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THE PURPOSE OF THE GATEWAYS FOR SERVICE OUT OF THE JURISDICTION

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Abstract This article argues that the purpose of the English gateways for service out of the jurisdiction is to identify a presumptive meaningful connection; that courts have used different mechanisms to rebut the presumption of a meaningful connection established by the gateways; and that there are lessons to be learnt from a clearer, more explicit understanding of this presumptive purpose of the gateways. The article uses *Brownlie* (*I* and *II*) and *Fong v Ascentic Ltd* to support and illustrate these arguments.

Keywords: private international law, service-out jurisdiction, gateways, common-law jurisdictions, 'letter and spirit' principle, presumption of meaningful connection.

I. INTRODUCTION

In many common-law jurisdictions, the court's personal jurisdiction over defendants who are not present in forum territory depends on the claimant's ability to bring themselves within 'the gateways' for service outside of the jurisdiction. The gateways were first introduced in England in the nineteenth century and continue to be a staple of jurisdictional decision-making, including in Australia, New Zealand, Singapore and Hong Kong. This article argues that the purpose of the gateways is to identify a presumptive meaningful connection; that courts have used different mechanisms to rebut the presumption of a meaningful connection established by the gateways; and that there are lessons to be learnt from a clearer, more explicit understanding of the presumptive purpose of the gateways. In particular, there has been much debate about whether the gateways should be construed narrowly or widely, and this article shows that, in some cases, a 'wide' approach to interpretation is consistent with the presumptive nature of the gateways.

This argument is of particular relevance to recent disagreement about the scope of the gateway for torts claims, insofar as the gateway identifies damage sustained in the jurisdiction as an available head of jurisdiction. It has been hotly debated whether the gateway applies to so-called 'indirect damage', which is continuing or consequential damage following an initial event of damage in a foreign country (for example,

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ongoing disability or medical costs in England after the sustaining of personal injury in an accident outside of the jurisdiction). Thus, in *Brownlie v Four Seasons Holdings Inc* (*Brownlie I*) and *Brownlie v FS Cairo (Nile Plaza) LLC* (*Brownlie II*), the minority emphasised that the purpose of the gateways was to identify a substantial and 'not merely casual or adventitious link' to the forum and that, therefore, the tort gateway had to be construed narrowly;[1] but the majority considered that it was permissible to construe the gateway more broadly, consistent with both the gateway's natural and ordinary meaning and its purpose.[2] In *Fong v Ascentic Ltd*, Lord Collins—sitting as a non-permanent judge of the Hong Kong Final Court of Appeal—explicitly disagreed with the proposition that the purpose of the gateways was to require a non-tenuous connection and decided that the court had to apply the wider, natural and ordinary meaning of the gateway.[3] This article shows that these differences in opinion can, in part, be explained by reference to the gateways' purpose of a presumptive meaningful connection.

The argument is broken down into two steps, following a brief overview of the gateways for service out of the jurisdiction (Section II). The first step is to demonstrate that the gateways have the purpose of establishing a meaningful connection, which may require the court to engage in purposive interpretation of the gateways (Section III). The second step is to demonstrate that the connection is a presumptive one (Section IV). It is argued that both the majority in *Brownlie* and Lord Collins in *Fong v Ascentic* adopted an over-inclusive—presumptive—interpretation of 'damage', on the basis that a connection so established is rebuttable if it is not meaningful in the relevant sense. On the facts, the presumption of a meaningful connection was not rebutted. Finally, the article shows that there are lessons to be learnt from a more explicit engagement with the presumptive nature of the gateways, drawing again on *Brownlie* and *Fong v Ascentic* (Section V).

II. GATEWAYS FOR SERVICE OUT OF THE JURISDICTION

There has been a long tradition in common-law jurisdictions to treat the court's power for service out of the jurisdiction as the source of the court's jurisdiction over defendants located overseas.[4] This power is commonly accompanied by a (long) list of 'gateways', or 'heads of jurisdiction', which identify a connection between the claim, or the defendant, and the forum. A claimant wishing to sue a defendant who is outside of the jurisdiction must be able to fit their claim within these gateways. For example, a claimant suing an overseas defendant in tort in England may be able to rely on Gateway 9, which refers to a claim made in tort where 'damage was sustained, or will be sustained, within the jurisdiction', or where 'damage which has been or will be sustained results from an act committed, or likely

[1] *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 (*Brownlie I*) (Lord Sumption, with whom Lord Hughes agreed); *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 (*Brownlie II*) (Lord Leggatt).

[2] *Brownlie I* ibid (Lady Hale, Lord Wilson and Lord Clarke); *Brownlie II* ibid (Lord Lloyd-Jones, with whom Lord Reed, Lord Briggs and Lord Burrows agreed).

[3] *Fong v Ascentic Ltd* [2022] Hong Kong Court of Final Appeal 12 (Lord Collins).

[4] A Dickinson, 'Keeping up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts' (2016) 86 BYIL 6.

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to be committed, within the jurisdiction', or where 'the claim is governed by the law of England and Wales'.[5]

Common-law countries that use such service gateways for jurisdictional purposes include England,[6] Hong Kong,[7] Singapore,[8] Australia[9] and New Zealand.[10] The gateways are usually contained in rules of court or practice directions annexed to such rules. Other requirements that must typically be satisfied before a court will assume jurisdiction are that there is a reasonable prospect of success of the claim and that the court is the appropriate forum (or, in the case of Australia, not a clearly inappropriate forum).[11] Only then will a court exercise its discretion to assume jurisdiction over a foreign defendant, on the basis that the case is 'a proper one for service out of the jurisdiction',[12] or that the forum is 'the proper place in which to bring the claim'.[13]

The focus of this article is on the English gateways. However, because of the similarity of their 'service out' regimes, the article is also relevant to other common-law jurisdictions. In fact, the Hong Kong regime for service out of the jurisdiction continues to be modelled on a previous version of the English rules.[14] The most relevant difference, in relation to New Zealand, Australia and Singapore, is the existence in these jurisdictions of an open-ended gateway, based on a 'real and substantial connection' or a 'sufficient nexus', to capture relevant claims that do not fit within the specific heads of jurisdiction.[15] The argument that is made here—that the purpose of the gateways is to identify a presumptive meaningful connection—would not apply to these general gateways. However, the existence of the general gateways may be treated as further evidence that the purpose of the specific gateways is to identify a presumptive meaningful (that is, a 'real and substantial' or 'sufficient') connection. A further difference is that, in New Zealand and most Australian states, plaintiffs need not seek the court's permission before serving a claim out of the jurisdiction that falls within the specific gateways. However, the court will uphold a protest to jurisdiction if the plaintiffs were wrong in their assessment that there was an available gateway,[16] so this difference is largely procedural.

[5] Civil Procedure Rules 1998 (CPR) Practice Direction (PD) 6B, para 3.1.

[6] ibid, r 6.37 and PD 6B.

[7] Rules of the High Court (Cap 4A) (Hong Kong) (Rules of the High Court (HK)) Order 11.

[8] Rules of Court 2021 (Singapore) (Rules of Court (Sing)) Order 8, r 1(1) and Supreme Court Practice Directions (2021) PD 63(2) and (3).

[9] See, eg, Uniform Civil Procedure Rules 2005 (New South Wales) (UCPR (NSW)) r 11.4 and sch 6.

[10] High Court Rules 2016 (New Zealand) (HCR (NZ)) rr 6.27–6.29.

[11] CPR (n 5) r 6.37; Rules of the High Court (HK) (n 7) Order 11, r 4; Rules of Court (Sing) (n 8) Order 8, r 1(1) and PD 63(2); UCPR (NSW) (n 9) r 11.6; HCR (NZ) ibid, r 6.29.

[12] Rules of the High Court (HK) ibid, Order 11, r 4.

[13] CPR (n 5) r 6.37(3). cf UCPR (NSW) (n 9) r 11.6, and HCR (NZ) (n 10) r 6.29, entitled 'Court's discretion whether to assume jurisdiction'.

[14] See *Fong v Ascentic* (n 3) paras 81–84 (Lord Collins) for a comparison of the regimes.

[15] HCR (NZ) (n 10) r 6.28 (but a plaintiff must obtain the leave of the court before serving a defendant in reliance on this gateway); see also, eg, UCPR (NSW) (n 9) r 11.5; Uniform Civil Procedure Rules 1999 (Queensland) (UCPR (Qld)) r 126; Federal Court Rules 2011 (Australia) (FCR (Aust)) r 10.43; Rules of Court (Sing) (n 8) PD 63(2)(a).

