UNDERSTANDING CLAIM PROXIMITY IN THE EU REGIME OF JURISDICTION AGREEMENTS

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Abstract The Brussels I Recast Regulation entitles business actors to agree on which court(s) will have jurisdiction but restricts the effectiveness of such jurisdiction agreements to disputes 'which have arisen, or which may arise, in connection with a particular legal relationship'. This article fills a gap in the academic literature by examining the content and implications of this necessary connection (proximity) between the claim and the legal relationship between the parties. First, it characterises claim proximity as a question of party autonomy by distinguishing it from the subject matter of the jurisdiction agreement, which is an issue of contract interpretation. Second, it scrutinises the foreseeability test which has been frequently used by the CJEU in order to determine claim proximity, highlighting its main operational aspects. Building on both theoretical considerations and some cases where the foreseeability test has been used by domestic courts, this article provides clarifications about the scope, the proper functioning and the limits of such a test in order to raise awareness regarding the difficulties that may arise in its use in court to determine claim proximity and therefore assess jurisdiction.

Keywords: European Law, prorogation of jurisdiction, international contracts, jurisdiction, jurisdiction agreement, competition law, unlawful cartel, abuse of dominance.

I. INTRODUCTION

It has become common practice in international business transactions to draft broadly worded jurisdiction agreements submitting all disputes arising between the parties to a predetermined forum.[1] Generally, business actors and legal practitioners appreciate the benefits of these agreements, on the one

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[1] For some examples see GB Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Wolters Kluwer 2016) 20–1. See also RA Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of*

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hand, in minimising the risk of litigation by reducing uncertainty over questions of jurisdiction and, on the other hand, in preventing parallel proceedings by channelling all possible claims to the same court. These expectations may nonetheless be disappointed if one of the parties successfully argues that the claim grounding the jurisdiction of the court has no connection with the contract between the parties but arises from a different legal relationship. This occurs in particular when non-contractual claims are litigated.[2] The EU law provisions regulating jurisdiction agreements address this issue by requiring there to be a connection with 'a particular legal relationship' in order for the court to have jurisdiction. This article seeks to clarify the content and implications of this 'proximity' requirement,[3] a subject that remains quite obscure in both academic literature and legislation.[4]

Section II distinguishes the notion of proximity from the scope of the subject matter of a jurisdiction agreement. When it comes to addressing the scope of a jurisdiction agreement, both scholarly works and practitioners' collections of clauses search deeply for the most appropriate interpretation of the agreement's scope, but tend to ignore the important questions of the existing limits to party autonomy and of their impact on the enforceability or effectiveness of such an agreement. This section also makes extensive reference to the recent judgments of the Court of Justice of the EU (CJEU), in particular *Apple v eBiscuss.com*,[5] where it was decided that the appropriate standard for determining claim proximity was whether the party against whom the jurisdiction agreement was being invoked would be 'taken by surprise' by its being heard by that court, on the basis that the claim arose from a relationship other than that in connection with which the jurisdiction agreement was entered into. In CJEU practice, this foreseeability test has become the standard approach to determining claim proximity, which the Court derived from the general principle of predictability of jurisdiction.

Judgments (Brill Nijhoff 2014) 295–343; A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) 183–91.

[2] Non-contractual claims are usually defined negatively in relation to contractual claims. See Case 189/87 *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others* [1988] ECR 5565, para 18. N Jansen, 'The Concept of Non-Contractual Obligations: Rethinking the Divisions of Tort, Unjustified Enrichment, and Contract Law' (2010) 1 Journal of European Tort Law 16, 17, observes that there is no comprehensive definition of non-contractual obligations but simply a list of obligations that EU law considers as having a non-contractual nature such as 'tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*'. See Reg (EC) No 864/2007 on the law applicable to non-contractual obligations [2007] OJ L149/40, art 2(1). At the same time, although such a definition must be interpreted autonomously, the Regulation's recital 11 recognises that '[t]he concept of a non-contractual obligation varies from one Member State to another'.

[3] See A Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018) 187.

[4] With the exception of id 183–208. Despite the recent codification of private international law in certain jurisdictions, the issue of non-contractual claims connected to a contract has been ignored altogether. See SC Symeonides, *Codifying Choice of Law around the World: An International Comparative Analysis* (Oxford University Press 2014) 137.

[5] (n 64).

Section III sets out the main operational aspects of the foreseeability test. It clarifies the methodology supporting it and then considers its replicability outside the context of competition law infringements and its operability in more complex cases. Additionally, it considers possible alternative tests which nonetheless have been rejected in judicial practice. This analysis finds that, in order to ensure that jurisdiction is sufficiently predictable, courts may be required, depending on the complexity of the case, to engage in in-depth fact-finding by examining the substance of the claim raised by the parties, making proximity not only crucial but also potentially difficult to assess in determining jurisdiction.

II. THE PROXIMITY REQUIREMENT

A. Distinguishing Proximity from Consent

Consider the following four examples of broadly worded jurisdiction agreements:

> The parties agree to bring any claims for breach of this contract exclusively in the courts of England and Wales [*Clause A*].
> The Courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with this agreement (including a dispute regarding the existence, validity or termination of this agreement) [*Clause B*].
> The parties agree to submit any and all disputes of whatever nature which arise between them exclusively to the courts of England and Wales [*Clause C*].
> Jurisdiction: England and Wales [*Clause D*].[6]

Agreements of this kind typically raise two distinct questions: (1) which disputes fall within their respective scopes; and (2) whether they are also effective in allocating jurisdiction.

