP 2015).
[41] *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC* [2001] QB 825 (CA).

which deference to the law of the court of origin might be justified: first, by characterising the question of submission as a matter of substance; or, in the alternative, by the application of a 'broad, internationalist spirit' to the question of foreign submission. This latter approach is akin to two choice-of-law ideas, both of which will be considered: Kahn-Freund's 'enlightened' approach and the *Datum* theory.

4.3.1 Submission as a Matter of Substance

If submission were to be viewed as a matter of substance, it would resolve much of the difficulty just highlighted in justifying the application of the law of the court of origin. Considering the findings of the previous chapters – that submission might amount to the undertaking of a foreign-created substantive obligation – there is certainly merit in this argument.

The approach of Briggs, treating foreign submission as the basis of a bilateral agreement, most obviously accommodates a substantive characterisation. In principle, if the only distinction between submission by participation and by prior agreement is the time at which consent is given, the same choice-of-law rules could apply. In *Vizcaya Partners Ltd v Picard*,[42] the Board held that the 'real question' was whether the judgment debtor had consented in advance to the jurisdiction of the court of origin according to the proper law of the contract, which elected New York law. The Board concluded that a jurisdiction agreement could not be implied on the facts. That the proper law might require a reference to the procedural rules of the foreign court was not considered a barrier to deferral.

Could a similar approach be adopted in relation to submission by participation? In theory, if the argument of Briggs were to be accepted, it might be a viable option, but he has not addressed how the applicable law should be ascertained from submission by participation. One option may be to apply Article 4(4) of Rome I by analogy,[43] which provides for 'the law of the country with which [the contract] is most closely connected'. On this view, where both parties have submitted to proceedings in the court of origin, the *lex fori* of that court would be most closely connected. However, this proceeds on the basis that a bilateral agreement formed by virtue of participation is not a jurisdiction agreement. If it were successfully argued that it does effectively amount to such an agreement, it would be excluded from Rome I under Article 1(e) and, unlike with traditional jurisdiction

[42] [2016] Bus LR 413 (PC).
[43] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

agreements, there would not necessarily be a related host contract from which a proper law could be ascertained. This seems to further compound the argument of the previous chapter that it is not practicable to analyse the act of submission in terms of a bilateral agreement.

Is there another way in which the act of submission by participation could be characterised as a matter of substance? By way of reminder, in *Adams,* the steps which brought about the aforementioned substantive obligation were treated as procedural. On a narrow view, the court addressed cannot consider those steps according to the procedural law of the court of origin. However, in *Pandya v Intersalonika General Insurance Co SA*,[44] it was held that the service of a claim form to interrupt a limitation period, normally considered an inherently procedural step, could not be 'severed, carved out or downgraded to a matter of mere procedure'.[45] Therefore, the English court referred not only to the foreign limitation period as a matter of substance, but also the rules for when that period could be interrupted and how. In that case, it meant considering whether service of the claim form had been properly effected according to foreign law so as to interrupt the foreign limitation period.

It is possible to consider the procedural steps leading to the undertaking of a substantive obligation in the same way – if the substantive obligation is imposed in accordance with the law of the court of origin, it can also assist in determining the effect of the procedural steps taken. This could explain the approach taken by the Court of Appeal in *Desert Sun Loan Corp v Hill,*[46] where it was held that submission related to a procedural right. Notably, the Court of Appeal did not attempt to identify the procedural right in question, though the conclusion seemed to derive from the fact that the interlocutory proceedings determined matters of procedure. Even if it were clear that the court of origin was dealing with the 'procedural' right to be heard, it is reasonable to suggest that this could not be 'severed, carved out or downgraded to a matter of mere procedure', given its implications for the subsequent determination of substantive rights and obligations.

Therefore, though a contractual choice-of-law analogy is not practicable, and may indeed further undermine the consent-based analysis of **Chapter Three**, foreign law might be accommodated by taking a broader approach to what is meant by substantive, as in *Pandya*.

[44] [2020] EWHC 273 (QB), applied in *Johnson v Berentzen* [2021] EWHC 1042 (QB).
[45] *Pandya*, [40].
[46] [1996] ILPr 406 (CA).