[16] HCR (NZ) ibid, rr 6.27, 6.29; and see, eg, UCPR (NSW) ibid, rr 11.4, 11.6 and sch 6; UCPR (Qld) ibid, rr 125, 127; see also FCR (Aust) ibid, rr 10.42, 10.43A.

III. PURPOSE OF A MEANINGFUL CONNECTION

A. A Meaningful Connection

The gateways are unilateral connecting factors. The purpose of connecting factors in the conflict of laws more generally is to identify meaningful connections,[17] and the gateways are no exception. In light of their jurisdictional function, the connections are meaningful insofar as they identify adjudicatory interests.[18] The term 'meaningful' has been chosen here because it is less loaded than the more commonly used alternatives of a 'real', 'substantial', 'close' or 'sufficient' connection, although the terms may be used interchangeably. In fact, the general gateways, where they exist, expressly refer to a 'real and substantial' or 'sufficient' connection.[19] The basic proposition is that the purpose of the gateways is to identify a non-arbitrary link to the forum.

This proposition should not be contentious. It is, nevertheless, important at this point to refer to recent dicta of Lord Collins in *Fong v Ascentic*,[20] which, 'in the wrong hands',[21] could be taken to suggest that the gateways do not have the purpose of identifying a meaningful connection. Lord Collins considered that '[t]he purpose of the gateways is to set out a list of the situations in which the legislator considers that there *may* be a sufficient link with [the forum]'.[22] Their purpose was *not* to provide 'a necessary connection' with the forum.[23] On the contrary, the link to the forum could be 'tenuous',[24] and this meant that there was also no 'legislative purpose' that the heads of jurisdiction should be construed to require 'a real connection' with the forum.[25]

According to Lord Collins, the clearest example of this was the gateway allowing service abroad on a person who is a 'necessary or proper party' to proceedings in the forum.[26] There was in this scenario no necessary 'territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the court'. Similarly, the gateway of domicile could be used to serve defendants who may have no real connection with the forum, because the common-law concept of domicile of origin did not always operate to ensure such a connection.[27] Lord Collins gave a further example of service on the basis that a contract was made in the forum, because 'the parties and the transaction may have nothing to do with [the forum]'; and finally,

[17] See, in the context of choice of law, *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, para 27 (that the purpose of characterisation is to identify 'the most appropriate law' to govern the issue).

[18] D Foxton, 'The Jurisdictional Gateways—Some (Very) Modest Proposals' [2022] LMCLQ 70, 71, 75, 78, 82. Some gateways do not, in fact, specify a connection to the forum, leaving the connection to be established by jurisdictional rules that limit the court's adjudicatory power in relation to the particular claim. See, eg, CPR (n 5) PD 6B, para 3.1(14).

[19] See Section II above.

[20] *Fong v Ascentic* (n 3) (Lord Collins).

[21] See M Chung, 'Service Out and the Tort Gateway in the Court of Final Appeal' (2023) 53 HKLJ 21, 28: 'After all, what else could the gateways be for? Put in the wrong hands, Lord Collins's *dicta* may even have the effect of watering down the Gateway Requirement when it has hitherto been (one of) the most significant obstacles which claimants have to surmount before they can serve a defendant out of the jurisdiction.'

[22] *Fong v Ascentic* (n 3) para 105 (Lord Collins).

[23] ibid, para 110.

[24] ibid, para 105.

[25] ibid, paras 109, 110.

[26] ibid, para 105.

[27] Note that the equivalent gateway in CPR (n 5) PD 6B, para 3.1(1) refers to a statutory definition of domicile that is different from the common law (and requires a connection): Civil Jurisdiction and Judgments Act 1982, section 41.

service to enforce a foreign judgment or award, which was available even where a foreign debtor had no local assets.[28]

There are two reasons why these dicta should not be understood as suggesting that the gateways lack a purpose of identifying a meaningful connection. The first is that Lord Collins seemed to be concerned, more narrowly, with a 'territorial' connection, focusing on either the defendant or the subject matter of the claim being (partly) located in the forum.[29] Apparently, the 'necessary or proper party' gateway was the clearest example that the gateways did not identify a 'sufficient' connection, because it was 'not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the court'.[30] Thus, one reason why Lord Collins disagreed with the proposition that the gateways have a purpose of connection was that there are some gateways that are not based on territoriality. In other words, Lord Collins was not considering in these dicta whether the gateways have the purpose of identifying a meaningful (albeit non-territorial) connection.

The second reason is that Lord Collins drew a distinction between the gateways *requiring* a connection, and the gateways identifying a potential meaningful connection. As will be shown in Section IV of this article, this distinction reflects the presumptive nature of the connection identified by the gateways. The gateways are presumptively meaningful (and hence over-inclusive), as demonstrated in particular by Lord Collins's examples of domicile and the place of contracting. This does not mean that, according to Lord Collins, the gateways do not have the purpose of identifying (rather than requiring or guaranteeing) a meaningful connection. In fact, Lord Collins placed significant reliance on the principle that a claim must fall both within the letter and 'the spirit' of a gateway, to ensure a sufficient connection to the forum.[31] If the gateways did not have a purpose of identifying a meaningful connection, there would be little point in evoking 'the spirit' of the gateways to establish this connection.

B. Relevance of Criticism of the Gateways

The proposition that the gateways have the purpose of identifying a meaningful connection is not intended to contradict scholarship that has criticised the gateways as being insufficiently rigorous, or meaningless, or redundant in practice. Critics may be right that some of the links in the gateways are, in fact, arbitrary; however, this does not mean that the gateways have *the purpose* of identifying links that are arbitrary. It just means that there is disagreement about what amounts to a meaningful link, or that something has gone wrong with the drafting because the words of the gateways do not reflect their purpose.

Thus, there has been considerable debate about whether the gateways have become too expansive. It has been said that the gateways permit overly weak connections to justify the court's assumption of jurisdiction over a foreign defendant.[32] For example, as has been noted above, the 'necessary or proper party' gateway identifies a link that is tied neither to the defendant nor the subject matter of the dispute, prompting criticism that

[28] *Fong v Ascentic* (n 3) para 105 (Lord Collins). [29] ibid. [30] ibid.
[31] *Fong v Ascentic* (n 3) para 117 (Lord Collins).
[32] A Dickinson, 'Faulty Powers: One-Star Service in the English Courts' [2018] LMCLQ 189; A Dickinson, '*In Absentia*: The Evolution and Reform of Australian Rules of Adjudicatory Jurisdiction' in M Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing 2019).

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the gateway is inconsistent with traditional ideas of comity and fairness.[33] Such criticisms may well be justified, but do not deny that the gateways have a purpose of identifying a meaningful connection. They simply illustrate that critics disagree with the gateways' (laxer) version of what amounts to a meaningful connection, which extends to factors promoting the efficient conduct of litigation.[34]

By the same token, the proposition that the gateways have a purpose of identifying a meaningful connection is not inconsistent with the view that the gateways ought to be abolished. The main reason that is given for this view is that the doctrine of *forum (non) conveniens* has effectively taken over the function of the gateways, making them redundant.[35] According to this view, a court would not consider itself to be the appropriate forum for a dispute if it lacked a meaningful adjudicatory interest, so there is little point in requiring claimants to satisfy the gateways first.

However, even if the criticism is justified and the gateways are practically redundant, they continue to have at least a notional purpose of identifying a meaningful connection. For example, the 'necessary or proper party' gateway will continue to have the purpose of identifying a connection that facilitates the efficient conduct of litigation, even if a court could simply apply the doctrine of *forum conveniens* to conclude that efficiency would favour the assumption of jurisdiction over a 'necessary or proper party'. Of course, if it were accepted that the gateways are redundant because of the doctrine of *forum conveniens*, there would be limited value in the present article. This is not, however, the case.[36] Courts have not adopted the position that consideration of the gateways is superfluous in practice.[37]

C. *Purposive Interpretation*

An important point that follows from the proposition that the gateways have the purpose of identifying a meaningful connection is that there is a role for purposive interpretation of the gateways.[38] The connecting factors do not raise pure questions of fact that are beyond the remit of purposive interpretation.[39] Depending on the facts, an entirely literal interpretation of the gateways, that disregards the purpose of a meaningful connection, may produce the wrong result. More generally, the 'natural and ordinary' meaning of the gateways is to be determined in light of their purpose.[40]

[33] See A Arzandeh, '"Gateways" within the Civil Procedure Rules and the Future of Service-Out Jurisdiction in England' (2019) 15 JPrivIntL 516, 524; see also the criticism noted by A Mills, 'Exorbitant Jurisdiction and the Common Law' in J Harris and C McLachlan (eds), *Essays in International Litigation for Lord Collins* (OUP 2022) 258–9.