The first question involves considering the *purported scope* of the jurisdiction agreement in order to verify whether the parties intended that a particular claim, on which they have subsequently centred their litigation, should fall within it. Scholars tend to address questions such as this when considering the theoretical grounds for examining the scope of a jurisdiction agreement—a question of interpreting the jurisdiction agreement and party consent. The second question concerns whether the party autonomy regime established by the applicable jurisdictional rules allows the parties to litigate

[6] *Clauses A*, *C* and *D* are taken from Mills (n 4) 176, 178; *Clause B* was litigated in *O'Flynn & Ors v Carbon Finance Ltd & Ors* [2015] IECA 93 [5]. For other examples of broadly worded jurisdiction agreements see *Philips Domestic Appliances and Personal Care BV v Salton Europe Limited & Ors* [2004] EWHC 2092 (Ch) [3] ('All disputes under the Agreement'); *Sabah Shipyard (Pakistan) Ltd v The Islamic Republic of Pakistan & anr* [2002] EWCA Civ 1643 [1] ('any action filed by the other Party under this Agreement'); *Fondazione Enasarco v Lehman Brothers Finance SA & anr* [2014] EWHC 34 (Ch) [4] ('any suit, action or proceedings relating to this Agreement').

a particular claim in the designated forum.[7] This is a question of *effectiveness* or *workability* that ultimately relates to the interpretation not of the jurisdiction agreement, but of the applicable jurisdictional rules. As each of these questions generates multiple issues, they deserve to be addressed separately.

1. *The subject-matter scope of jurisdiction agreements*

The question of the agreement's 'purported'[8] scope is normally addressed using the common canons of contract construction under the law governing the jurisdiction agreement. General scholarly works and practitioners' collections of clauses usually explain that the determination of the scope of a jurisdiction agreement is a matter of construction of the contract and interpretation of the parties' intention[9]—an approach that courts also seem to follow.[10]

More specifically, when it comes to determining whether or not the broadly worded scope of a jurisdiction agreement encompasses a non-contractual claim (eg, for negligent misstatement or misrepresentation, fraud or bribery), English courts for a long time tended to rely on a literal construction of the agreement focussing on connectors such as '*arising under*', '*arising out of*', '*relating to*', or '*in connection with*' a relevant contract.[11] Scholarly analyses of court rulings show that each of these connectors has a different meaning regarding non-contractual claims.[12] Accordingly, *Clause A* and *Clause B* above seem to be narrower in scope than *Clause C* and *Clause D*, which contain no connector

[7] For an historical analysis see H Muir Watt, '"Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance' (2010) 6(3) ERCL 250, 265–72; M Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41(2) Vanderbilt Journal of Transnational Law 381, 385–98; more recently, Mills (n 4) 31–44.

[8] Mills (n 3) 175.

[9] See JF Coyle, 'Interpreting Forum Selection Clauses' (2019) 104 IowaLRev 1791, 1803–6 (a US view); Born (n 1) 20; Brand (n 1) 320–1; P Sheridan, 'Construction Act Review: Jurisdiction, Disputes Arising under or in Connection with the Contract' (2015) 31(2) ConstLJ 108; ZS Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 102–9; F Sparka, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis* (Springer 2009) 69–70; D Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell 2005) 110–11.

[10] See *Roche Products Ltd. & Ors v Provimi Ltd* [2003] EWHC 961 (Comm) [60]–[68]; *Fiona Trust & Holding Corporation v Yuri Privalov* [2007] UKHL 40 [23]. The latter case concerned an arbitration agreement but is commonly referred to in the context of jurisdiction agreements: see L Merrett, 'Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements' (2009) 58(3) ICLQ 545, 548–9.

[11] For example, *Fillite (Runcorn) Ltd. v Aqua-Lift* [1989] 45 B.L.R. 27, held that the expression 'disputes arising under the contract' contained in an arbitration agreement was not wide enough to include a claim of negligent misstatement or misrepresentation.

[12] For an overview, see Briggs (n 1) 184–91. See for example *Philips Domestic Appliances and Personal Care BV v Salton Europe Limited & Ors* [2004] EWHC 2092 (Ch) [3] ('All disputes under the Agreement'); *Sabah Shipyard (Pakistan) Ltd v The Islamic Republic of Pakistan & anr* [2002] EWCA Civ 1643 [1] ('any action filed by the other Party under this Agreement'); *Fondazione Enasarco v Lehman Brothers Finance S.A. & anr* [2014] EWHC 34 (Ch) [4] ('any suit, action or proceedings relating to this Agreement'). On restitution claims, see G Panagopoulos, *Restitution in Private International Law* (Bloomsbury Publishing 2000) 219–21.

and may therefore encompass claims that do not have even a minimal connection with the contract.

A distinction can therefore be drawn between 'narrow' and 'wide' scope of jurisdiction agreements.[13] At one end of the spectrum lie jurisdiction agreements which only cover contractual claims (or only some of them, such as *Clause A*). At the other end one finds jurisdiction agreements encompassing all possible non-contractual claims arising between the parties, even those with no connection whatsoever with the contract (as in *Clause C* or, less explicitly, *Clause D*).[14] Expressions such as '*arising under*' appear to lie at one extreme, courts generally considering this wording to be narrower than '*arising out of*',[15] whereas expressions such as '*arising in connection with*' or '*in relation to*' have been considered to be 'words of the very widest scope'.[16]

Any exercise aimed at measuring the inclusiveness of a jurisdiction agreement based on the use of a certain connector risks being worthless. On the one hand, because each case concerns only one or a few very specific non-contractual claims *vis-à-vis* one particular jurisdiction agreement, it is practically impossible to devise a comprehensive and precise approach. On the other hand, both the governing law and court discretion may lead to different interpretations of clauses drafted in English depending on the quality of the translation.[17] The result is inevitably approximate. Nonetheless, this exercise has the obvious advantage of allowing practitioners to know whether they have achieved their objective of drafting the widest possible jurisdiction agreement.[18] Case law may provide indications about whether certain types of claims will more reasonably be covered by certain forms of wording. For example, a *rectification claim* is likely to be covered by a jurisdiction agreement whose scope extends to all disputes 'arising out of' the contract, whereas this would not be the case for a clause using the expression 'arising under',[19] a formula that would instead cover claims of contract voidance

[13] The same distinction has been made in international commercial arbitration: see I Welser and S Molitoris, 'The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract . . .".' (2012) 17 Austrian Yearbook of International Arbitration 18, 20–1.

[14] For a US view see Coyle (n 9) 1803–6.

[15] See *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2005] EWHC 3503 (TCC) [49] ('In this case it is evident that the phrase "under" the contract is less broad than "arising out of or in connection with" the contract'); *Government of Gibraltar v Kenney* [1956] 2 QB 410 (noting that 'it is quite clear that "arising out of" is very much wider than "under" the agreement'); *Heyman v Darwins Ltd* [1942] AC 356, 399.