4.3.2 An Internationalist Spirit

Over the last quarter century, there has been a growing trend in the process of characterisation to apply the *lex fori* with 'a broad internationalist spirit'. This was endorsed by Mance LJ in *Raiffeisen,* where he explained that the 'the overall aim [was] to identify the most appropriate law to govern a particular issue.'[47] This has led to the *lex fori* being applied in light of the relevant foreign law.

This bears similarities to Sir Otto Kahn-Freund's 'enlightened approach'.[48] According to Kahn-Freund, concepts existing in the common law should be given an adjusted meaning by the courts when determining cross-border disputes so as to properly appreciate their international element. Garnett has argued that the courts have implicitly adopted Kahn-Freund's 'enlightened approach' to the question of foreign submission.[49] This is certainly evident in *Adams* and *Akai* and there is even such an inkling in the *dictum* of Lord Collins when he refers to the 'international context' in *Rubin*.[50]

Brainerd Currie's *Datum* theory, endorsed by Albert Ehrenzweig,[51] may be thought of as a moderately more formal means of bringing foreign law into this formulation. Where a foreign rule or fact is perceived by the court addressed as relevant to the dispute in question, it is treated as local data, but does not require a rigid choice-of-law rule.[52] A similar approach was recognised by the Court of Appeal in *Joint Stock Company (Aeroflot -Russian Airlines) v Berezovsky & Anor*.[53] In that case, the Court of Appeal undertook a choice of law enquiry with regard to the finality principle and held that:[54]

> English law lays down the requirements for a final and binding judgment but the incidents in fact of the foreign judgment must be determined by foreign law.

In other words, whilst English private international law might control the requirements for the enforcement of foreign judgments (here finality), the factors relevant to the determination of the requirement were drawn from foreign law. This reasoning was derived from the

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[47] *Raiffeisen,* 840.
[48] Kahn-Freund, 'General Problems of Private International Law' (1980) 143 Recueil de Cours 139.
[49] Garnett (2012), [6.82].
[50] A similar view was endorsed by Green J in *Swiss Life Assurance v Kraus* [2015] EWHC 2133 (QB), where it was stated that foreign law was 'relevant and admissible but not conclusive'.
[51] Basedow et al (eds), *Encyclopedia of Private international law* (Edward Elgar Publishing 2017), Chapter E.2: Ehrenzweig, Albert A; for a criticism of the *Datum* theory, see Gotlieb, The incidental question revisited: theory and practice in the conflict of laws' (1977) 26(4) ICLQ 734.
[52] Kay, 'Conflict of Laws: Foreign Law as *Datum'* (1965) 53(1) California Law Review 47.
[53] [2014] EWCA Civ 20.
[54] *Berezovksy,* [36].

decision of Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd*,[55] which considered the availability of issue estoppel in relation to points raised in the court of origin as a defence in the court addressed. Lord Reid recognised that issue estoppel was a question for the *lex fori* but that it 'ought to be developed in a manner consistent with good sense' and that it would 'verge on absurdity' to regard as conclusive something which the court of origin would not have done.

Arden LJ treated this akin to a choice-of-law rule, referencing foreign law in so far as it related to the requirement of finality. This was justified on the basis that concerns about being unfamiliar with foreign procedure were only relevant if foreign law was in application (though the result was effectively the same).[56] In other words, the Court of Appeal managed to circumvent the procedural challenge by applying the *lex fori* in an internationalist spirit, but treating the foreign law as determinative.[57] This is highlighted by the use of the words 'must be', though its application, even as local data, must have remained subject to the usual enforcement exceptions like natural justice and public policy.[58]

Therefore, it could similarly be argued that the *lex fori* sets down the requirement of foreign submission as a prerequisite to judgment enforcement, but the law of the court of origin must be relied upon to determine whether the procedural steps taken constitute such a submission. Treating the foreign law as determinative limits the risk of arbitrary justice introduced by *Rubin.*

4.3.3 Finding the Right Approach

Considering both of the options proffered, it is clear that each carries benefits which are in keeping with the rationale for deferral expressed in the previous section. If foreign submission and its associated procedural steps were to be characterised as a matter of substance, the legitimate expectations of the litigants would be upheld, with greater certainty as to when the law of the court of origin would be relevant. This approach also fully acknowledges the importance of the foreign court's determination of the parties' conduct, thereby respecting comity. Nevertheless, **4.3.1** highlighted the difficulty that could arise in developing a workable choice-of-law rule, which may ultimately be fatal to this approach.

