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Just and Efficient Resolution of Private International Disputes: Israel's New Theory of Jurisdiction

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JUST AND EFFICIENT RESOLUTION OF PRIVATE INTERNATIONAL DISPUTES: ISRAEL'S NEW THEORY OF JURISDICTION

*Yaad Rotem**

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ABSTRACT

What is the guiding rationale according to which the rules of international jurisdiction to adjudicate private disputes are to be construed? Israeli law has been contemplating this question for some time now, as the traditional territorial theory seems to be on the decline and is therefore unsatisfactory as a basis for modern legal rules. Unfortunately, a thorough effort to choose an alternative theory is still missing. A painful reminder of this current state of affairs was given recently as the Israeli Supreme Court issued, on the very same day, two decisions concerning cases in which a foreign plaintiff, having no other effective forum in which to litigate his dispute with the defendant, sought relief from Israeli courts. Israeli law, unlike American law, grants plaintiffs a constitutional right of access to court, and does not purport to protect with the same zeal the defendant's interest not to be haled to a foreign forum. Still, while in one case the Court acknowledged its jurisdiction to adjudicate the claim, it declared the absence of such jurisdiction with regard to the second case. The second case involved a claim filed by a Monaco resident and citizen whose husband, sharing the same residency and citizenship, had been evading litigation with her on the issue of the get – the Jewish religious divorce. A careful comparison of these two decisions arguably reveals a possible contradiction (the argument being that each decision followed a different theory of international jurisdiction) and a possible error (the argument being that the decision in the get case, which, in fact, may influence many Jewish women worldwide, did not follow the correct theory of international jurisdiction). The purpose of the article is

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therefore twofold: first, to depict the current disarray in this area of Israeli private international law, and the problems generated as a result; and second, to outline the contours of a new theory of international jurisdiction, which seems to be having a growing influence over Israeli case law, as the rationale generating it is driven by strong judicial intuition. Private international law pertains to a wide range of private disputes, and the arguments are thus demonstrated both in a commercial context and in the context of marital and inheritance disputes.

I. INTRODUCTION

Not very often does one encounter two conflicting judgments, both rendered on the very same day by the very same court. However, on Monday, November 29, 2004, the Israeli Supreme Court rendered two judgments, the careful reading and meticulous comparison of which demonstrate the lack of coherence in Israeli law regarding the international jurisdiction of Israeli courts to adjudicate private disputes (hereinafter “international jurisdiction”). The two judgments rendered on that November morning were not directly related to one another, except for the fact that both can be characterized as concerning cases in which a foreign plaintiff, having no other effective forum in which to file the claim against the defendant, attempted to obtain relief from an Israeli court. One of the two judgments concerned a claim filed by an American estate executor against a third party, who was served with process in Israel and who allegedly withdrew money unlawfully from the estate.¹ The second judgment concerned a divorce and maintenance claim filed by a Monaco citizen and resident whose husband, also a Monaco citizen and resident, had refused for some time to provide her with a *get*, the Jewish religious divorce that can only be granted willingly by the husband.²

Critically examining both judgments from a purposeful viewpoint—one that explores the rationale from which the legal rule derives—reveals that the two judgments are in fact inseparable. The two judgments may be actually contradicting one another. Inasmuch as there is no clear and definitive statement by the Court explaining its rationale, one may have reasons to conclude that each judgment was rendered in accordance with a different theory of international jurisdiction. If this is true, the outcome of at least one of these two judgments should have been quite different, assuming that the Court should have adhered to one theory.

Thus, the Israeli law of international jurisdiction suffers from some amount of incoherence. This incoherence is not the only feature

¹ CA 2846/03 *Eldermann v. Eherlich* [2004] IsrSC 59(3) 529.

² HCJ 6751/04 *Sabbag v. The Rabbinical Court of Appeals* [2004] IsrSC 59(4) 817.

characterizing Israeli law. In recent years, a new theory of international jurisdiction seems to be increasingly influential over Israeli case law. This theory, the Just and Efficient Resolution of Disputes Theory (JERDT), is of a functional nature, as it focuses upon resolving what it considers to be no more than a private dispute, albeit one that generates factual connections to more than one country. The new theory attempts to maximize the protection accorded to two interests: the plaintiff's right of access to court, which is a constitutional right under Israeli law, and the optimization of the venue in which the dispute is to be adjudicated. This article will discuss several trends in Israeli case law that support the JERDT theory.

Unfortunately, this new theory has also fallen victim to the theoretical void created in the Israeli law of international jurisdiction. Accordingly, even without taking a stand on which theory of international jurisdiction is the "correct" one, the inexorable conclusion to be drawn is that Israeli private international law is in immediate need of a systematic theoretical inquiry. Of course, an orderly investigation should eventually point to one theory upon which rules of international jurisdiction ought to be crafted.