[34] Foxton (n 18) 79–80; see the discussion by Mills ibid 261–4.

[35] A Briggs, 'Service Out in a Shrinking World' [2013] LMCLQ 415; A Briggs, 'Service Out: *communis error frangit ius*' [2019] LMCLQ 195, 198.

[36] See, eg, Arzandeh (n 33). cf Singapore, where a recent choice was made to retain the gateways: A Arzandeh, 'The New Rules of Court and the Service-Out Jurisdiction in Singapore' (2022) SingJLS 191.

[37] L Merrett, 'Forum Conveniens' in W Day and S Worthington (eds), *Challenging Private Law: Lord Sumption on the Supreme Court* (Bloomsbury 2020) 379.

[38] cf Merrett ibid 381.

[39] But see I Sin, 'Service Out and Tort Gateway in the Hong Kong Court of Final Appeal' (2023) 139 LQR 210, 211.

[40] On the general importance of purposive interpretation, see *Rittson-Thomas v Oxfordshire County Council* [2021] UKSC 13, [2022] AC 129, para 33.

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There is scholarly work that has sought to map out the main adjudicatory interests that underpin the gateways, with the aim of aiding in their (purposive) construction and development.[41] There are also numerous cases demonstrating the correctness of this proposition.[42] One famous example is *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*, where the English Court of Appeal rejected the argument that use of the definite article in 'the damage' in the torts gateway meant that the whole of the damage had to be sustained within the jurisdiction, on the basis that this construction 'could lead to an absurd result if there were no one place in which all the plaintiff's damage had been suffered'.[43] In other words, the purpose of the gateways was to treat the suffering of damage as a meaningful connection, and this rationale did not depend on the entirety of the damage being sustained within the jurisdiction. Another example is *Mercedes v Leiduck*,[44] where Lord Mustill said that regard must be had to 'the intent' of the words—'their spirit'—when determining whether Mareva injunctions could be construed as injunctions under the rules for service out. It was 'not enough simply to read the words of the rule and see whether, taken literally, they are wide enough to cover the case'.[45]

More recently, in *Brownlie II*, the majority rejected a narrow construction of 'damage' that would have excluded cases of indirect damage from the gateway.[46] The result was that the claimant, Lady Brownlie, was able to rely on the gateway to sue for damages following a car crash during a holiday in Egypt. Lord Lloyd-Jones was satisfied that, 'both in its natural and ordinary meaning and on a purposive reading', the term 'damage' extended to all the bodily and consequential financial effects suffered by the claimant.[47] However, Lord Lloyd-Jones also considered, in *obiter*, that economic-loss cases may have to be treated differently, because 'the mere fact of any economic loss, however remote, felt by a claimant where he or she lives or, if a corporation, where it has its business seat would be an unsatisfactory basis for the exercise of jurisdiction'.[48] This distinction between personal injury or wrongful death cases, on

[41] Foxton (n 18). In fact, the Civil Procedure Rule Committee used Foxton's work in their revision of the gateways: Minutes of the Civil Procedure Rule Committee (Annual Open Meeting, 13 May 2022) para 57.

[42] By way of a small sample, see *Union International Insurance Co Ltd v Jubilee Insurance Co Ltd* [1991] 1 WLR 415 (QB) 417–18 (reasoning that for a contract to be made 'by or through an agent trading or residing' within the jurisdiction, the agent must be the defendant's agent, because the purpose of the rule is to capture foreign defendants who are conducting business within the jurisdiction through an intermediary); *Alliance Bank JSC v Aquanta Corpn* [2012] EWCA Civ 1588, para 70 ('what is the relevance, for the purpose of founding jurisdiction, of the circumstance that the contract has been made within the jurisdiction, or made by or through an agent trading or residing within the jurisdiction, unless it is the intended defendant who has "come into" the jurisdiction to make the contract, or has used the services of an agent trading or residing within the jurisdiction for the purpose of making the contract'); *Demirel v Tasarruf Mevduati Sigorta Fonu* [2007] EWCA Civ 799, [2007] 1 WLR 2508-2, para 24 ('… we see no reason to limit the jurisdiction of the court. It would … prevent the giving of permission to serve out in circumstances where there was a belief, hope or expectation that assets belonging to the defendant existed or would or might arrive within the jurisdiction but at the time of the application it was not possible to identify any assets actually within the jurisdiction. Or the claimant may wish to enforce a foreign judgment by compelling a person within the jurisdiction who has the right to call for assets of the defendant outside the jurisdiction to call for such assets').

[43] *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA) 437.

[44] *Mercedes v Leiduck* [1996] AC 284 (PC). [45] ibid 299. [46] *Brownlie II* (n 1).

[47] ibid, para 76 (Lord Lloyd-Jones). [48] ibid.

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the one hand, and economic-loss cases, on the other, was 'not inconsistent',[49] but it can only be explained on the basis that the gateways have a purpose of meaningful connection—and that they should be interpreted accordingly.

Within this context, there remains significant debate about what a purposive interpretation of the gateways should look like. For example, to what extent are traditional common-law ideas of exorbitant jurisdiction a relevant, or permissible, interpretive aide?[50] What is the role of principles of public international law?[51] More generally, what is the kind of meaningful connection that the gateways should generally be understood to work towards? Is it a rigorous link with the defendant or the subject matter of the dispute?[52] Or does the existence of the doctrine of *forum conveniens* mean that the purpose of the gateways has shifted towards identifying more generous—less rigorous—connections?[53]

These significant questions are not the focus of this article. Instead, the article explains why, despite the purpose of a meaningful connection (however understood), the gateways are designed to risk the inclusion of cases that lack such a connection. The reason is that the gateways have the purpose of identifying a *presumptive* meaningful connection. This, in turn, is a factor that must be taken into account in the purposive interpretation of the gateways. What is more, the majority's reliance in *Brownlie I* and *Brownlie II* on the doctrine of *forum conveniens* is best understood as an example of such presumptive reasoning, rather than as support for a general trade-off between the doctrine and the scope of the gateways.[54] These arguments are explored in Section IV which follows.

IV. A PRESUMPTIVE MEANINGFUL CONNECTION

The second step in the argument is that the purpose of the gateways is to identify a *presumptive* meaningful connection. This part of the argument is more controversial than the first. The gateways are not generally described as presumptive connecting factors. On the contrary, they tend to be contrasted with the Canadian common-law rule of a real and substantial connection, which operates on the basis of explicitly presumptive connecting factors that are capable of rebuttal.[55] Thus, it has been said that the 'Canadian presumptions can be engaged and then rebutted' but 'once through an English jurisdictional gateway, one never turns back'.[56] A closer look, however,

[49] ibid. [50] See Mills (n 33). [51] See ibid 261–4.

[52] A Dickinson, 'Service Abroad—an Inconvenient Obstacle? *Abela v Baadarani* [2013] UKSC 44' (2014) 130 LQR 197; Dickinson, 'Faulty Powers: One-Star Service in the English Courts' (n 32); Merrett (n 37) 379–81; A Arzandeh, '*Brownlie II* and the Service-Out Jurisdiction under English Law' (2022) 71 ICLQ 727, 739–40; A Arzandeh, 'The English Court's Service-Out Jurisdiction in International Tortious Disputes' (2017) 133 LQR 144.

[53] A Briggs, 'Holiday Torts and Damage within the Jurisdiction' [2018] LMCLQ 196, 200; A Briggs, 'The Hidden Depths of the Law of Jurisdiction' [2016] LMCLQ 236, 245–6; see Merrett (n 37) 379–81, who rejects this view.

[54] As apparently interpreted—critically—by Lord Sumption (in *Brownlie I* (n 1) para 31), Lord Leggatt (in *Brownlie II* (n 1) para 198) and academic commentators. See, eg, Dickinson, 'Faulty Powers: One-Star Service in the English Courts' (n 32) 194–5; Merrett (n 37) 379–80.

[55] *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572.

[56] W Day, 'Reputation in the Conflict of Laws' [2019] LMCLQ 1, 5 (but see at 7); see also Arzandeh (n 33) 533–4; cf Chung (n 21) 32.

reveals that the purpose of the gateways is to use a connection that is presumptively meaningful, as well as presumptive. These propositions will be discussed in turn.