[16] *Pacific Resources Corp v Credit Lyonnais Rouse* (CA, 7 October 1994).

[17] For an example of controversial translation from English of a complex jurisdiction agreement see Cassazione (It.), S.U. (20 February 2007) No 3841, *Poste Italiane SpA v JP Morgan Chase* (2008) 44(1) Rivista italiana di diritto internazionale privato e processuale 160.

[18] As suggested by S Davis, 'The Critical Importance of Carefully Drafting Arbitration Clauses' (2003) 22 Australian Resources and Energy Law Journal 161, 166 (with reference to arbitration agreement, but as applicable to jurisdiction agreements too).

[19] Under *Ashville Investments Ltd v Elmer Contractors Ltd*, (1987) B.L.R. 55.

following a repudiation of acceptance.[20] Furthermore, a jurisdiction agreement referring to all disputes arising 'in relation to' a contract is apt to include claims for damages arising from tortious interference with a party's business.[21]

Despite the difference in specificity, it is hard to draw *ex post* any concrete indications about the intention of the parties from all these 'linguistic nuances'.[22] This is the reason underlying the House of Lords' notorious judgment in *Fiona Trust v Privalov* and its extremely liberal 'one-stop adjudication' doctrine, requiring courts to disregard the particular connector(s) used by the parties in favour of a presumption of inclusiveness.[23] Essentially, by denying the distinction between narrow and wide jurisdiction agreements, this doctrine replaced the parties' intention with an assumption of what 'any sensible businessmen [would] have wished to agree'.[24] Even this inclusive approach, however, presents some flaws, as not only does it force courts into 'second-guessing or only half-recognising the decisions of the parties',[25] but it is also unlikely to find favour in other EU Member States, whose courts may continue to engage with the linguistic distinctions rejected by *Fiona Trust*.[26]

Political philosophers have given a name to this sort of problem: 'the inclusion paradox'. Analogous with the famous 'paradox of tolerance', the inclusion paradox reflects the idea that, regardless of one's good intentions, absolute inclusiveness remains nonetheless conceptually problematic.[27] In the context of jurisdiction agreements, this paradox is expressed by the tension between the parties' statement that *all* claims be subject to the designated jurisdiction on the one hand, and the requirement that these claims have *a certain connection* with the contract on the other hand. In other words, broad

[20] See *Norther Developments (Cumbria) Ltd v J&J Nichol* [2000] B.L.R. 158 [35] ('The repudiation issues were matters arising *under the contract*'); *Mackender Hill and White v Feldia AG* [1966] 2 Lloyd's Rep. 449, 455 (qualifying a rescission for non-disclosure as a dispute *arising under* the policy 'just as does a dispute as to whether one side or other was entitled to repudiate the contract').

[21] See *ET Plus SA v Welter* [2005] EWHC 2115 (Comm) [45] (concluding that 'the clause extends beyond the four corners of the contract; it will cover disputes as to its true construction and it will further extend to both contractual and tortious claims, provided these are sufficiently connected to the non-performance of the contract so as to satisfy the test encapsulated in the word "regarding"').

[22] *Fiona Trust* (n 10) [12].

[23] ibid [13] (L Hoffmann) and [27] (L Hope of Craighead). See in this regard P Gillies, 'Arbitration and Fragmentation of the Dispute Resolution Process into Competing Arbitral and Judicial Proceedings – The Courts Role' (2013) 16 International Trade and Business Law Review 397, 399–400.

[24] *Fiona Trust* (n 10) [28].

[25] Mills (n 3) 183.

[26] ibid 183–4 (concluding to be better 'attempting to determine the intentions of the parties through a teleological approach based on their broader contractual intentions'). For further criticisms to the one-stop adjudication doctrine see J Delaney and K Lewis, 'The Presumptive Approach to the Construction of Arbitration Agreements and Separability – English Law Post *Fiona Trust* and Australian Law Contrasted' (2008) 31 UNSWLJ 341, 344–5; K Sadrak, 'Arbitration Agreements and Actions for Antitrust Damages after the *CDC Hydrogen Peroxide* Judgment' (2017) 16 YARS 77, 102–3 (defining the application of this doctrine to antitrust claims 'controversial').

[27] This paradox reflects Jürgen Habermas' recognition of the aporias of tolerance, on which see L Thomassen, 'The Inclusion of the Other? Habermas and the Paradox of Tolerance' (2006) 34(4) Political Theory 439, 448–53.

language does not necessarily mean full inclusiveness, especially when it comes to non-contractual claims – which is why wide jurisdiction agreements are more often than not considered 'by definition [. . .] ambiguous'.[28] Unless more information can be deduced from the relevant contextual circumstances, and provided that this exercise is feasible under the applicable law or the contract,[29] saying whether or not the parties knew which specific disputes would directly or indirectly result from their relationship is pure speculation.

This information gap explains why it remains unclear whether even the most inclusive jurisdiction agreements (like *Clause D*, for instance) include non-contractual claims. It also contributes to the courts' 'increasing exasperation' when interpreting the subject-matter scope of jurisdiction agreements, making this a field where 'the technical value [of] precedents can only be seen as limited, and risks being over-stated'.[30]

2. *The question of effectiveness*

Discussing a jurisdiction agreement's 'effectiveness' or 'workability' also requires determining whether its 'purported' scope would also be recognised and enforced by the law as a matter of party autonomy.[31] In this regard, the EU regime of jurisdiction agreements entitles business actors to agree on 'the court or the courts of a Member State [that] are to have jurisdiction to settle any disputes which have arisen or which may arise *in connection with a particular legal relationship*'.[32] Accordingly, for a jurisdiction agreement to be

[28] Coyle (n 9) 1806.

[29] In fact, the contract itself may prevent the parties from relying on contextual circumstances to interpret their intention under the contract. This occurs, for instance, in case of a 'merger' or 'entire agreement clause' stating that all the terms between the parties have been merged into the writing. See M Barber, 'The Limits of Entire Agreement Clauses' (2012) 6(4) JBL 486, 488; M Fontaine, F De Ly, *Drafting International Contracts: An Analysis of Contract Clauses* (Martinus Nijhoff 2008) 129–50. An open issue remains whether the principle of severability of a jurisdiction agreement which is part of a contract permits the merger clause to be discarded.