Part I of this article will introduce three alternative theories of international jurisdiction that compete for dominance in Israeli private international law. Two of these theories, the Principle of Territorial Sovereignty and the Principle of Effectiveness, have been acknowledged by Israeli law and have served courts in the process of deriving the legal rules of international jurisdiction, at least rhetorically. The third theory, the JERDT, has not yet been formally recognized yet by Israeli lawmakers. In recent years, however, the JERDT has begun influencing judicial decisions, gradually pushing aside its two predecessors. Part II of this article will demonstrate the influence of JERDT in the context of Section 482(a) of the Israeli Civil Procedure Regulations.³ This section relates to the assumption of international jurisdiction in a situation in which the foreign defendant is absent from Israeli territory, but a business "agent" of that defendant can nevertheless be served with process in Israel. Part III of this article will demonstrate the influence of the JERDT in the context of jurisdiction over claims filed by foreign plaintiffs in an attempt to obtain relief from Israeli courts. The cases that will be discussed are unique in that the plaintiffs have no other effective forum in which to litigate their dispute with the defendant.

³ Israeli Civil Procedure Regulations 482(a) (1984) [hereinafter "Regulation 482(a)].

II. THREE THEORIES OF INTERNATIONAL JURISDICTION

What is the theoretical basis under Israeli law for the various legal rules concerning the exercise of international jurisdiction? Israeli case law has thus far acknowledged two different theories, but has not explained the precise hierarchy between them.

One theory is the well known Principle of Territorial Sovereignty. This theory endeavors to exercise international jurisdiction based on geographical criteria. The theory's contention is that a court of law, like any other governmental agency, is entitled to exercise its powers over persons and assets found within the Israeli territory and over acts committed within the Israeli territory. Accordingly, the court lacks any powers over persons and assets that are absent from Israeli territory or over acts that were not concluded within the Israeli territory.⁴ Some form of a territorial nexus between the forum and the claim, or the parties to the claim, needs to exist so that a local court would be considered competent to adjudicate the claim.

Notwithstanding its philosophical origins, the Principle of Territorial Sovereignty accomplishes two goals. The first goal is "vertical," as the theory enhances the ability of citizens to ascertain the jurisdiction to which they are subject. For example, a person traveling from Tel Aviv to Paris knows that her presence on French soil may very well subject her to the jurisdiction of French courts. The second goal is "horizontal" in nature, as the Principle of Territorial Sovereignty enhances the ability of countries to coordinate the division of jurisdictional powers between them, even unilaterally and without direct communication. If each country would adhere to the Principle of Territorial Sovereignty, then division of such powers would be easily accomplished in accordance with the easily acknowledged geographical criterion.

Because all rules of private international law are enacted unilaterally by each country, the Israeli legislature is entitled to reject the Principle of Territorial Sovereignty and confer upon its courts extra-territorial jurisdiction, provided that the legislature makes its intention clear.⁵ Otherwise, the default scope of jurisdiction dictated by the Principle of Territorial Sovereignty covers only the Israeli territory. Obviously, in a world in which many disputes between private parties transpire as a result of activities that take place in a virtual sphere, such as Internet-based activities, the Principle of Territorial Sovereignty cannot always be a good basis for determining which rules of jurisdiction are to be interpreted. For example, how would the court

⁴ H CJ 279/51 Amsterdam v. Minister of Finance [1952] IsrSC 6 945. The case embracing this doctrine in the American context is *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁵ See Amsterdam, IsrSC 6 at 971.

decide whether or not it entertains jurisdiction to adjudicate a claim filed because of a tort committed online, if the court's jurisdiction depends upon the tort being committed within Israel?⁶ Indeed, the new and globalized world in which we live may very well form a serious challenge to accomplishing both the "vertical" and "horizontal" goals.

A second theory of international jurisdiction is the Principle of Effectiveness. This theory seeks to limit the forum's international jurisdiction to cases in which a judgment that would eventually be rendered by the local court would also actually be enforced.⁷ In its original form, this theory was based on the implicit assumption that judgments rendered by a local court can only be enforced by that court or other courts of the same country.⁸ However, the Principle of Effectiveness has recently taken a slightly different form, as it is well established that judgments of a local court, such as an Israeli court, can actually be enforced abroad, in the United States, for example.⁹ Thus, the Principle of Effectiveness can be restated to mandate the exercise of international jurisdiction based on the probability that the judgment rendered at the end of the adjudication process would in fact be enforced.¹⁰

The Theory of Effectiveness is motivated by the following rationales. First, an overloaded court should not bother to adjudicate cases if its judicial effort is to be futile because the judgment will not be enforced.¹¹ Second, the court should refrain from adjudicating cases in circumstances that might disgrace the court or undermine the public trust in the justice system. Such conditions could form if judgments rendered by courts will not always be enforced.

The inherent difficulty in using the Principle of Effectiveness as a theory of international jurisdiction is that the court is required to immediately reject a claim for lack of international jurisdiction based on an assessment of probability as to the future chances of enforcing the judgment, even though this probabilistic assessment itself is quite

⁶ See generally Section 500(7) of the Israeli Civil Procedure Regulations, 1984, which enables the court to exercise international jurisdiction on a foreign defendant provided that the proceeding against the defendant is founded on "an act or omission committed within [Israel]".