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[55] [1967] 1 AC 853 (HL), 919.
[56] *Berezovsky*, [33] – this was similarly argued by Arden LJ in the Court of Appeal in *Harding* [2005] 1 WLR 1539 (CA), [52].
[57] A similar approach was taken by the English courts in *Bumper Development Corp v Commissioner of Police for the Metropolis* [1991] 1 WLR 1362 (CA).
[58] *Berezovsky*, [45].

Expressly adopting an 'internationalist spirit' to the question of foreign submission, through an 'enlightened approach' or treating foreign law as *datum,* would be more flexible than the alternative, not requiring a formalistic choice-of-law process. This may better permit the court addressed to adjust its approach depending upon the legitimate expectations arising out of the circumstances of the litigants. However, the ultimate conclusion of the Supreme Court in *Rubin*, which went against the law of the court of origin, might suggest that approaching the question of foreign law in an 'internationalist spirit' can be easily undermined. Openly acknowledging the importance of the legitimate expectations of the parties to the choice-of-law analysis could prevent such an eventuality.

Whichever approach is to be preferred, there is a clear advantage in expressly recognising the approach to be adopted by the court addressed when assessing the litigant's conduct before the court of origin. Not only will this improve efficiency, but it will also clarify how the legitimate expectations of the parties and notions of comity are to be placed within the framework being laid out. Even so, it is important to acknowledge that the application of foreign law is never unfettered in the English courts and so the circumstances in which deferral will not be appropriate must be considered.

4.4 Limitations to Deferral

Thus far, it has been explained why the law of the court of origin should hold a greater role in the analysis of foreign submission, as well as how the law governing an apparently procedural issue can be examined in the court addressed. However, these findings do not necessarily determine when the law of the court of origin should apply. As such, it is necessary to consider in what instances an otherwise-applicable rule of the court of origin might justifiably be circumvented by the court addressed.

The approach adopted in *Akai*, as Lord Collins suggests in *Rubin,* may indeed form the starting point for the correct approach. There, confined by the mandatory nature of section 32, Thomas J considered that there could not be a finding of submission,[59] despite the judgment debtor having submitted according to the law of the court of origin. In *Akai*, it was treated as a general rule of practice that the English courts will never be bound by a finding of submission. However, *Akai* could, instead, be treated as highlighting a public policy

[59] See n 13.

limitation, manifested through section 32. This would significantly narrow the scope of that case.

On this premise, it would have to be accepted that the enforcement of a foreign judgment, handed down in breach of a dispute resolution agreement, would be contrary to English public policy. *AES Ust-Kamenogorsk Hydropower Plant LLP* supports this view,[60] with English public policy described as favouring the enforcement of dispute resolution agreements and section 32 as a manifestation of that view.[61] Notwithstanding, it has long been established that public policy should be given a narrow meaning and that a rule should not be viewed as contrary to that condition simply because English law would have decided the issue differently.[62] Therefore, the defence of public policy may be pushed too far by this approach. In the alternative, section 32 could be treated as a statutory manifestation of English principles of substantial justice, a safeguard from enforcement recognised in *Pemberton.*[63]

This approach could similarly apply to section 33 of the 1982 Act. Again, section 33 could be treated as a matter of English public policy which should override an otherwise-applicable law, but it may be difficult to justify. Whilst it seems more palatable to suggest that a foreign judgment handed down against a defendant under duress would go against English public policy, it is less clear that treating an appearance under protest would cause to offend in the same way. As such, it is more agreeable to interpret section 33 as placing into statute a non-exhaustive list of actions which, if held to constitute submission, would offend notions of English substantial justice. In turn, this would represent a defence to enforcement of the foreign judgment, rather than determining the meaning of foreign submission. On this approach, section 33 should be given its literal meaning, limiting the extent to which a judgment debtor can evade enforcement.