[30] Briggs (n 1) 184–5.

[31] On 'effectiveness' see Mills (n 3) 175–6; on 'workability' (in the context of international commercial arbitration) see A Frignani, 'Interpretation and Application of the New York Convention in Italy' in GA Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 561, 566–7.

[32] Emphasis added. See (1) Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L35/1 (Brussels I Regulation Recast), art 25(1), preceded by art 23(1) of the Regulation 44/2001 and art 17(1) of the 1968 Brussels Convention. See U Magnus, 'Article 25' in U Magnus and P Mankowski (eds), *European Commentaries of Private International Law – Brussels Ibis Regulation* (Otto Schmidt 2016) 583; P Mankowski, 'The Role of Party Autonomy in the Allocation of Jurisdiction in Contractual Matters' in F Ferrari and F Ragno (eds), *Cross-Border Litigation in Europe: The Brussels I Recast Regulation as a* Panacea*?* (Wolters Kluwer 2015) 97; M Herranz Ballestreros, 'The Regime of Party Autonomy in the Brussels I Recast: The Solutions Adopted for Agreements on Jurisdiction' (2014) 10(2) *Journal of Private International Law* 291; T Ratković and D Rotar Zgrabljić, 'Choice-of-Court Agreements under the Bussels I Regulation (Recast)' (2013) 9(2)

enforceable under the EU regime the claim litigated in court must fulfil a *proximity* requirement *vis-à-vis* the legal relationship between the parties.

Despite the various amendments to the EU regime that have occurred over time, this requirement has remained unchanged.[33] Generally speaking, proximity is connected to the objectives of predictability and certainty of law.[34] Proximity is a substantive requirement of a jurisdiction agreement and therefore must be distinguished from consent and from the related analysis of the intention of the parties. Borrowing the words of AG Jääskinen from his opinion in *Refcomp v Axa*, a jurisdiction agreement 'must not be worded in such a general manner as to include all possible disputes between the parties, irrespective of the contracts concluded by them'.[35]

Two theories have been advanced to explain the rationale behind proximity. The first theory, to which scholars today almost unanimously adhere, argues that proximity must be understood in terms of predictability, limiting the danger of so-called 'catch-all clauses'—clauses 'which conferred jurisdiction in relation to *any* dispute which might arise out of *any* future legal relationship into which the parties may enter'.[36] The second theory, set out by AG Giuseppe Tesauro in his opinion in *Powell Duffryn v Petereit*, links proximity with the need to 'prevent the party in a stronger bargaining position from imposing on the other party the jurisdiction of any other court'.[37] This second theory raises the problem of implementing protective public policy considerations outside the context of jurisdictional rules that already protect the weaker party to a contract by limiting party autonomy.[38]

Regardless of the preferred theory, the proximity requirement makes clauses such as *C* and *D* problematic, if not totally unenforceable, in respect of non-contractual claims which have no connection with the contract. Both these clauses lack a proper connector with a relevant contract, thus potentially permitting jurisdiction for an unspecified number or type of claims and creating a problem of a lack of proximity. In so doing, they question the autonomy of the parties to contract over jurisdiction. The problem, then, is how to assess proximity in litigation.

Journal of Private International Law 259. See also Art 3(1)(a) of the 2005 Hague Convention on Choice-of-Court Agreements, reported in (2005) 44(6) *International Legal Materials* 1294.

[33] Such wording was originally influenced by the Hague Convention on the jurisdiction of the selected forum in the case of international sale of goods (adopted 15 April 1958, not in force), Art 2 and the Hague Convention on the choice of court (adopted 25 November 1965, not in force) art 1. See G van Calster, *European Private International Law* (2nd edn, Hart Publishing 2016) 114–15.

[34] See Magnus (n 32) 591–2.

[35] Case C-543/10 *Refcomp SpA v Axa Corporate Solutions Assurance SA and Others*, Opinion of AG Jääskinen, EU:C:2012:637, note 35.

[36] CGJ Morse, 'Forum-Selection Clauses – EEC Style' (1989) 1 AJICL 576 (emphasis added); Magnus (n 35) 620.

[37] Case C-214/89 *Powell Duffryn v Petereit*, Opinion of AG Tesauro [1992] ECR I-1756, para 13.

[38] See Brussels I Regulation Recast, recitals 18–19 and the 'exclusive jurisdiction' provisions of the various EU provisions reported in (n 32).

B. The Foreseeability Test

To assess a claim's proximity to a particular legal relationship the CJEU has implemented a *foreseeability test*, which it deemed consistent with the general objective of the EU regime of jurisdiction agreements, namely the predictability of jurisdiction.

1. Early cases

The proximity problem was first addressed in *Meeth v Glacetal* (1978).[39] The defendant had raised a *set-off defence* against the claimant's initial request for payment based on the damage resulting from the alleged delay in delivering goods. The CJEU observed that respect for party autonomy and the need 'to avoid superfluous procedure' required the court designated in the jurisdiction agreement to adjudicate 'a claim for a set-off connected with the legal relationship in dispute'.[40] This was an easy exercise, however, as the defendant's cross-claim was clearly connected with the contract entered into by the parties.[41] *Meeth* therefore left unsettled the question of whether there was jurisdiction over an offset of a cross-claim arising from a different legal relationship than the main claim (for example, an alleged infringement of the duty to disclose) which in some legal systems may require separate proceedings.[42]

In *Powell Duffryn v Petereit* (1992), the CJEU applied the foreseeability test in respect of a broadly worded jurisdiction clause contained in a company's bylaws.[43] The clause in question, similar to *Clause C* above, provided:

> By subscribing for or acquiring shares or interim certificates the shareholder submits, with regard to all disputes between himself and the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company.[44]

The CJEU first set out the test for assessing proximity under Article 17 of the 1968 Brussels Convention, stating that the requirement of a connection with a particular legal relationship

> is intended to limit the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. Its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all

[39] Case C-23/78 *Nikolaus Meeth v Glacetal* [1978] ECR 2133. [40] ibid para 8.

[41] In this case, adjudication in the same proceedings is the rule. R Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (Cambridge University Press 2002) 56.