⁷ See Amsterdam, IsrSC 6 at 971.

⁸ See MICHAEL KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE 70 (2004). Again, the case embracing this doctrine in the American context is *Pennoyner v. Neff*, 95 U.S. 714 (1877) ("The State, having within her territory property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him; and her tribunals may inquire into his obligations to the extent necessary to control the disposition of that property.").

⁹ KARAYANNI, *supra* note 8, at 89-90.

¹⁰ *Id.*

¹¹ *Id.*

variable. Indeed, the chances of enforcing any particular judgment depend upon the physical existence of the defendant or his property at the time of enforcement in a territory that enforces the court's judgments. However, persons and assets can easily move or be transferred from one place to another, especially in the modern world. Thus, the probability of enforcement can certainly change instantaneously if the defendant or his assets are on the move.

The basic rule under Israeli law regarding the assumption of international jurisdiction is often referred to as the "Rule of Presence" because it allows Israeli courts to entertain a claim if the defendant was served with process within Israel.¹² This rule derives from the Principle of Territorial Sovereignty. The Rule of Presence mandates that the territorial connection is the defendant's presence at the time the claim is filed.¹³ Indeed, most Israeli rules of international jurisdiction seem to be founded upon the Principle of Territorial Sovereignty rather than upon the Principle of Effectiveness. The latter principle usually serves only as one inconclusive consideration in certain borderline cases.¹⁴

However, Israeli law of international jurisdiction has been experiencing a theoretical transformation. The Principle of Territorial Sovereignty is gradually being pushed away by social engineers in various countries.¹⁵ In Israel, it is being replaced by a new theory. This new theory, which is driven primarily by strong judicial intuition, does not view the process of exercising international jurisdiction as a declaration made by an Israeli governmental agency that concerns the sovereignty of one country or another. Rather, it views this process as a functional move designed to promote the resolution of a dispute that, although international in nature, is merely a private civil dispute. Indeed, it is well acknowledged that the primary function of a court of law in the private sphere, albeit not its only purpose,¹⁶ is to resolve the

¹² CA 420/63 *Abramovsky v. Gleitman* [1963] IsrSC 17 2605. This rule is also referred to sometimes as "the rule of capture," as it enables the capture of the defendant for the purpose of exercising jurisdiction. In the United States, this rule is called the Transient Jurisdiction Rule. *See, e.g., Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

¹³ *See Abramovsky*, IsrSC 17 at 2607.

¹⁴ *See KARAYANNI, supra* note 8, at 204-05 (stating that effectiveness should work in a relative manner).

¹⁵ *Id.* at 78, 107 (describing how fairness considerations have influenced rules of international jurisdiction); *id.* at 109-24 (describing the demise of the territorial theory); *see also* Zheng Tang, *Exclusive Choice of Forum Clauses and Consumer Contracts in E-Commerce*, 1 J. PRIVATE INT'L L. 237 (2005).

¹⁶ *See generally* Development, *The Paths of Civil Litigation*, 113 HARV. L. REV. 1752 (2000).

disputes brought before the court.¹⁷ In other words, the main goal of a court of law with regard to private disputes is to provide the litigants with a service of dispute resolution. This function of the court does not change even if the dispute in question originates in the inter-sphere,¹⁸ generating factual connections to more than one country.¹⁹ Thus, instead of focusing on the international relations of sovereign countries, the new theory shifts the focus to resolving the private dispute in the “best” possible manner. In recent years, many Israeli judges have followed the rationale of the new theory, even if not explicitly, when called upon to decide questions of international jurisdiction.

In the Israeli context, the objective of resolving an international dispute in the “best” possible manner is translated into more concrete goals. Thus, the JERDT aspires to accomplish two goals in the Israeli context. The first goal is to protect the plaintiff’s right of access to court. In contrast to U.S. law, which considers the right of due process a constitutional right,²⁰ Israeli law does not allow defendants to enjoy a similar constitutional right.²¹ Rather, under Israeli jurisprudence, it is the plaintiff who enjoys a constitutional protection of her right of access to the court system.²² Since the new theory of international jurisdiction aspires to bring about the resolution of a private dispute within the confines of a regime under which the right of access to court is a constitutional right, the new theory seems to be aiming to protect the plaintiff’s right to litigate a private dispute to which she is a party before a court of law, and consequently to exhaust her rights vis-à-vis the defendant. Thus, the new theory endeavors to

¹⁷ See Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

¹⁸ The “intersphere” means “the international sphere.” The intersphere can be either physical or virtual. It is the environment in which legal relationships are formed and legal disputes erupt.

¹⁹ This is an apolitical perception of the judicial process. See Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1047-48 (2006) (describing prevalent perception under EC law).

²⁰ See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that a state court may constitutionally assert long-arm jurisdiction over a party to a dispute only if that party has “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”).