A. Presumptively Meaningful

The first point is that the gateways have the purpose of identifying what may most accurately be described as a *presumptively* meaningful connection. The gateways accept the possibility that the application of a given connecting factor may not establish a meaningful connection on the facts of a particular case—in other words, that the connecting factor does not guarantee a meaningful connection. This means that at least some of the connecting factors are (accepted to be) over-inclusive. For example, the gateway for contracts that are made in the jurisdiction would extend to a contract being entered into electronically while the relevant party is in transit at the airport, although the case lacks the kind of meaningful connection that the gateway ultimately pursues.[57] Another—less obvious—example is the gateway for defendants domiciled in the forum, which does not *guarantee* a meaningful connection because the common-law rules of domicile can exceptionally operate so as to include a defendant who has not been 'home' in decades (and may have no desire to return);[58] although the position in England is different because the gateway now relies on a statutory definition of domicile that requires a substantial connection.[59] These examples are referred to by Lord Collins in *Fong v Ascentic* to make the point that the gateways do not *require* a sufficient connection.[60]

The rationale for this over-inclusiveness must be that it is better to include some cases that lack a meaningful connection ('false positives') than to exclude some cases that have a meaningful connection. Specific connecting factors almost always come with a risk that, in some cases, they will fail to establish or recognise a connection that is meaningful in the relevant sense. That is why, in the context of choice of law, 'pre-fixed, mono-directional, and rigid connecting factors' are sometimes replaced or paired with 'open-ended, poly-directional, and flexible connecting factors', which depend on 'multiple contacts and circumstances to be evaluated in light of each particular case'.[61] In the context of jurisdiction, specific connecting factors are unable to establish or identify a meaningful connection in every case.[62] Thus, when faced with a choice between over-inclusiveness and under-inclusiveness, the gateways choose the former.

[57] For a summary of criticism of this connecting factor, see Foxton (n 18) 84–5.

[58] Contrast T Monestier, 'A "Real and Substantial" Mess: The Law of Jurisdiction in Canada' (2013) 36 FordhamIntlLJ 396, 428: 'It is hard to see how the first presumptive factor (defendant domiciled in the jurisdiction) could ever be rebutted. The very nature of this presumptive factor is that it creates a universal form of jurisdiction based on the defendant's very real and substantial connection to the forum.'

[59] CPR (n 5) PD 6B, para 3.1(1), referring to the Civil Jurisdiction and Judgments Act 1982, section 41.

[60] *Fong v Ascentic* (n 3) paras 105, 109–110 (Lord Collins).

[61] S Symeonides, *Codifying Choice of Law around the World* (OUP 2014) Ch 4, parts V–VI; see, eg, Private International Law (Miscellaneous Provisions) Act 1994, section 12 ('displacement' of the 'general' choice of law rule for torts).

[62] See *Club Resorts Ltd v Van Breda* (n 55) para 73 ('Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court').

This choice is not surprising, considering that an under-inclusive connecting factor may have the effect of interfering with a claimant's legitimate expectation of access to justice in the forum.[63] For example, as has been noted, the gateway for contracts concluded within the jurisdiction may be over-inclusive in some cases where the contract was completed from different locations. But the risk of such false positives is preferable to the alternative, which is to risk the exclusion of cases that do have a meaningful link (despite the parties being in different locations) by limiting the gateway to contracts that were concluded face to face.[64] This is particularly so because the court can rebut the presumption of a meaningful connection in such cases.

This conclusion is important because it may affect the way the gateways are interpreted. Where a court is faced with two competing interpretations of a gateway—one that is likely to be under-inclusive, and one that is likely to be over-inclusive—the correct approach may well be to adopt the wider interpretation. For example, if a court considers that, in some cases, there will be a meaningful connection based on a contract that was concluded in the forum while the parties were in different countries, it would reject an argument that the gateway should be interpreted so as to be limited to contracts entered into in person.[65] Or, faced with an argument that the torts gateway is limited to cases where the whole of the damage was sustained within the jurisdiction, the court would reject the argument, as happened in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*, in order to recognise the potential arbitrariness of the distinction, even though this raises the question of the potential over-inclusiveness of the gateway.[66]

There is a potential justification, therefore, for adopting a wider—over-inclusive—interpretation of the gateways.[67] This does not provide an answer to the more general criticism that the gateways are insufficiently rigorous, or that the courts have been unduly generous in their interpretation of the gateways.[68] But the existence of 'false positives' may not be a solid basis for such criticism, where 'false positives' are the flipside of an over-inclusive but purposive interpretation that preserves the court's jurisdiction in cases in which the connection *would* be accepted as meaningful. For example, as has been noted, there has been significant debate whether the gateway for damage sustained in the forum includes indirect damage. One argument that has been made is that this wide interpretation would allow the claimant to manufacture a connection to the forum by going there after sustaining the initial damage.[69] However, the existence of such a false positive would not, *on its own*,[70] be a basis for criticising the inclusion of indirect damage, if it was accepted that a wide interpretation is justified to cater for non-arbitrary cases of indirect damage.

[63] On the role of access to justice concerns in this context, see J Walker, 'The Distant Shore: Discretion and the Extent of Judicial Jurisdiction' in A Dickinson and E Peel (eds), *A Conflict of Laws Companion* (OUP 2021); *Club Resorts Ltd v Van Breda* ibid, para 73.

[64] See Foxton (n 18) 84–5.

[65] ibid.

[66] *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette* (n 43).

[67] Or, in the words of Lord Lloyd-Jones in *Brownlie II*, an interpretation that is not 'unnaturally restrictive': *Brownlie II* (n 1) para 77 (Lord Lloyd-Jones).

[68] See Sections III(B) and (C).

[69] *Brownlie II* (n 1) para 194 (Lord Leggatt).

[70] For Lord Leggatt, this was not the only concern: see Section V.

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B. Presumptive Connection

The second point is that the purpose of the gateways is to provide for a presumptive (not just a presumptively) meaningful connection. In other words, the connection may be rebutted, with the result that the claimant cannot, ultimately, avail themselves of the relevant gateway in a case involving a 'false positive'. In substance, this presumptive connection adopts the same reasoning process as the Canadian common-law presumption of close connection. In determining whether the presumption of a meaningful connection is rebutted, the court would necessarily be guided by the purpose of meaningful connection, as embodied by the particular gateway.

At first sight, this point may be thought to be quite controversial.[71] There is no explicit recognition in the gateways that they are presumptive in nature. What is more, there seem to be no examples of courts explicitly describing the gateways as operating on a presumptive basis. Yet, in substance, this is exactly how some courts have approached the gateways, including Lord Collins in *Fong v Ascentic* and the majority in *Brownlie I* and *Brownlie II*. They have relied on three distinct (but at times overlapping) mechanisms: the principle that the case must fall within both the letter and the spirit of the gateways; the doctrine of appropriate forum; and the principle that the proceeding must have a legitimate benefit (in the forum). These mechanisms all form part of the court's discretionary power to assume jurisdiction, which, in England, used to be subject to the proviso that the case is a 'proper one' for service out of the jurisdiction,[72] and which now requires England to be 'the proper place in which to bring the claim'.[73]

Beyond these authorities, there is a good argument of principle that the purpose of the gateways is to operate presumptively. If it is accepted that the gateways are over-inclusive, the overall coherence of the rules depends on the court's ability to rebut 'false' connections established by the gateways. In this way, the gateways combine the aim of predictability (that is associated with the use of specific connecting factors), with the need to ensure access to justice, and the need to avoid jurisdictional over-reach.

1. Letter and spirit principle

Courts have occasionally invoked the principle that a case 'must be clearly within both the letter of the rule and the spirit of the head' before the court will grant leave for service out of the jurisdiction.[74] The most recent—and most important—example is *Fong v Ascentic*, where Lord Collins used the principle 'to mitigate the effect of' the over-inclusive nature of the gateways.[75] Lord Collins considered that it was 'well established' that courts apply this principle when considering whether a case falls within one of the heads of jurisdiction. However, the principle did not 'apply exclusively to the construction of the heads of jurisdiction'.[76] A 'wider' view of the

[71] See references in n 56.

[72] A proviso that is still in use in Hong Kong: Rules of the High Court (HK) (n 7) Order 11, r 4.

[73] The better view is that the latter is not to be understood restrictively as referring only to the doctrine of *forum conveniens*: see Lord Collins's analysis in *Fong v Ascentic* (n 3) para 119 (Lord Collins); cf Dickinson, 'Faulty Powers: One-Star Service in the English Courts' (n 32) 191–2, referring to the CPR's 'overriding objective' of dealing with cases 'justly and at proportionate cost'.