[42] This is a typical case where German law would demand separate proceedings (Art 145(3) ZPO). See D Looschelders and M Makowsky, 'Set-Off', in S Leible and M Lehmann, *European Contract Law and German Law* (Wolters Kluwer 2014) 695–7.

[43] Case C-214/89 *Powell Duffryn plc v Wolfgang Petereit* [1992] ECR I-01745.

[44] ibid para 2.

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> disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made.[45]

The Court therefore concluded that the jurisdiction clause at issue covered all disputes arising out of the relationship *between the company and the shareholders as such*.[46] Yet even this test does not seem to provide a straightforward answer in respect of more difficult corporate litigation cases, such as where 'the shareholder(s) were to take action against the company no longer as shareholders but in another capacity (or the company against them)'.[47] It should be recalled, additionally, that party autonomy is already heavily limited in the corporate setting, as certain questions concerning the relationship between a company and its shareholders are subject to the exclusive jurisdiction of the court of the Member State where the company has its seat.[48] Because of these constraints, *Powell Duffryn* can hardly be qualified as a leading case helpful for the understanding of the problem of claim proximity in other settings.

2. *Recent cases regarding competition law claims*

In more recent rulings, the CJEU has employed the foreseeability test in the context of claims arising out of competition law infringements.

In *CDC Hydrogen Peroxide v Evonik Degussa and Others* (2015),[49] the CJEU was asked to interpret Article 23(1) of the Brussels I Regulation in relation to an unlawful secret cartel.[50] The lawsuit before the referring court consisted of a follow-on damage action arising out of a cartel agreement between the world's leading manufacturers of hydrogen peroxide and sodium perborate, which the EU Commission had declared unlawful in 2006.[51] Acting on behalf of dozens of purchasers of hydrogen peroxide, the Belgian company Cartel Damage Claims (CDC) Hydrogen Peroxide brought a follow-on action for disclosure and damages in

[45] ibid para 31.
[46] ibid para 34.
[47] S Rammeloo, 'Jurisdiction Clauses in Transnational Company Relationships' (1994) 1 MJ 433.
[48] See Brussels I Regulation Recast, art 24(2); Brussels I Regulation, art 22(2); 1968 Brussels Convention, art 16(2). See MV Polak, 'Case C-214/89, *Powell Duffryn PLC v Wolfgang Petereit*, Judgment of 10 March 1992, not yet reported' (1993) 30 CMLRev 406, 416–17.
[49] See Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others*, EU:C:2015:335. The judgment also addresses other questions concerning art 5 (1) and 6(1) of the Brussels I Regulation. See W Wurmnest, 'International Jurisdiction in Competition Damages Cases under the Brussels I Regulation: *CDC Hydrogen Peroxide*' (2016) 53 CMLRev 225; O Geiss and H Daniel, '*Cartel Damage Claims Hydrogen Peroxide SA v Akzo Nobel NV and others*: A Summary and Critique of the Judgment of the European Court of Justice of May, 21 2015' (2015) 36 European Competition Law Review 430.
[50] See the referred questions in *CDC* (n 49) para 14.
[51] See Commission Decision No C(2006) 1766, (2006) OJ L 353, 54, paras 3–4, 11–12, 40.

Germany against six cartel participants.[52] The defendants objected to the jurisdiction of the referring court on the basis of forum selection and arbitration clauses in the supply agreements between the claimants and the cartel participants.[53] The CJEU concluded that,

> given that the undertaking which suffered the loss could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause and that that undertaking had no knowledge of the unlawful cartel at that time, such litigation cannot be regarded as stemming from a contractual relationship.[54]

The Court added that 'where a clause refers to disputes in connection with liability incurred as a result of an infringement of competition law', the designated court is entitled to retain jurisdiction over the referred claim.[55]

CDC was ambiguous in at least two respects. First, as the CJEU referred to competition law infringements in general, the ruling was misinterpreted as providing a clear-cut rule for all kinds of competition law claims regardless of their specific legal qualification.[56] This confusion in turn led courts to mistakenly assume that they had been absolved from applying the foreseeability test in each specific case, thus applying the *CDC* judgment in situations different from those which had given rise to it.[57] Second, some commentators have interpreted *CDC* as requiring contract practitioners to add specific competition law-related jurisdiction clauses to show that the parties had foreseen the possibility of such litigation when contracting.[58] However, these commentators failed to account for the practical implications of their proposal both in terms of costs and feasibility.[59] On the one hand, requiring drafters to insert competition law-specific jurisdiction clauses in international contracts would dramatically increase the transaction costs, multiplying the lawyer's bills and the parties' negotiation efforts.[60] On the other hand, such specificity

[52] A parallel litigation was launched in Helsinki. See District Court of Helsinki (4 July 2013) *CDC Hydrogen Peroxide Cartel Damage Claims SA v Kemira Oyj*, Välituomio 36492, no 11/16750.

[53] On arbitration agreements in *CDC*, see K Sadrak, 'Arbitration Agreements and Actions for Antitrust Damages after the *CDC Hydrogen Peroxide* Judgment' (2017) 16 Yearbook of Antitrust and Regulatory Studies 77; D Geradin, 'Arbitrability of EU Competition Law-Based Claims: Where Do We Stand after the *CDC Hydrogen Peroxide* Case?' (2016) 40 World Competition 67.

[54] *CDC* (n 49) para 70. [55] ibid para 71.

[56] On this point see J Segan, 'Arbitration Clauses and Competition Law' (2018) 9(7) Journal of European Competition Law & Practice 423, 425–6.

[57] *Cour de Cassation*, First Civil Chamber (7 October 2015) no 14-16.898 (2015) Recueil Dalloz 2621.

[58] See O Sendetska, 'Arbitrating Antitrust Damages Claims: Access to Arbitration' (2018) 35(3) JIntlArb 370.

[59] See H Gaudemet-Tallon and F Jault-Seseke, 'Droit international privé mars 2016–février 2017' (2017) Recueil Dalloz 1023, and Briggs (n 1) 183, both defining such a change as 'unrealistic'.

[60] That is, opting out of a boilerplate provision generates transaction costs. See P van Wijck, 'Foreseeability' in G De Geest (ed), *Contract Law and Economics* (Edward Elgar 2011) 232.