A similar view has been endorsed by Dickinson in the context of conditional appearances. Dickinson argues that, where the law of the court of origin requires 'the defendant to choose between challenging the jurisdiction and defending the claim, there would be a strong case for refusing recognition'.[64] Otherwise, where the defendant has voluntarily participated on

[60] [2011] 2 Lloyd's Rep 233 (CA).
[61] *AES,* [151].
[62] Cheshire (15 edn, 2017), 133–135.
[63] *Pemberton*, 796.
[64] Dickinson (2019), 312–313.

the merits, they should 'take the foreign court's procedural rules as they find them'.[65] This recalls the dictum of Lord Tenterden in *De La Vega*.[66]

The same may be said where the rules and practice of the court of origin undermine the litigant's Article 6 right to a fair hearing.[67] This may be particularly true of section 33, if the rules of the court of origin are such that the judgment debtor could not appear for one of the purposes enunciated in that section without having been held to have submitted. Article 6 recognises the importance of having an opportunity to be heard,[68] similar to that laid out in *Agbara*.[69] This includes when determining whether a foreign judgment should be enforced in the court addressed of a contracting state.[70] In other words, if the rules and practice of the law of the court of origin are such that insignificant steps taken are treated as submission; the litigant cannot properly contest the jurisdiction of the court of origin; plead a dispute resolution agreement; or dispute the seizure of goods, this could be in breach of Article 6. Though, in principle, Article 6 is not to be interpreted restrictively,[71] it seems likely that the circumstances in which the court of origin's rules and practice could be found to be in breach, leading the court addressed to refuse to take them into account, will be rare.[72]

4.5 Conclusion

When assessing the participation of the judgment debtor in proceedings before the court of origin, the court addressed should turn its mind to the procedural law of the court of origin so as to properly determine the procedural effects of steps taken. This approach upholds the legitimate expectations of the parties, which, in turn, better facilitates the parties in the regulation of their affairs and leads to a more efficient use of resources overall. It also ensures fair play between the litigants, with the extent to which a defendant can evade enforcement by the maintaining of a jurisdictional challenge limited to its permitted effect under the law of the court of origin. The recommended approach also better accords with modern notions of comity.

[65] Dickinson (2019), 312–313.
[66] See 4.2.1.
[67] European Convention on Human Rights 1950.
[68] See, for instance: *Donadze v Georgia* [2006] ECHR 199 § 35.
[69] See 3.5.
[70] *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745.
[71] *Moreira de Azevedo v Portugal* (1990) 13 EHRR 721.
[72] *Government of the United States of America v Montgomery (No 2)* [2004] 1 WLR 2241 (HL).

It was further argued that the apparently procedural nature of the steps taken before the court of origin should not be a barrier to deferral. This can be justified by characterising the act of submission as substantive or analysing it with an ‘internationalist spirit’. That said, the role of foreign law should not be unfettered. Where the procedural rules and practice of the court of origin do not allow the judgment debtor to appear solely for one of the purposes outlined in section 33, the court addressed will be justified in refusing the application of foreign law. This would limit the instances in which a judgment debtor could evade enforcement and lead to more predictable enforcement outcomes. Within this framework, sections 32 and 33 operate as defences to enforcement, rather than determine the meaning of foreign submission.

Conclusion

Understanding the conceptual meaning and theoretical underpinning of foreign submission is fundamental to the enforcement of foreign judgments as a whole. Ever since Dicey's 'principle of submission' was introduced, there has been an ongoing debate as to where the line should be drawn in terms of the conduct that a judgment debtor should be able to engage in without being held to submit to the court of origin's jurisdiction. The currently prevailing concept of foreign submission, under which a judgment debtor can participate in foreign proceedings if they maintain a jurisdictional challenge, is too narrow in its triggers, but too broad in effect.