[74] *Fong v Ascentic* ibid, para 117 (Lord Collins).

[75] ibid, para 106.

[76] ibid, para 117.

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principle was to be preferred.[77] In effect, this 'wider' view adopts a presumptive understanding of the heads of jurisdiction.

Thus, Lord Collins used the 'ordinary' meaning of the term 'damage' to conclude that the tort gateway included indirect damage suffered in the forum as a result of foreign acts. Mr Fong, a Hong Kong resident who had suffered injuries while being employed at a site in Mainland China, was able to rely on the gateway to bring a claim against his US employer, and there was no need for a more restrictive interpretation to guarantee a real or substantial connection. The spirit principle could help to keep this more expansive interpretation in check. In particular, a court could use the principle to refuse leave, or set it aside, where the plaintiff had created an artificial link with the forum—for example, by travelling to the forum for medical treatment.[78]

The principle applies to the gateways (or, more specifically, 'to the question whether the claim falls within the spirit of a gateway').[79] However, it is a principle that is sourced in the court's discretion rather than the gateway itself.[80] When it applies to rebut a presumptive connection established by a gateway, the court concludes that the claimant should not be able to rely on it. A question that has caused some confusion in this context is whether the claimant can nevertheless be said to have 'passed through the gateway'.[81] But this seems to be largely a question of stylistic preference, as long as it is clear that the principle, in substance, rebuts the operation of the gateway.

As Lord Collins himself noted, the principle has done double duty: it has been used to interpret connecting factors restrictively,[82] as well as to rebut them where they are over-inclusive. The interrelationship between the two can be murky, but this is not a problem per se. Sometimes it is immaterial whether the court is using the principle in one way or the other. For example, where jurisdiction depends on acts having been committed in the forum, or on damage having been suffered there, courts have used qualifiers to require 'significant' damage or 'substantial and efficacious' acts.[83] These qualifiers could amount to a restrictive interpretation of the connecting factor, or to a rebuttal of a broadly interpreted connecting factor to guarantee its purpose of a meaningful connection. Either way, the result is the same. However, these boundary issues do make it more difficult to work out just how well established the principle is as a rebuttal mechanism.

Thus, Lord Collins cited *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* in support of his 'wider' approach to the spirit principle.[84] But the case might simply be an example of the principle being used as an interpretive aid. When discussing the

[77] ibid.

[78] ibid, para 118.

[79] ibid, para 117. Lord Collins here disagreed with a dictum in *Sharab v Al-Saud* [2009] EWCA Civ 353, [2009] 2 LloydLR 160, para 35 that he interpreted as making a contrary proposition, although the Court in that case may have been drawing a different distinction, rejecting the principle as a principle of interpretation.

[80] Lord Collins's comment at para 117 in *Fong v Ascentic* (n 3) that the principle 'applies to the question whether the claim falls within the spirit of a gateway, and not simply to the exercise of the discretion', is not inconsistent with this (see, eg, para 106: '[o]ne of the results of the discretionary nature of the jurisdiction under Order 11, r 1(1) is to mitigate the effect of such situations').

[81] See ACY Chan and KKC Tse, 'The Tort Gateway: The Missing Jigsaw Piece?' [2023] LMCLQ 211, 215; cf Sin (n 39) 214–15.

[82] But see *Sharab v Al-Saud* (n 79) para 35 and n 77 above; cf *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc* [2013] EWHC 2968 (Ch) paras 58–59.

[83] *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* (n 43).

[84] *Fong v Ascentic* (n 3) para 117 (Lord Collins).

requirement that damage caused by a tort resulted 'from an act committed within the jurisdiction', the Court of Appeal said that 'it would certainly contravene the spirit, and also we think the letter, of the rule if jurisdiction were assumed on the strength of some relatively minor or insignificant act having been committed here, perhaps fortuitously'.[85] The Court concluded, therefore, that damage had to result from 'substantial and efficacious acts committed within the jurisdiction', and its allusion in this context to a distinction between 'the spirit' and 'the letter' of the rule, may have simply reflected the potential difference between a literal and purposive approach to interpretation.

There is, however, clear support for Lord Collins's 'wider' principle. In *Johnson v Taylor Bros & Co Ltd*,[86] the House of Lords considered that the gateway for non-performance of a contract within the jurisdiction was not available in relation to a consequential breach that was not the real subject of the claim. The claimant's case was that the defendant had failed to ship the goods. The non-tender of shipping documents, which was the only part of the defendant's non-performance of the contract that occurred within the jurisdiction, was merely a trivial consequence of that alleged breach. Rather than relying (entirely) on a narrow construction of the gateway that excludes non-performance of such ancillary breaches, their Lordships decided that, as a matter of discretion, the gateway should not be available to the claimant in such circumstances.[87]

Thus, Lord Birkenhead said that he based his conclusion 'upon the broadest possible grounds, that is to say, upon the reason and policy of the Order under consideration'; but that it was 'not unimportant in this connection to notice that the Order gives a discretionary authority'.[88] Viscount Haldane considered that 'the Court should decline to exercise its power' where 'a breach within the jurisdiction and in the letter within the terms of the rule, is in substance not so'.[89] This discretionary power 'gets rid of difficulties which would often be great if the only question were whether there has been any breach at all within the jurisdiction'.[90] Lord Atkinson considered the court 'would in strictness have jurisdiction' to make an order for service outside of the jurisdiction. However, this jurisdiction was 'discretionary, not mandatory', and, in this case, the application should be refused because 'the real and substantial cause of action' arose outside the jurisdiction.[91] Lord Buckmaster said that, 'even in a case within the words of the rule', the order could only be made by leave of the court, which had to have regard 'to the real breach in respect of which the action is brought, and not merely to a breach on which it is necessary to rely, not to obtain relief, but only to found jurisdiction under the rule'.[92]

Ultimately, the House of Lords used its discretion to correct an erroneous presumption established by the gateways. Although there was a presumption that a breach within the jurisdiction was a meaningful connection, there was no meaningful connection on the facts of the case, because the breach was not the real subject of the claim. In other

[85] *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* (n 43).
[86] *Johnson v Taylor Bros & Co Ltd* [1920] AC 144 (HL).
[87] Only Lord Dunedin (ibid 154) seemed to rely exclusively on interpretation of the gateway.
[88] *Johnson v Taylor Bros & Co Ltd* (n 84) 153 (Lord Birkenhead).
[89] ibid 153–4 (Viscount Haldane). [90] ibid 154. [91] ibid 158–9 (Lord Atkinson).
[92] ibid 160–1 (Lord Buckmaster).

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words, the spirit principle was used in its 'wide' sense, as a way of dealing with the over-inclusive nature of the gateways.

Another case referred to by Lord Collins was *Rosler v Hilbery*.[93] Here, the foreign claimants sought to sue a Belgian sequestrator of a Belgian company, in relation to a debt owing to the Belgian company by companies being wound up in England. The English court had made an order that the debt should, at the request of the Belgian sequestrator, be paid to his English solicitor. The claimants brought an action against the Belgian sequestrator and his English solicitor, claiming an injunction to restrain the solicitor from transferring the debt until it had been determined whether the claimants had a better claim to the money. The claimants argued that the Belgian sequestrator was a 'necessary or proper party' to a claim against the English solicitor and that they were seeking injunctive relief within the jurisdiction.

The Court of Appeal did not consider that the claim fell within the meaning of either gateway but, more relevantly, concluded that this was not a case where leave for service outside of the jurisdiction ought to be granted. The main basis for this conclusion was that Belgium, not England, was the *forum conveniens*. However, Pollock MR placed additional reliance on the principle that 'one ought to have regard to the true spirit of the rule', referring to *Johnson v Taylor Brothers & Co Ltd*.[94] He noted that there was 'no substance in the claim' against the English solicitor.[95] It was 'a matter on which it is necessary to rely not to obtain the integral relief necessary, but merely for the purpose of founding jurisdiction under the rule'.[96] The 'true substance of the matter' was an action by the claimants against the Belgian sequestrator, and it was Belgium, therefore, where the matter ought to be determined.