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would disrupt the use of boilerplate clauses which have become dominant in the context of international business transactions.[61]

In the subsequent case *Apple v eBizcuss.com*, the CJEU attempted to unravel at least some of the uncertainties generated by *CDC*.[62] In *Apple*, the referring court sought guidance from the CJEU on whether Article 23(1) of the Brussels I Regulation required the enforcement of a broadly worded jurisdiction agreement in the context of an action for abuse of a dominant position stemming from Article 102 TFEU and the corresponding national law provisions.[63] The jurisdiction agreement at issue provided:

> This Agreement and the corresponding relationship between the parties shall be governed by and construed in accordance with the laws of the Republic of Ireland and the parties shall submit to the jurisdiction of the courts of the Republic of Ireland. [. . .].[64]

The CJEU first recalled the foreseeability test and then distinguished the case from *CDC*, stating that, whilst an unlawful cartel under Article 101 TFEU

> is in principle not directly linked to the contractual relationship between a member of that cartel and a third party which is affected by the cartel, the anti-competitive conduct covered by Article 102 TFEU, namely the abuse of dominant position, can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms.[65]

The Court therefore concluded that an action for abuse of dominance 'cannot be regarded as surprising' and is therefore 'not excluded on the sole ground that that clause does not expressly refer to [it]'.[66]

Apple immediately attracted considerable criticism. Whilst one commentator observed that foreseeability 'does not seem to have the force the Court ascribes to it',[67] another highlighted the radical change of perspective from *CDC* to *Apple*, moving from granting access to justice for the victims of competition law infringements to protecting potential abusers.[68] At any rate, reconciling the two rulings seems difficult, particularly for legal practitioners called on to draft such agreements since the issues raised by the decision in *CDC* still

[61] See Sendetska (n 58) 362.

[62] See Case C-595/17 *Apple Sales International, Apple Inc., Apple Retail France EURL v MJA, acting as liquidator of eBizcuss.com*, EU:C:2018:854. See P Caro de Sousa, 'Should Jurisdictional Clauses Be Interpreted Differently in Competition Law Cases? A Comment on Case C 597/17 *Apple*' (November 2018) Competition Policy International 4.

[63] See Cour de Cassation (11 October 2017) no 16-25.259 (2018) *Revue critique de droit international privé* 132. See also *Supremo Tribunal de Justiça* (16 February 2016) *Interlog, Taboada & Barros v Apple*, 135/12.7TCFUN L1.S1, on which M Sousa Ferro, 'Antitrust Private Enforcement in Portugal and the EU: The Tortuous Topic of Tort' (2016) 4 Global Competition Litigation Review 140.

[64] *Apple* (n 62) para 9.

[65] ibid para 28.

[66] ibid paras 28 and 30.

[67] H Gaudemet-Tallon, 'Clause contributive de juridiction et droit de la concurrence: l'affaire *eBizcuss* devant la CJUE' (2018) Recueil Dalloz 2338, 2341.

[68] A-L Calvo Caravaca and J Carrascosa Gonzalez, 'European Union Private International Law in Front of Antitrust Damages Action' (2018) 10(2) Cuadernos Derecho Transnacional 47.

remain unsettled after *Apple*.[69] The next section attempts to provide the necessary clarifications.

III. DEMYSTIFYING FORESEEABILITY

The objective of this section is to address the gap in the academic literature concerning the use of the foreseeability test as a means of determining claim proximity.[70] It has been argued that the EU regime 'allows for jurisdiction agreements to encompass some non-contractual claims, but its scope is restricted by questions of the proximity of the claim to the contractual relationship' and that '[t]he requirement that the parties not be "taken by surprise" suggests a focus on the foreseeability of the action'.[71] It follows that

> It is clear that claimants cannot rely on a jurisdiction agreement in respect of proceedings that are entirely unrelated to that contractual relationship, however broadly it is drafted. It is, however, not clear how this 'proximity' test will be determined in difficult cases.[72]

This section offers an analysis of the foreseeability test in four steps. First, it examines the proper standard under which the test should be applied (the reasonable person standard). Second, it verifies the extent to which the test is replicable outside both the corporate setting and the competition law context in which the CJEU has elaborated it. Third, it investigates how the test has been applied by domestic courts in cases with complex factual backgrounds. A final subsection mentions two tests ('but-for' and 'interdependence') that have been proposed in judicial practice as alternatives to the foreseeability test.

A. The Reasonable Person Standard

Among the 'central pillars' of the Brussels Regime are the certainty of law and the predictability of jurisdiction.[73] EU legislators put 'legal protection and, hence, legal certainty' at the core of the EU system of jurisdiction,[74] holding that '[t]he rules of jurisdiction must be highly predictable'.[75] Legal certainty pertains to the quality of the law[76] and is often used as an 'umbrella principle' embracing other principles such as that of predictability.[77] In turn,

[69] See Caro de Sousa (n 62) 3. [70] See Mills (n 3) 184–9. [71] ibid 187. [72] ibid.

[73] A Dickinson, 'Background and Introduction to the Regulation' in A Dickinson, E Lein (eds), The Brussels I Regulation Recast (OUP 2015)1, 23.

[74] Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by Mr P Jenard, OJ EC 1979 C 59, 1, 3.

[75] Brussels I Regulation, Recital 11 and Brussels I Regulation Recast, Recital 15.

[76] Determining 'clearly and precisely' which court has jurisdiction 'is conducive to the legal certainty sought by the Convention'. Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, para 51.

[77] J Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust' (2016) 41(2) ELRev 275, 280.

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predictability serves the economic interests of business actors, by making jurisdiction a diagnosable risk.[78] This risk-allocation rationale is an element that the provisions on jurisdiction agreements share with other aspects of law concerning international business transactions, such as damage recovery.[79]

The CJEU has specified on multiple occasions that, in order to make jurisdiction predictable, it is necessary that

> the applicant [must be able] to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued.[80]

Both the ease of identification and the reasonable foreseeability of the forum call for a notion of foreseeability that combines subjective and objective dimensions. According to this model, the subjective element would require courts to allow the party challenging the enforceability of a jurisdiction agreement to prove that the other party had *actual knowledge* of the particular claim to be submitted to, or excluded from, the jurisdiction of the designated court. At the same time, the objective element would require courts to verify whether *a reasonable person* in the same circumstances as the party against which the jurisdiction agreement is invoked would have foreseen that such a claim might be submitted to the designated court.