²¹ The defendant may have a recognizable interest not to be haled into a foreign forum, but such an interest does not amount to the level of a constitutional right. Thus, the defendant’s interest may be taken into account, for example, whenever the court is conferred with discretion to decide whether or not to exercise its already existing jurisdiction. One such context is that of the *Forum Non Conveniens* doctrine. See KARAYANNI, *supra* note 8, at 67.

²² See, e.g., PCA 3899/04 *State of Israel v. Eben Zohar* [2006] IsrSC __ (26) (publication pending).

adjust the Israeli law of international jurisdiction to fit the Israeli constitutional regime.

The second goal that the new theory promotes is optimization of the place in which the dispute is to be adjudicated. The significance of this goal is apparent, as one can hardly question the importance of attempting to litigate a private dispute, particularly an “international” private dispute, before the best possible forum.²³ To the extent that the forum exercises its jurisdiction under the constraint of locating the best possible place in which the dispute may be adjudicated, several goals are accomplished. First, resources spent by the parties and witnesses are spared. Second, the court may become better acquainted with all relevant evidence in order to reach a just and truthful decision. Third, workload may be divided between legal systems. Finally, protection is also provided for the defendant’s interest not to be haled to participate in a foreign judicial proceeding conducted away from his home.²⁴

This theory is referred to as the Just and Efficient Resolution of Disputes because the ‘Just’ element stands for protecting the plaintiff’s right of access to court and the ‘efficient’ element stands for promoting the optimization of the place in which the dispute is to be adjudicated. Maximizing the protection of these two interests manifests a clear tendency to refrain from any arrangement that requires balancing these interests against one another. Thus, the new theory comports to the long-standing Israeli legal tradition of exercising international jurisdiction following a two-tiered test. The Israeli two-tiered test differentiates between the court’s “ability” to exercise international jurisdiction and the “necessity” of exercising such jurisdiction.²⁵ Current Israeli law accepts a situation in which the court is empowered to exercise international jurisdiction and adjudicate a dispute, but nevertheless chooses not to do so for various reasons, such as the existence of a prior agreement on jurisdiction executed between

²³ See KARAYANNI, *supra* note 8, at 98-99, 107; Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PENN. L. REV. 311, 314-15 (2002); Michael J. Whincop, *Three Positive Theories of International Jurisdiction*, 24 MELB. U. L. REV. 379, 392-94 (2000).

²⁴ Unlike the right of access to court, which is a constitutional right under Israeli law, the normative standing of the defendant’s interest is unclear. In this respect, Israeli law differs from U.S. law, which includes the defendant’s interest within the constitutional right of due process.

²⁵ Thus, a defendant may raise a forum non conveniens argument even if jurisdiction is established under Regulation 482(a). See, e.g., CA 2846/03 Eldermann v. Eherlich [2004] IsrSC 59(3) 529, 533 (holding that, even though the defendant was subjected to the jurisdiction of Israeli courts under Regulation 482(a), he was still permitted to raise a forum-non-conveniens argument).

the litigating parties.²⁶ The JERDT changes the two-tiered test in a manner that maximizes the protection accorded to the two rationales comprising the JERDT without creating a conflict between these two interests and without having to strike a balance between them. When examining the “ability” of an Israeli court to exercise international jurisdiction, a court applying the JERDT should aspire to protect the plaintiff’s right of access to court. Thus, the court should, to the extent possible, adhere to an interpretation that aspires to prevent a situation in which the plaintiff is left without any effective forum in which to litigate his dispute with the defendant. On the other hand, when examining the “necessity” of exercising international jurisdiction, a court applying the JERDT should aspire to protect the process of optimizing the place of adjudication of the dispute. Thus, for example, the court should refrain from exercising its international jurisdiction if from the defendant’s viewpoint, the local forum is the worst of two possible places in which the dispute can be effectively litigated.

III. THE CASE OF SERVING PROCESS TO THE AGENT OF A FOREIGN DEFENDANT

The JERDT is gradually taking over the Israeli case law of international jurisdiction, thus pushing away its two theoretical predecessors, the Principle of Territorial Sovereignty and the Principle of Effectiveness. Proof for this argument can be found in the Israeli case law interpreting Regulation 482(a). Regulation 482(a), the heading of which is “Serving with Process to an Agent Authorized to conduct Business,” states that a claim filed regarding the business or work of a person who is absent from Israel can be served with process to an agent of that person currently operating or managing the defendant’s business in Israel. Of course, service of process to an agent is intended to comport with the Rule of Presence described earlier.²⁷ Regulation 482(a) is essentially an application of the Rule of Presence that focuses the Israeli forum’s “ability” to assume jurisdiction, the first step in the two-tiered test.²⁸

In two often-cited cases the Israeli Supreme Court ruled that, “to the extent that the facts reveal more and more indications of a business cooperation between the defendant and her ‘agent’, the court

²⁶ *Id.*

²⁷ Service of process to an agent allows the court to exercise jurisdiction over the principal, but not over the agent.