It is too broad because the scope of the judgment debtor's alleged submission can extend to further claims entered against them, even those not contemplated at the time of the initial participation. In *Rubin v Eurofinance*, this went as far as deeming a judgment debtor's submission to insolvency proceedings to extend to a subsequent claim entered against them. It is too narrow in the sense that a defendant can take various steps before the court of origin without submitting, so long as they are not *only* useful to a defence of the merits. This is the product of an overly expansive (and inaccurate) interpretation of section 33 of the CJJA 1982, the use of the *Rein v Stein* waiver test, and a more recent trend in favour of a consent-based analysis. This creates a significant imbalance between the parties, with a successful claimant potentially having to exhaust further resources in relitigating if the unsuccessful defendant can rely on a jurisdictional challenge to evade enforcement.

Chapter Three accepted that a consent-based analysis of the judgment debtor's conduct could result in a narrowing of the scope of foreign submission, limiting the effects of *Rubin*. Nevertheless, contrary to the view of Briggs, consent cannot adequately explain why the act of submission results in an enforceable obligation. Moreover, it would further exacerbate the current imbalance existing between the claimant and defendant. Maintaining a theory of waiver and estoppel would be similarly afflicted, especially if determined according to English law. Treating the participation of the litigants as procedural presence does not create the same difficulties, though it must be stretched quite far to accommodate modern conceptions of foreign submission and it would certainly require reference to the law of the court of origin. **Chapter Four** confirmed that such an approach could be adopted by the English courts.

However, the thesis has contended that the binding force of foreign submission is better explained by reference to the legitimate expectations of the parties. Whether a judgment

debtor legitimately expects to be bound by the foreign judgment will depend upon the extent of their participation within the jurisdiction of the court of origin and the procedural effect of those steps under that law. The source of the legitimacy of the expectation is a combination of the procedural laws of the court of origin and the relationship between the litigants and the court. Where an individual commits to abide by the rules of the court of origin, and seeks to benefit from the counterparty's similar commitment, they should be held to this, as well as the outcome of the proceedings. This idea of fair play has been consistently relied upon by the English courts in explaining why a judgment debtor should be bound by the resulting foreign judgment.

Within this framework, the law of the court of origin holds a crucial role. Whether the English condition of foreign submission has been met should depend primarily on the procedural consequence of their participation under that law. For instance, if those rules permit the litigant to take certain steps or participate in a certain way without becoming formally subject to its jurisdiction and the resulting judgment, and the judgment debtor took those steps, they should not legitimately expect to be bound. This should be respected by the court addressed. Conversely, if the judgment debtor's participation is sufficient to amount to the foreign equivalent of submission under the court of origin's rules, this should similarly be respected.

If a judgment debtor has gone further than contesting the jurisdiction of the court of origin, per section 33, the waiver of that objection should be determined in accordance with the law of the court of origin, not the *Rein* waiver test. This will promote a greater balance between the claimant and defendant, with the latter unable to evade enforcement on the basis of a continued objection to the jurisdiction of the court of origin. The procedural nature of the foreign law being examined should not be a barrier to deferral, except where those rules are held contrary to English notions of natural justice, by virtue of sections 32 and 33 of the CJJA 1982, or where they infringe on the judgment debtor's Article 6 right.

Looking forward, it would be useful to examine the viability of this approach under the framework of the Judgments Convention. Saumier, for example, has suggested that the extent to which a consent-based analysis is preferred may impact on its interpretation and carry implications for enforcement under the Convention.[1] Moreover, analysing the conduct of the litigants from the perspective of legitimate expectations may be capable of explaining the binding force of foreign judgments more generally. It could also be argued that

[1] Saumier, 'Submission as a Jurisdictional Basis and the HCCH 2019 Judgments Convention' (2020) 67 Netherlands International Law Review 49, text to footnote 4.

jurisdictional rules protecting ‘weaker’ claimants, including consumers and employees, might affect the legitimate expectations of the parties. This would require further investigation.

Overall, this approach maximises fair play between the litigants and creates greater certainty as to when their conduct will constitute foreign submission and why it carries binding force. The question for the English courts should be whether the judgment debtor legitimately expected to be bound by the foreign judgment.

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