The *CDC* case is a perfect illustration of this twofold mechanism, with the CJEU acknowledging the relevance of both dimensions.[81] It also makes clear that actual knowledge trumps the reasonableness test, so that knowledge, and evidence thereof, of an existing cartel would be sufficient to connect the related damage claim with the parties' contractual relationship and therefore make it foreseeable. On the other hand, by concluding that a claim for damages can arise from an abuse of dominance in a distributorship relationship, the CJEU in *Apple* acknowledged the value of the objective dimension. What is important is not the foreseeability of the claim per se, but rather the foreseeability of the jurisdiction flowing from the claim.[82] An accurate analysis of the claim is therefore essential in order to determine its proximity to the parties' legal relationship.[83]

It might be argued that hardly anyone—let alone a reasonable person—would be in a position to say what forms of claims would take them by surprise when

[78] See Brand (n 1) 109. See also P Kurer, *Legal and Compliance Risk: A Strategic Response to a Rising Threat for Global Business* (Oxford University Press 2015) 84–8; H Avila, *Certainty in Law* (Springer 2016) 172–4.

[79] See D Saidov, *The Law of Damages in the International Sale of Goods* (Hart Publishing 2008) 101–19.

[80] Lastly Case C-196/2015 *Granarolo SpA v Ambrosi Emmi France SA*, EU:C:2016:559, para 16; Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, EU:C:2012:220, para 23; Case C-533/07 *Falco Privatstiftung v Gisela Weller-Lindhorst* [2009] ECR I-03327, para 22.

[81] *CDC* (n 49) para 70.

[82] Saidov (n 79) 113. See also *Etihad Airways PJSC v Prof Dr Lucas Flöther* [2019] EWHC 3107 (Comm) [120].

[83] This analysis must necessarily be performed on a summary basis, as courts must 'readily' rule on jurisdiction. See Case C-375/13 *Harald Kolassa v Barclays Bank plc*, EU:C:2015:37, para 61.

entering into a contract. However, whilst this might be true *in abstracto*, it might still be possible to determine claim proximity in relation to a specific case. For example, whilst it can be maintained that a contract might not by itself give rise to a fraud claim, fraud might nonetheless be present under circumstances which may cause a reasonable person to foresee a related claim. To this end, the proposed combination of subjective and an objective element may ensure that there is the necessary flexibility 'to accommodate a variety of factual settings and, at the same time, […] still have a discernible content'.[84]

B. Case Specificity

For business actors to properly allocate jurisdictional risk, the test used to determine the effectiveness of a jurisdiction agreement should ideally be replicable outside the specific claims for which it has been elaborated, ie the corporate setting and the competition law context. Foreseeability, however, is just a 'shortcut'[85] which assists courts in deciding on jurisdiction and, in this sense, is hardly a precise test.

In particular, courts might be tempted, in the wake of *CDC* and *Apple*, to conclude that there is proximity simply from the legal characterisation of the claim so that, although damages claims arising out of unlawful cartels have no connection whatsoever with a contract, the abuse of a dominant position means that such a connection necessarily exists.[86] This is not the case. Even after these rulings, a case-by-case assessment is still required.[87] Indeed, the nature of competition law infringements are so varied that it is hard to delineate the concrete reach of *CDC* and *Apple*.[88] The careful wording used by the CJEU in both rulings—that an infringement of Article 101 TFEU is 'in principle' unconnected to a contractual relationship[89] and a violation of Article 102 TFEU 'can' materialise in contractual terms[90]—shows that the CJEU also intended that the test be applied to the facts of individual cases.

[84] Saidov (n 79) 122.

[85] HLA Hart and T Honoré, *Causation in the Law* (Oxford University Press 1985) 261–2.

[86] M Sousa Ferro, '*Apple* (C-595/17): ECJ on Jurisdiction Clauses and Private Enforcement: "Multinationals, Go Ahead and Abuse Your Distributors"?' (2018) Competition Policy International <https://ssrn.com/abstract=3276569> 3–4, observes that anticompetitive conduct arising out of art 101 TFEU 'is just as (or more) likely to be linked to the contractual relationship and to materialize in contractual terms as [one under art] 102'. See also *Apple*, AG Opinion (n 65) para 70, where AG Wahl rejected 'the notion that cartels . . . always produce their harmful effects outside any contractual relationship, while conduct constituting an abuse of dominant position . . . would necessarily have its source in the contract entered into by the victim of the alleged conduct and the person committing such an abuse'.

[87] Sousa Ferro (n 86) 3.

[88] Notably, 'the list of abusive practices contained in [art 102 TFEU] is not an exhaustive enumeration of the abuses of a dominant position prohibited by the Treaty'. Case C-395/96 *Compagnie Maritime Belge Transports and others v Commission* [2000] ECR I-01365, para 112; Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, para 26.

[89] *CDC* (n 49) para 61.

[90] *Apple* (n 62) para 28.

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The labelling of the legal relationship is simply insufficient to determine its proximity to the claim.[91]

Beyond competition law, the galaxy of possible non-contractual claims connected to a particular legal relationship is vast. Consider a false public statement released by a senior company manager which harms the reputation of one of the company's investors. Is the resulting damage claim connected, for the purpose of determining jurisdiction, with a financing contract that the victim has signed with the company's CEO? Imagine a forged document, totally unrelated to the contract in force between two business partners but which triggers a governmental investigation to the detriment of the commercial relationship between the parties. Or a bribery case, unknown at the time, that caused a company to settle in a certain way a dispute relating to a share purchase agreement. Is the tort claim arising out of the bribe subject to the jurisdiction clause contained in such a share purchase agreement? And what about a supply or a distributorship contract being the primary vehicle through which cartel participants profit from the cartel's detrimental economic effects?

Answering each of these questions is difficult because the foreseeability test is not just replicable outside the contexts in which the CJEU elaborated it. Accordingly, domestic courts must be prepared to engage in a case-by-case analysis in order to determine whether the foreseeability test is met. Neither *CDC* nor *Apple* has exempted courts from conducting such case-by-case assessments of proximity.