In essence, Pollock MR reasoned that a claim does not have a meaningful connection as envisaged by the gateways if it is practically unnecessary but is brought to manufacture a connection (or if it is parasitic on such a claim). There was an undertaking by the English solicitor not to part with the money while the dispute was ongoing, so the injunction was unnecessary; and the English solicitor was only incidentally involved in the dispute, as a custodian of the funds, making the claim against him as an anchor defendant a merely technical foothold for jurisdiction.[97] Similar reasoning was adopted in *Beck v Value Capital Ltd (No 2)*;[98] and there is also overlap between this reasoning and the cases considered below, where courts rebutted the presumption of a meaningful connection by highlighting the lack of a practical or legitimate benefit of the (part of the) claim that provides the connection.[99]

Finally, in *George Monro, Ltd v American Cyanamid and Chemical Corp*,[100] Scott LJ used the spirit principle to refuse—'in the discretion of the court'—the claimant's

[93] *Rosler v Hilbery* [1925] Ch 250 (CA). [94] ibid 259 (Pollock MR). [95] ibid 260.
[96] ibid 261.
[97] Now, of course, the gateways require there to be a 'real issue' between the claimant and the anchor defendant 'which it is reasonable for the court to try': CPR (n 5) PD 6B, para 3.1(3)(a).
[98] *Beck v Value Capital Ltd (No 2)* [1975] 1 WLR 6 (Ch) 15–16 (in this case, too, the Court relied on the question of appropriate forum). On the other hand, Megarry J in *GAF Corp v Amchem Products Inc* [1975] 1 LloydLR 601, also cited by Lord Collins in *Fong v Ascentic* (n 3) para 117, seemed to use the reasoning for interpretation purposes (at 605–6 per Megarry J). The Court of Appeal dismissed the appeal on the basis that the Judge's exercise of discretion could not be faulted, focusing on the question of appropriate forum. [99] See Section IV(B)(3) below.
[100] *George Monro, Ltd v American Cyanamid and Chemical Corp* [1944] KB 432 (CA).

application under the gateway for torts 'committed within the jurisdiction'.[101] Scott LJ considered that a claim in negligence for the manufacture of dangerous goods in America could only be said to have arisen in the jurisdiction on the basis of damage suffered here. However, this was 'not the kind of case where service ought to be permitted outside the jurisdiction unless quite exceptional circumstances are shown'.[102] In other words, if the connecting factor is construed widely so as to include the suffering of damage, it is over-inclusive and the presumption of connection may well be rebuttable in such cases. Goddard LJ and du Parcq LJ simply interpreted the head of jurisdiction narrowly, limiting it to wrongful acts committed within the jurisdiction.[103]

2. *Proper place in which to bring the claim*

In *Brownlie II*, Lady Brownlie was able to rely on the torts gateway to sue for damages following a car crash during a holiday in Egypt, despite strong disagreement from Lord Sumption (in *Brownlie I*) and Lord Leggatt (in *Brownlie II*). The majority in *Brownlie I* and *Brownlie II* considered that the doctrine of *forum conveniens* could be relied upon as a 'safety valve' to ensure a substantial connection to the forum, allowing for a more relaxed approach to the interpretation of the gateways when compared to the jurisdictional rules of the European Union.[104] Lord Lloyd-Jones said that there was 'no danger' that 'the wider reading of "damage"' would result in the English courts assuming jurisdiction 'simply on the basis of the English identity of the claimant' or in cases where there is 'no substantial connection between the wrongdoing and the jurisdiction'.[105] There was, therefore, 'no need to adopt an unnaturally restrictive reading of the domestic gateways'. The test of *forum non conveniens* was 'an appropriate and effective mechanism which can be trusted to prevent the acceptance of jurisdiction in situations where there is merely a casual or adventitious link between the claim and England'.[106]

The implicit proposition is that the court's discretion includes a rebuttal mechanism for presumptive (over-inclusive) gateways. The question of 'the proper forum' is relied upon to neutralise the risk of the gateways being too wide on the facts of a particular case. Thus, Lord Lloyd-Jones referred to the lower court's analysis of the appropriate forum in that case, noting its view that the claimant's losses had been experienced in England 'to a significant extent'.[107] The implication of this point, for Lord Lloyd-Jones, was that England could not have been the appropriate forum in the absence of a meaningful connection to the claim. The absence of such a mechanism in the European scheme explains, at least in part, why the term 'damage' is interpreted more narrowly. In the Brussels system, the connecting factor is a mandatory rule of jurisdiction:[108] it has to identify not just a potentially legitimate forum but a forum that will determine the claim if it is brought there.

[101] ibid 437 (Scott LJ). [102] ibid 437.
[103] ibid 439–40 (Goddard LJ) and 440–1 (du Parcq LJ).
[104] *Brownlie II* (n 1) para 77 (Lord Lloyd-Jones, with whom Lord Reed, Lord Briggs and Lord Burrows agreed); *Brownlie I* (n 1) para 51 (Lady Hale) and paras 66–67 (Lord Wilson), with Lord Clarke agreeing with both Lady Hale and Lord Wilson.
[105] *Brownlie II* ibid, para 77 (Lord Lloyd-Jones). [106] ibid, para 79. [107] ibid, para 80.
[108] ibid, para 55; see Briggs, "Holiday Torts and Damage within the Jurisdiction' (n 53) 199.

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Lord Lloyd-Jones's reasoning is not free from difficulty. There is currently no specific mechanism in the *Spiliada* test that would ensure that England is not the appropriate forum despite the claim being a 'false positive'.[109] England could well be the natural forum for a claim that satisfies the gateways only in an artificial manner (for example, because both of the parties are now located there and it is much more efficient for the action to proceed there); and even if England is not the natural forum, it may nevertheless be the appropriate forum if justice cannot be done in the foreign court. Presumably, that is why Lady Hale felt the need to clarify that the '"valuable safety valve" of discretion … need not be limited to the *Spiliada* principles, but can concentrate on the real question, which is "the proper place for the resolution of the dispute"'.[110] The better approach would be to anchor an explicit rebuttal mechanism in the court's discretion, that makes it clear that a rebutted presumption of connection is a determinative factor (rather than a consideration to be weighed in the typical two-stage *Spiliada* test). Such an approach would be consistent with Lord Collins's views in *Fong v Ascentic*.[111]

In light of these difficulties, it is not surprising that the majority's reliance on the doctrine of appropriate forum has been interpreted as 'trad[ing] off the absence of [a meaningful] connection against the relative advantages of England as a place to hold a trial'.[112] This trade-off has been criticised as unprincipled.[113] However, the majority's reasoning need not be read as making such a proposition. The better view is that the majority conceived of the doctrine of appropriate forum as a tool for rebutting a false connection established by the gateways—however flawed a tool it might be. The term 'safety valve', used by both Lady Hale and Lord Lloyd-Jones,[114] is a fitting description for such a rebuttal mechanism.

Thus, the majority did not adopt a reduced threshold of meaningful connection so that courts could give greater weight to considerations relating to, for example, the practicality of litigation.[115] Lord Lloyd-Jones, in particular, said that a reduced threshold of indirect damage—an over-inclusive meaning—was justifiable because the doctrine of appropriate forum would ensure that there was a substantial connection on the facts of the case. In this context, Lord Lloyd-Jones emphasised that the doctrine was about more than questions of practicalities or convenience and that it was, in his view, an effective tool to establish a substantial connection between the forum and the claim.[116]

[109] The *Spiliada* test is the two-prong test set out by Lord Goff in *Spiliada Maritime Corporation v Cansulex Limited* [1987] 1 AC 460, at 478, which applies when there is another forum with jurisdiction to hear the claim. The court must identify the natural forum to hear the claim, which is the forum with 'the most real and substantial connection to the action'. The natural forum will ordinarily be the appropriate forum, unless 'there are circumstances by reason of which justice requires' that the court hear the claim despite a foreign court being the natural forum. See Arzandeh, '*Brownlie II* and the Service-Out Jurisdiction under English Law' (n 52) 738–9; Dickinson, 'Faulty Powers: One-Star Service in the English Courts' (n 32) 195; Merrett (n 37) 380–1.

[110] *Brownlie I* (n 1) para 51 (Lady Hale).

[111] *Fong v Ascentic* (n 3) paras 118–120 (Lord Collins).

[112] *Brownlie II* (n 1) para 198 (Lord Leggatt); *Brownlie I* (n 1) para 31 (Lord Sumption); Dickinson, 'Faulty Powers: One-Star Service in the English Courts' (n 32) 194–5, agreeing with Lord Sumption's criticism of this reasoning in *Brownlie I*.

[113] ibid.

[114] *Brownlie II* (n 1) para 77 (Lord Lloyd-Jones); and *Brownlie I* (n 1) para 51 (Lady Hale), adopted from *Stylianou v Toyoshima* [2013] EWHC 2188, para 53.