²⁸ In practice, the second tier, which concerns the “necessity” of exercising international jurisdiction, becomes relevant to the extent that the served defendant raises a forum non conveniens argument or *Lis Alibi Pendens* argument or argues that a jurisdiction agreement, within a jurisdiction other than Israel, was concluded between the parties.

shall tend to regard the latter as being an agent authorized to conduct business” in the manner required by Regulation 482(a), thus enabling the court to exercise international jurisdiction over the defendant.²⁹ When applied properly, this test reflects the idea that exercising international jurisdiction over the absent defendant by serving process to an agent in Israel derives from the Principle of Territorial Sovereignty. Indeed, to the extent that many indications exist of business cooperation between the defendant and his agent, the absent defendant can certainly be regarded as being present within the Israeli territory. To be sure, the more indications found of a business cooperation between the defendant and her agent,³⁰ the more one can argue that although the defendant is technically, or physically, absent from Israel, “one of her limbs,” the agent, is actually present within the Israeli territory and can be served with process, thus enabling the court to exercise international jurisdiction over the defendant. Therefore, according to the Principle of Territorial Sovereignty, the business cooperation between the defendant and her alleged agent should surely amount to running a single economic unit or a single firm. Otherwise, one cannot argue that the defendant herself is present in Israel.

However, the Israeli Supreme Court in the cases of *General Electric Corp.* and *Tendler* did not stop in articulating the abovementioned test regarding “indications of business cooperation,” and added that a Regulation 482(a) agent is one whose “relationship with the defendant has reached such a level of intensity that one may assume, as a legal matter, that the agent will notify the defendant on the proceedings initiated against him. . . .”³¹ The Israeli Supreme Court further added, that “the purpose of Regulation 482(a). . . is mainly to assure that the defendant is notified, of the proceedings initiated against him,

²⁹ PCA 39/89 *General Electric Corp. v. Migdal Insurance Ltd.* [1989] IsrSC 42(4) 762; PCA 3652/94 *Tendler v. Le Club Mediterranee (Israel) Inc.* [1994].

³⁰ Israeli case law has mentioned the following relevant indications of a business cooperation: Does the agent conduct negotiations on behalf of the defendant? Does the agent maintain operative connections with customers in Israel of the defendant? Does the agent report to the defendant on the status of the market? Does the agent have to obey the defendant’s instructions? Is the agent presented to third parties as representing the defendant? Do employees of the agent perceive themselves to be representing the defendant? See *General Electric Corp.*, IsrSC 42(4) at 768-69. Is the agent’s business title identical to that of the defendant? Do they share a commercial brand name? Do the agent and the defendant advertise their business together? Are the agent and the defendant parent and subsidiary? Do the agent’s board meetings take place at the defendant’s offices abroad? Is the agent authorized to issue receipts on behalf of the defendant? Does the agent operate exclusively for the defendant? Is the agent a branch of the defendant? What is the subjective impression of a bystander? See *Tendler*, at ¶ 7.

³¹ See *General Electric Corp.*, IsrSC 42(4) at 768; *Tendler*, at ¶ 6.

by the one with whom the defendant maintains an ongoing commercial relationship in the ordinary course of business. . . .³² These comments certainly reflect the purpose of Regulation 482(a) to uphold due process by notifying the defendant of the proceeding initiated against him. However, these comments do not comport in any way whatsoever with the Principle of Territorial Sovereignty.

In actuality, the act of serving with process has two completely different functions. First, it upholds due process requirements by enabling the defendant to defend himself against the claim filed by the plaintiff. Thus, the defendant must be notified of the proceedings and must be provided with an opportunity to submit his response to the court. Second, and more importantly in the international jurisdiction context, the act of serving the agent with process is meant to express the exercise of international jurisdiction in accordance with the Principle of Territorial Sovereignty, rather than comporting with other theories of international jurisdiction, such as the Principle of Effectiveness.³³

The Court's comments were thus unnecessary and redundant, and perhaps even contradictory to the test of "indications of business cooperation" that was articulated by the very same Court. Still, the Court's seemingly redundant comments had practical implications. First, practitioners repeatedly argue that Regulation 482(a) is not being applied uniformly.³⁴ Second, and more importantly, certain bizarre Regulation 482(a) agents were acknowledged as such by the courts. For example, an Israeli customs clearance agent was acknowledged as a Regulation 482(a) agent of a foreign defendant for whom the customs clearance agent provided services,³⁵ despite the fact that one can hardly consider an outside provider of service to the defendant, who was hired to supply a customs clearance service, as someone whose business is so integral to that of the defendant to the extent that it enables the foreign defendant himself to be regarded as being pre-

³² See *Tendler*, at ¶ 5.

³³ Consider the meaning of this last proposition: if the Court had to interpret Regulation 482(a) according to the Principle of Effectiveness, the Court would no doubt have ruled that the correct test is whether or not the alleged agent is one through whom the judgment rendered against the defendant would be enforceable. A judgment rendered against the defendant can be enforced via the agent in cases in which the agent holds the defendant's property. For example, if an agent owes money to the defendant or holds the defendant's property as a trustee or as a fiduciary.