C. Determining the Substance of the Claim

Proximity is normally determined in the light of the parties' formulation of a claim. This makes the outcome ultimately dependent on contingent factors such as the counsel's creativity, raising the question of the scope of the court's analysis regarding the substance of the claim.

Consider for example *Hewden Tower Cranes v Wolffkran*, concerning a fatal accident that occurred on a construction site in London in 2000.[92] The claimant sued in the London Technology and Construction Court arguing that the accident was caused by defects in a climbing frame it had hired from the defendant in 1997, holding the latter liable for damages. The defendant contested the court's jurisdiction by invoking a jurisdiction clause contained in a crane purchase agreement entered into with the claimant in 1999, which designated a court in Germany as the 'sole [court] competent for any disputes arising directly or indirectly out of the contractual relation'.[93] In order to rule on jurisdiction, the English court had to establish whether the damages claim arising out of the accident was 'directly or indirectly' connected to the crane

[91] See *Etihad* (n 82) [148], [152].
[92] *Hewden Tower Cranes Ltd v Wokffkran GmbH* [2007] EWHC 857 (TTC).
[93] ibid [34].

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purchase agreement and found it was not, one reason being that the crane's involvement in the accident 'appeared to have been pure chance' as the crane 'was merely the location where the defects in the [c]limbing [f]rame manifested themselves with devastating consequences'.[94]

Here the connection between the claimant's tort claim and the contractual relationship between the parties was so remote that the defendant could not avail themselves of the jurisdiction clause in relation to such a claim. Notably, the analysis of the accident's factual basis played a crucial role in assisting the court in assessing the claim's proximity.

Of course, sometimes the parties' formulation of the claim may be determinative. Take for example the ruling of the Portuguese Supremo Tribunal de Justiça (STJ) in a case very similar to *Apple* that involved the enforcement of a jurisdiction clause in a damages claim arising out of an abuse of dominance allegedly committed by Apple to the detriment of its nationwide distributors.[95] Notably, this ruling was issued before the CJEU's *Apple* judgment. The STJ decided to enforce the jurisdiction clause on the ground that 'the initial petition shows and emphasises [. . .] a change in behaviour in the equilibrium in the contractual framework established in the contract between the claimant and the respondent'.[96] In fact, 'it is [the initial petition] that defines and sets the legal and factual framework of the procedural premises to the jurisdiction of the court [. . .] and reflects the meaning and the effect that result and arise out of the contractual relationship that both parties have entered into'.[97] Decisively, the claimants' petition, which centred on the distributors' freedom to fix prices, only raised questions concerning the behaviour of the respondent which related to the contract, emphasising that the claim was based on competition law violations 'committed inside the contract'.[98]

Cases such as these show how the boundary between the assessment of jurisdiction and the substance of the claim may become extremely blurred, questioning the actual possibility of applying the foreseeability test in cases characterised by complex factual backgrounds. It might be therefore suggested, as a general recommendation to determine proximity, not simply to look at the claim as formulated by the parties but to dig deep into the *substance* of the claim by engaging in a review of the facts of the case and the related evidence provided by the parties.

Remarkably, this suggestion was recently offered by the High Court of Justice in *Etihad Airways PJSC v Flöther*, decided in 2019.[99] In that case, the court had to determine whether a dispute arising from the alleged breach of a comfort letter containing no jurisdiction clause originated from a previous loan agreement between the parties which provided for the jurisdiction of English courts.[100] The court acknowledged that proximity has to be decided 'in the light of

[94] ibid [38]. [95] (n 63). [96] ibid para II.b.3 in fine. [97] ibid.
[98] See L D'Avout, 'Comportement du règlement « Bruxelles I » en cas d'entente anticoncurrentielle' (2015) *Recueil Dalloz* 2041. [99] See *Etihad* (n 82). [100] ibid [16].

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admissible evidence as a whole' after considering 'the substance of the claim' and concluded it had jurisdiction over the dispute.[101]

D. Complementary Tests

Finally, two tests have been considered in judicial practice to determine proximity.[102] A first test involves enquiring whether the non-contractual claim would have arisen without the existence of the contract. Under such a *but-for test*, the non-contractual claim does not have to be foreseeable at the time of contracting, but what is relevant is whether such a claim would not have arisen 'but for' the contractual relationship. When foreseeability does not help clarify proximity, considering the contract as the claim's necessary factual antecedent of the claim could fill the gap.[103] A second test—the *close interdependence test*—requires a close factual link between the non-contractual claim and the particular legal relationship between the parties.

Both these tests have occasionally been raised by the parties but the courts have rejected them on the ground that they have no basis either in scholarship or in judicial practice.[104] The fact that foreseeability is the only test currently used by the CJEU seems to explain its prevalence in practice. Nonetheless, courts may find some comfort in these two tests as a complement to foreseeability, when the latter test does not provide a clear answer to the question of proximity.

IV. CONCLUSION

This article has attempted to cast light on a difficult question regarding the EU regime of jurisdiction agreements: the need for there to be a sufficient connection (proximity) between a claim and the particular legal relationship which gives rise to the jurisdiction of the court. The importance of this requirement lies in the fact that both business actors and legal practitioners need clear and predictable jurisdictional rules, and, as they stand now, neither proximity nor its associated foreseeability test seem to make them so.

A few suggestions are offered here. First, proximity must be kept conceptually separate from the question of consent—the issue is not whether the parties wanted a particular claim to be submitted to the designated jurisdiction, but whether that claim objectively arises from a relationship between the parties other than that in connection with which the jurisdiction agreement was made. Second, courts should be reminded that the foreseeability test necessarily entails a case-by-case analysis which may

[101] ibid [130], [135].
[102] These tests were proposed by Professors Vischer and Schwander in *Roche Products* (n 10) [54].
[103] ibid [65].
[104] ibid [67]–[68].

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require a factual analysis of the substance of the claim. They should not draw on the recent CJEU decisions in *CDC* and *Apple* to adopt an overly fixed rule which turns on the legal characterisation of the non-contractual claim, but respect proximity's necessary connection with the case at hand.

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