[115] *Brownlie II* (n 1) paras 77–80 (Lord Lloyd-Jones); *Brownlie I* (n 1) para 51 (Lady Hale) and para 66 (Lord Wilson).

[116] *Brownlie II* ibid, para 78 (Lord Lloyd-Jones).

He reasoned that Lady Brownlie's damage in England was more than an adventitious and casual link; that the damage had been sustained in the forum 'in a very real sense';[117] and, by implication, that the court would use the doctrine of appropriate forum to guarantee that there was a substantial connection between the claim and the forum, even if the meaning of indirect damage, on its own, could not.

3. No legitimate benefit

In addition to the spirit principle and the doctrine of appropriate forum, courts have relied on another principle to rebut the presumption of connection as established by the gateways: the principle that the claim does not pursue a legitimate benefit in the forum.

Thus, in *Demirel v Tasarruf Mevduati Sigorta Fonu*,[118] the Court of Appeal interpreted the gateway for enforcement of a foreign judgment widely, partly on the basis of a purposive approach, and concluded that there was no requirement of assets within the jurisdiction.[119] It said that such a requirement would 'prevent the giving of permission to serve out in circumstances where there was a belief, hope or expectation that assets belonging to the defendant existed or would or might arrive within the jurisdiction' or where 'the claimant may wish to enforce a foreign judgment by compelling a person within the jurisdiction … to call for' the defendant's assets outside of the jurisdiction.[120] However, the Court of Appeal went on to say that a court may nevertheless decline to assume jurisdiction if the claim offers no 'real prospect of a legitimate benefit to the claimant'.[121] In other words, the Court construed the gateway widely to ensure inclusion of cases with a meaningful connection (where there is a prospect of a legitimate benefit to the claimant, despite the absence of assets in the forum); but where there is no such prospect, the presumption of connection is rebutted.

The Court of Appeal rationalised its reasoning by reference to a principle that 'it will ordinarily not be just [to exercise the discretion in favour of permitting service out of the jurisdiction] unless there is a real prospect of a legitimate benefit to the claimant from the English proceedings'.[122] The Court referred to *Insurance Corporation of Ireland v Strombus International Insurance Co*,[123] where Mustill LJ said that, in actions seeking a negative declaration of non-liability, 'the Court should be careful not to bring a foreigner here as a defendant … unless it can be shown that a solid practical benefit would ensue'.[124] At a very general level, claims that lack utility may be said to be at odds with the gateways' purpose of establishing a meaningful connection, to the extent that the connection is meant to justify an assumption of jurisdiction over a foreign defendant to ensure access to justice. A claim that lacks utility need not be served outside of the jurisdiction to ensure access to justice.

But the concern is especially pronounced where the gateway—including its connecting factor—is used as an illegitimate strategic device. Such a case would necessarily lack a meaningful basis for the assertion of jurisdiction. It would be a 'false positive' and the presumption of connection, as established by the gateways,

[117] ibid, para 76. [118] *Demirel v Tasarruf Mevduati Sigorta Fonu* (n 42). [119] See n 42.
[120] *Demirel v Tasarruf Mevduati Sigorta Fonu* (n 42) para 24. [121] ibid, para 27.
[122] ibid.
[123] *Insurance Corporation of Ireland v Strombus International Insurance Co* [1985] 2 LloydLR 138. [124] ibid 144 (Mustill LJ).

would be rebutted. Thus, Mustill LJ's dictum has been used as authority for the proposition that the court 'must be … careful to ensure that the negative declaration is sought for a valid and valuable purpose and not in an illegitimate attempt to pre-empt the jurisdiction in which the dispute between the parties is to be resolved'.[125] Claims for negative declaratory relief are not the only claims that trigger such concerns. For example, where a claimant relies on an anchor defendant to bring a claim against another defendant under the 'necessary or proper party' gateway, and the claim is not a 'bona fide' one (and only a jurisdictional device), the gateway will either be unavailable because there is no 'real issue' between the claimant and the anchor defendant, or the court may refuse to permit service outside the jurisdiction.[126]

The principle of legitimate benefit also explains why courts have declined jurisdiction over defamation claims alleging the commission of a local, but comparatively trifling, tort. Thus, it has been said that the court should not assume jurisdiction over a claim alleging the publication of defamatory material in England, if the damage suffered in England was insignificant or technical, and the real complaint relates to the publication of the material overseas.[127] In *Kroch v Rossell et Compagnie Société des Personnes à Responsibilité Limitée*, the Court relied on the 'letter and the spirit' principle to refuse service of a defamation claim that did not, 'in substance',[128] occur within the jurisdiction, because there was limited publication in England and 'the reality of the cause of action' was 'one which belong[ed] to a foreign country'.[129] More recently, in Singapore, it has been said that the rationale is to prevent the claimant from abusing the jurisdiction of the court.[130] Is the claimant 'seeking to bring the foreign defendant into the home jurisdiction to pursue a claim for injury arising within the jurisdiction' or are they, 'in reality, seeking in this jurisdiction to vindicate the alleged damage to [their] reputation in other jurisdictions'?[131]

A related problem arose more recently in *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd*.[132] Here, the Court rejected a narrow construction of the gateway for claims made 'under an enactment which allows proceedings to be brought', which would have limited its application to enactments that expressly authorise the bringing of proceedings against foreign defendants.[133] This interpretation would have excluded claims under enactments that, on their true construction, applied to foreign defendants, and there was no good reason for such a distinction in principle. However, where application of the enactment itself depended on there being a sufficient connection to the defendant, and where there was no sufficient connection on the facts of the case, the Court considered that permission for

[125] *New Hampshire Insurance Co v Philips Electronics North America Corp* [1998] CLC 1062, 1067.

[126] See *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, para 79; cf the discussion of *Rosler v Hilbery* in Section IV(B)(1) above.

[127] *Kroch v Rossell et Compagnie Société des Personnes à Responsibilité Limitée* [1937] 1 All ER 725 (CA); see *Dow Jones & Co Inc v Jameel* [2005] EWCA Civ 75, [2005] QB 946, para 70. See also Defamation Act 2013, section 9(2).

[128] *Kroch v Rossell et Compagnie Société des Personnes à Responsibilité Limitée* ibid 728 (Slesser LJ).

[129] ibid 731 (Scott LJ).

[130] *Lee Hsien Loong v Review Publishing Co Ltd* [2007] SGHC 24, paras 22–31 (Menon JC).

[131] ibid, para 30.

[132] *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd* [2018] EWCA Civ 1660, [2018] 1 WLR 4847.

[133] ibid, para 48.

service outside of the jurisdiction ought to be refused.[134] The Court specifically identified two requirements—that the claim must have a reasonable prospect of success, and that England and Wales must be 'the proper place' to bring the claim—as the appropriate bases for refusing jurisdiction. In light of the former requirement, in particular, there was no need to rely on a general principle of legitimate benefit. But like the principle of legitimate benefit, the requirement operated to rebut the presumption of a meaningful connection. If the purpose of the gateway is to provide for jurisdiction over statutory claims that apply to foreign defendants, then there is no meaningful connection if the statute will not, in fact, be applicable to the defendant because the court considers that there is an insufficient connection.

V. LESSONS

This article has demonstrated that the gateways for service out of the jurisdiction have the purpose of identifying a presumptive meaningful connection. Even though this position is well established in substance, it has not been articulated in these terms. Neither courts nor scholars have used the language of presumption to make sense of the gateways. There are, however, benefits to doing so.

First, framing the gateways as presumptive connecting factors helps to clarify the interrelationship between the connecting factor and its rebuttal. A rebuttal of the connection necessarily involves an examination of the purpose of the connection. It is only when a case does not involve a meaningful connection as envisaged by the gateway that the presumption ought to be rebutted. The reason why a case may lack such a meaningful connection is because the gateway, as a specific connecting factor, is prone to being over-inclusive. This means that a rebuttal mechanism such as the spirit principle is not a distinct principle of close connection that is divorced from the purpose of the gateway (or its interpretation).[135] In this sense, the gateways really do matter.

Courts do not always go far enough in their examination of a gateway's purpose. For example, in *Brownlie II* and *Fong v Ascentic*, Lord Lloyd-Jones and Lord Collins effectively concluded that there was no basis for rebutting the presumption of a meaningful connection on the facts, without grappling explicitly with the purpose of the gateway. The indirect damage suffered by the claimants was not the kind of damage that lacked 'a real' or 'substantial' connection to the forum. Apart from references to the extensiveness of the damage suffered, there was no further elaboration of why the cases met this threshold. There was certainly no discussion of what makes damage a presumptively meaningful connecting factor, which might have included consideration of the role of the defendant's legitimate expectations (in facing the consequences of its foreign acts, in the place where the damage was sustained).[136] Such a discussion could have proved instructive, both in *Brownlie II* and *Fong v*

[134] ibid, paras 49–50.