³⁴ See, e.g., PCA 11822/05 *Philip Morris USA Inc. v. Elroi* [2006] ¶ 4 (publication pending).

³⁵ See VCP (TA) 3069/03 *Merck Frosst Canada & Co. v. Birzeit Palestine Pharmaceutical Co.* [2003] ¶ A(2).

sent within the Israeli territory.³⁶ Similarly, an Israeli importer of vehicles was determined to be a Regulation 482(a) agent of the foreign vehicles manufacturer.³⁷ Under the Principle of Territorial Sovereignty, this decision is problematic because the business relationship between the importer and the manufacturer does not undermine the fact that each continues to maintain an independent legal and economic unit that stands by itself, thus making it difficult to argue that the foreign manufacturer is actually present within the Israeli territory.³⁸

This criticism of the Court's ruling could be put to rest by arguing that, despite the internal contradiction in its ruling, the Court's original intention was to examine the relationship between the foreign defendant and the alleged business agent according to the standards set by the "indications of business cooperation" test in a manner that coincides with the Principle of Territorial Sovereignty.³⁹

Those so-called redundant comments made by the Court and the practical implications that these comments carried with them actually reflect the correct positive position of Israeli law. Indeed, these comments were not made fortuitously, but rather reflected the Court's understanding that a broad interpretation of Regulation 482(a) is in order. Indeed, under the JERDT, one needs to take an expanding approach with regard to the court's "ability" to exercise international jurisdiction.⁴⁰

If in fact the JERDT is the correct theory of international jurisdiction to be applied, then the supplementary and allegedly redundant test placed by the Court in the *General Electric Corp.* and *Tendler* cases, which focuses solely upon protecting the defendant's due process rights, is the only correct and relevant test according to which Regulation 482(a) should be interpreted. In other words, the JERDT in-

³⁶ See *Tendler*, at ¶ 6 (stating that a salesperson with no other business cooperation with the defendant is not to be regarded as a Regulation 482(a) agent).

³⁷ See PCA 11556/05 *Kamoor Vehicles Ltd. v. Heemo* [2006] ¶ 6 (publication pending).

³⁸ Of course, the dispute may nevertheless be adjudicated by the Israeli forum if the court chooses to exercise jurisdiction by serving the defendant with process abroad.

³⁹ See *Tendler*, at ¶ 5 (stating that a test that seeks a level of business cooperation that is more intense than mere ongoing business communication is too narrow and does not coincide with the purpose of Regulation 482(a)).

⁴⁰ See *Tendler*, at ¶ 4 ("I do not agree to a narrowing interpretation of Regulation 482(a). . . which does not comport with today's reality of a 'small world,' which entertains close connections among countries and in which modern means of communication allow the instantaneous and cheap transfer of information via the telephone, the facsimile, and other electronic means, from almost any place on earth to any place on earth. . ."); see also *Kamoor Vehicles Ltd.*, ¶ 6 (publication pending).

structs the forum to reject the “indications of business cooperation” test when contemplating its ability to assume jurisdiction within the confines of Regulation 482(a). Interpreting Regulation 482(a) in a manner that requires the plaintiff to merely prove that the defendant’s right of due process was protected maximizes the protection provided for the plaintiff’s right of access to court. Indeed, in a situation in which the plaintiff need not show anything other than that the defendant was appropriately notified of the proceeding, the court’s doors are opened before the plaintiff in the widest manner possible. The Israeli courts’ international jurisdiction would thus encompass any foreign defendant who holds in Israel an appropriate address for service of process. Such an address need not be examined technically, but rather, should be examined in accordance with the law of service with process that applies in domestic cases.

Such an expansive interpretation of Regulation 482(a), which derives from the JERDT, does not derogate in any way from the defendant’s capability to argue that there exists a better forum in which the parties can litigate the dispute. As previously mentioned, Regulation 482(a) concerns only the first step of the two-tiered test of international jurisdiction: the “ability to assume jurisdiction” tier.⁴¹ Thus, in the JERDT terms, Regulation 482(a) need be interpreted solely in accordance with the plaintiff’s right of access to court.

The second rationale dictated by the JERDT concerning the protection of the process of optimizing the place of adjudication of the dispute is to be accomplished within the second tier, which concerns the “necessity” of exercising jurisdiction. Within the confines of the second tier, the defendant may certainly raise such arguments as *forum non conveniens* and *lis alibi pendens* that would eventually result in a refusal by the Israeli court to exercise international jurisdiction.

IV. THE CASE OF FOREIGN PLAINTIFFS WHO HAVE NO ALTERNATIVE FORUM

Although court decisions that exhibit the influence of the JERDT are becoming more prevalent, this theory has not been formally recognized by the Israeli Supreme Court. In fact, the Court’s case law seems to be moving back and forth between the new theory and the problematic Principle of Territorial Sovereignty. While courts, particularly of the lower levels, are formally obligated to the Principle of Territorial Sovereignty as a guiding theory, judges having to decide real cases that affect real people are intuitively drawn away from the territorial theory and toward the two goals of the new theory.

⁴¹ See *supra* note 27.

One context in which this phenomenon can perhaps be observed is the context of exercising jurisdiction over claims filed by foreign plaintiffs who have no other forum but the Israeli forum in which to litigate their dispute with the defendant.

A. *The Eldermann Case*

The *Eldermann* case required the Israeli Supreme Court to interpret Section 136 of the Israeli Inheritance Law, which states that an Israeli court can assume jurisdiction to adjudicate “the inheritance of every person who at the time of his death was a resident of Israel or owned property in Israel.”⁴² The Supreme Court ruled that a claim filed by an American Executor of an estate, who was appointed by an American court in order to execute a certain will, against a defendant resident in Israel, who according to the statement of claim unlawfully withdrew money from a bank account of the deceased after her death, does not fall within the meaning of Section 136.⁴³ Therefore, the Court ruled, Section 136 does not apply and consequently does not condition the Israeli court’s international jurisdiction over the defendant in this case upon the deceased at the time of her death being domiciled in Israel or having owned property in Israel.⁴⁴ The Court held that the claim was not an inheritance claim within the meaning of Section 136, although the defendant had argued that his possession of the disputed money emanates from a second will left by the deceased.⁴⁵ In this second will, the defendant argued, that the defendant himself was appointed as an executor of the estate, and the will stipulated that he was entitled to forty percent of the assets. The defendant did not argue, however, that a court order to execute the second will was issued.⁴⁶

Instead of interpreting Section 136 in accordance with its purpose, and within such a construction exposing the exact purpose upon which courts ought to entertain jurisdiction in matters falling within the scope of Section 136, the Supreme Court preferred to compare the issue at hand to the issue of subject-matter jurisdiction and to reach a conclusion according to which “our answer to the question presented can only be the one offered by us. . . .”⁴⁷ The Court explained, *inter alia*:

If our conclusion shall be that the claim at hand concerns the deceased’s inheritance, we shall be obliged to rule

⁴² Israeli Inheritance Law (1965).

⁴³ CA 2846/03 *Eldermann v. Eherlich* [2004] IsrSC 59(3) 529, 536.

⁴⁴ *Id.* at 539.

⁴⁵ *Id.* at 532.

⁴⁶ *Id.*

⁴⁷ *Id.* at 533.

that [Israeli] court lack international jurisdiction to adjudicate the claim . . . In order to decide whether or not the claim at hand concerns an inheritance claim one needs to initiate a process of categorization and classification. This is why we mentioned . . . a hypothetical state of affairs, in which the deceased herself files a claim such as the one filed by the [estate executor]. The claim in both lawsuits would be the same and the relief sought would also be identical – i.e., monetary. The lesson to be learned is that the mere fact that the claim at hand was filed by an estate executor, who desires to obtain an asset (or be granted with restitution) from a third party, does not necessarily turn the claim to one which concerns matters of “inheritance.” Had the claim been filed for a relief in the form of a request for an inheritance order or for probate, clearly one would have to conclude that the claim concerns matters of “inheritance.” However, the case before us is not such a case. We can demonstrate our point by taking notice of various cases litigated by other courts in which a similar question arose.⁴⁸

Although the Supreme Court had trouble explaining in an orderly fashion the rationale engendering its conclusion, according to which Section 136 does not apply to the claim filed by the estate executor, the new theory can supply a fairly reasonable explanation in its stead. Section 136 could be interpreted as limiting the international jurisdiction of Israeli courts to adjudicate matters of inheritance. On the other hand, a narrow construction of Section 136 would expand the international jurisdiction of Israeli courts, thus expanding the protection accorded to the estate executor’s right of access to court.⁴⁹ Indeed, the interpretation given to Section 136 in the *Eldermann* case prevents a situation in which plaintiffs, such as the American estate executor, are left without any relevant forum in which they can litigate with the defendant (who according to their claim is unlawfully holding property of the estate), to the extent that the defendant resides in Israel and cannot be subjected to the jurisdiction of any other foreign court.

An inheritance, or probate, proceeding is an in rem proceeding.⁵⁰ To the extent that the estate executor attempts to collect property of the estate, which is held by the executor himself or held by a

⁴⁸ *Id.* at 536.

⁴⁹ The constitutional protection of the Basic Law: Human Dignity and Liberty is granted to “any person as such” (Section 2 of the Basic Law).