[135] cf A Briggs and A Dickinson, 'Reframing Jurisdiction: A New Scheme?' (2022) 41 CJQ 317, who propose that certain grounds of jurisdiction that are not 'self-sufficient' be combined with a distinct principle of real and substantial connection.

[136] cf, in the context of choice of law, English and Scottish Law Commissions, *Private International Law: Choice of Law in Tort and Delict* (Working Paper No 87/Consultative Memorandum No 62) paras 4.58, 4.72.

Ascentic, and a clear presumptive framing could encourage future courts to engage in such discussions.

Second, the fact that the rebuttal mechanism is grounded in the court's discretion whether to assume jurisdiction clarifies that the gateways are not intended, on their own, to establish the existence of jurisdiction. According to Lords Sumption and Leggatt, the purpose of the gateways was to confer a jurisdiction that the court could nevertheless decline to exercise.[137] According to Lords Lloyd-Jones and Collins, on the other hand, the gateways were not, on their own, sufficient to found jurisdiction, because jurisdiction only exists once the court has exercised its discretion to assume jurisdiction.[138] This latter view is consistent with the presumptive nature of the gateways: a presumptive connection does not equate to the existence of jurisdiction but enables the assumption of jurisdiction if it is not rebutted.

Third, a presumptive understanding of the gateways helps us understand—and to some extent mitigate—the differences in opinion in *Brownlie* (*I* and *II*) and *Fong v Ascentic*. Lady Hale, Lord Lloyd-Jones and Lord Collins adopted an over-inclusive (presumptive) interpretation of the gateway that could be tempered by way of rebuttal. Lord Sumption and Lord Leggatt did not. They considered that such a 'wide' approach to the gateway was unprincipled,[139] as did academic commentators.[140] But this criticism did not grapple directly with the argument that has been made in this article—that the purpose of the gateways is to identify a meaningful but presumptive connection, and that the majority reasoning in *Brownlie* (*I* and *II*), and Lord Collins's judgment in *Fong v Ascentic*, ought to be read as adopting this position. A more direct engagement with this argument would have exposed, in clearer terms, the common ground between the judges. There was, in effect, a shared view that a court should only assume jurisdiction over a foreign defendant if there is a meaningful connection as envisaged by the gateways; and that the court should not assume jurisdiction in cases involving a 'false positive', where the claimant has manufactured a link to the forum by, for example, seeking treatment there for a jurisdictional purpose, because there would not be a meaningful connection in such cases.

In fact, it is not out of the question that these (and similar) concerns may have pushed Lord Sumption and Lord Leggatt to adopt an interpretation of the gateways that, even on their view, was potentially *under*-inclusive. Lord Leggatt said that, if the gateway included indirect damage, it would be 'not so much a gateway … as an open territory with no fence'.[141] It would apply whenever an English resident who has returned home after suffering an injury abroad experiences ongoing pain, disability or financial loss in England.[142] It turned the claimant's residence (or even presence) in England into 'a sufficient factual basis' for jurisdiction over foreign defendants, even though the latter may have no other connection with the forum. Such an outcome was inconsistent with the courts' duty to interpret the gateways 'so far as possible in ways which render them meaningful'.[143] Neither Lord Leggatt nor Lord Sumption

[137] *Brownlie I* (n 1) para 31 (Lord Sumption); *Brownlie II* (n 1) para 198 (Lord Leggatt).
[138] *Brownlie II* ibid, para 77 (Lord Lloyd-Jones); *Fong v Ascentic* (n 3) para 112.
[139] *Brownlie II* ibid, para 198 (Lord Leggatt); *Brownlie I* (n 1) para 31 (Lord Sumption).
[140] See Arzandeh, '*Brownlie II* and the Service-Out Jurisdiction under English Law' (n 52) 738–9; Dickinson, 'Faulty Powers: One-Star Service in the English Courts' (n 32) 195; Merrett (n 37) 380–1.
[141] *Brownlie II* (n 1) para 171 (Lord Leggatt).
[142] ibid.
[143] ibid, para 197.

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specifically considered whether, in exceptional cases, indirect damage might give rise to what is on the facts a meaningful connection, or even whether *Brownlie* might have been such a case. On their non-presumptive approach to interpretation, they did not need to. So they did not expressly engage with an argument that there was a meaningful link between the defendant's acts and the forum because, in light of the parties' pre-existing relationship,[144] the defendant could have reasonably foreseen that its actions might lead to damage being sustained in England; or because, as a hotel catering to international tourists, it had opened itself up to the risk of causing damage overseas.

This leads to the fourth and final point, which is that a clear presumptive framing highlights the flexible nature of the court's inquiry, when it considers whether the meaningful connection that is envisaged by a gateway is truly established on the facts of a case. Because the court is engaged in the rebuttal of a presumption, its job is not to come up with a new, more restrictive interpretation of the gateway, but to consider whether, on the facts of the case, there is a relevant meaningful connection.

As has just been seen, in *Brownlie*, the rebuttal inquiry would have enabled a conclusion that the assumption of jurisdiction should turn on 'the foreseeability for the defendant of the need to be accountable to the plaintiff in this forum'.[145] This factor would have weighed against a rebuttal of the presumption. The claimant had arranged for accommodation and transportation with the hotel while she was still in England. More generally, a hotel catering to international tourists may expect that any damage sustained by a tourist, as a result of an accident in the foreign country, may in part be sustained in the forum upon the tourist's return. Similarly, in *Fong v Ascentic*, the plaintiff was a Hong Kong resident who was employed by a US company to work in the Mainland, and who entered into the employment contract when he was still in Hong Kong. From the employer's perspective, it would not have been unexpected that the plaintiff decided to return to Hong Kong after sustaining his work-related injury.

Neither Lord Lloyd-Jones nor Lord Collins referred to this factor. On the contrary, they referred to earlier case law where the place of damage did not seem to be foreseeable for the defendants, and the courts nevertheless exercised their discretion to assume jurisdiction.[146] So it is difficult to argue that the meaningfulness of the connection, for them, would have depended on the idea of foreseeability. At the same time, Lord Lloyd-Jones clearly stated that, even on his approach, 'there should … be no danger that the wider reading of "damage" would establish a jurisdiction simply on the basis of the English identity of the claimant'.[147] The implication of this dictum is that there must be *some* circumstances in which the gateway will not be available to an English claimant even though they have suffered damage upon their return home (and practical considerations favour a trial in England). Perhaps the only cases that Lord Lloyd-Jones had in mind were cases where the damage in the forum is relatively insignificant. However, it is difficult to see how such a narrow scope for rebuttal

[144] cf the discussion in Walker (n 63) 69–71.

[145] Walker (n 63) 66, who argues, however, that the distinction 'has little to do with where the harm was suffered'.

[146] See, eg, *Cooley v Ramsey* [2008] EWHC 129, [2008] IL Pr 27; *Wink v Croatio Osiguranje DD* [2013] EWHC 1118.

[147] *Brownlie II* (n 1) para 77 (Lord Lloyd-Jones). cf Lord Collins, who made a similar comment but seemed to be concerned more specifically with the 'portability' of the claim, where the claimant's domicile or residence in the forum does not provide a meaningful connection: *Fong v Ascentic* (n 3) paras 118, 120 (Lord Collins).

would really address the concern that, in cases of indirect damage, a wide reading of the gateway would have the effect of turning the English identity of the claimant into a connecting factor.

Be that as it may, the more general point is that the flexibility of the rebuttal inquiry, guided by the gateway's purpose of meaningful connection, allows for a tailored approach to the potential assumption of jurisdiction on the facts of each case. When reflecting on the role of the doctrine of *forum conveniens*, Lord Leggatt expressed concern that an open-ended inquiry into the connection to the forum would not provide a 'stable' basis for jurisdiction.[148] This is not an illegitimate concern. The conflict of laws has always grappled with the question of whether it is legitimate to trade predictability for justice. But, for now, for the reasons explored in this article, the better view is that the purpose of the gateways is to combine predictability with justice. The gateways are presumptive, and both *Brownlie* and *Fong v Ascentic* are best understood in this light.

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[148] *Brownlie II* ibid, para 208 (Lord Leggatt).