⁵⁰ See, e.g., Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1482 n.11 (2001).

third party who does not dispute the ownership of the estate, it is sufficient that the relevant property is located in the domicile country of the deceased. However, the executor might experience some difficulties in a situation in which not only the property of the estate is located outside the country of domicile, but a third party holds the property and is present in another country. As a result of the *Eldermann* ruling, estate executors can now file a claim against these third parties even if the deceased did not reside in Israel at the time of death and did not own property in Israel. Indeed, in such cases, the Israeli court would be able to exercise international jurisdiction in accordance with the Rule of Presence. Should estate executors such as the American executor in the *Eldermann* case face a situation in which they have no other relevant forum in which to litigate with the third party, as likely happened in the *Eldermann* case, where the defendant resided in Israel, and could not be subjected to the international jurisdiction of any other country, these plaintiffs would be able to litigate in Israel, assuming that it is possible to serve the defendant with process in Israel.⁵¹

Although focused upon protecting the plaintiff's right of access to court, the *Eldermann* ruling does not derogate in any way from the duty of Israeli courts to promote the optimization of the place in which the dispute is to be adjudicated. Indeed, as the Court emphasized in *Eldermann*, the defendant is certainly entitled to argue that, despite the fact that Israeli courts can entertain jurisdiction of the claim, Israel is a forum non conveniens, thus mandating that Israeli courts refuse to actually exercise their jurisdiction.⁵² Of course, within the confines of such an argument, the defendant can no longer evade the litigation with the American estate executor. First, the defendant must point to a relevant alternative forum (in which litigation will be more convenient). Second, the defendant must prove that the alternative forum is in fact an effective forum in which litigation will indeed commence and in which the defendant will not be able to raise further obstacles in the face of litigation to the merits, such as a limitations defense.

In order to understand the difference made by the new theory, it is important to note that interpreting Section 136 in accordance with the Principle of Territorial Sovereignty as the dominating theory of international jurisdiction might have resulted in a different outcome altogether. Indeed, in such a case, one could argue that the claim filed by the American estate executor concerns an inheritance claim within

⁵¹ If the defendant in this case could be subjected to American jurisdiction, the estate executor would file his claim in the United States. Obviously, a certain state of affairs mandated that the claim be filed in Israel.

⁵² *Eldermann*, IsrSC 59(3), at 533.

the meaning of Section 136. Such a construction would guarantee that Israeli courts will litigate any dispute that concerns the estate only if, at the time of death, the deceased resided in Israel or owned property in Israel, thus promoting the territorial rationale. The Court ruled that the case at hand is nothing short of a simple monetary claim, the international jurisdiction of which could be obtained within the confines of the Rule of Presence.⁵³ But this conclusion can certainly be doubted. As the *Sabbag* case demonstrates, courts tend to view legislation that concerns international jurisdiction as exhausting, in a manner rejecting the residual Rule of Presence.⁵⁴ The Supreme Court refrained from clarifying the purpose of Section 136, in accordance with which the phrase “the inheritance of every person” ought to have been construed. Furthermore, the Court failed to explain why one should resort to the residual Rule of Presence as the relevant norm, rather than referring to Section 136.⁵⁵ Moreover, one could argue that the claim at hand concerns “the inheritance of every person” within the meaning of Section 136, because the Inheritance Law itself applies to such claims filed by estate executors against third parties⁵⁶ and because the real dispute between the American estate executor and the defendant in the *Eldermann* case concerned which will should have been executed.⁵⁷

Construing Section 136 in accordance with the Principle of Territorial Sovereignty might have resulted in a conclusion that the Israeli legislature has limited the international jurisdiction of Israeli courts, in cases such as the *Eldermann* case, only to situations where, at the time of death, the deceased either resided in Israel or owned property in Israel. On the other hand, construing Section 136 in accordance with the JERDT, even under the assumption that Section 136 is exhaustive, leads to the conclusion drawn by the Court: that Israeli courts can exercise international jurisdiction to litigate the claim filed by the American estate executor. According to this interpretation, the Israeli legislature narrowed the international jurisdiction of Israeli

⁵³ *Id.* at 539.

⁵⁴ See *infra* Part III.B.

⁵⁵ See *Eldermann*, IsrSC 59(3) at 535-36 (noting that the Rule of Presence is a residual norm as it is only common law); H CJ 6751/04 *Sabbag v. The Rabbinical Court of Appeals* [2004] IsrSC 59(4) 817 (focusing upon interpreting relevant legislation concerning international jurisdiction rather than on examining the Rule of Presence).

⁵⁶ See Israeli Inheritance Law, 1965, §§ 82, 98.

⁵⁷ See *Eldermann*, IsrSC 59(3) at 533. Of course, in such a case, the fact that the defendant cannot point to a court order regarding the execution of the other will, may serve to strengthen the plaintiff's argument. The absence of such a court order does not undermine however the need to consider the dispute as one concerning inheritance.

courts in matters of inheritance, but did not take away the option of estate executors to resort to the Rule of Presence in order to exhaust the estate's entitlements against third parties who could not be forced to litigate anywhere else but in Israel.

B. *The Sabbag Case*

As if to emphasize the lack of coherence disturbing the Israeli law of international jurisdiction, which partly emanates from the failure to identify the JERDT's influence, the Israeli Supreme Court decided yet another case of international jurisdiction on the very same day on which the *Eldermann* judgment was rendered. This time, however, the Supreme Court blatantly adhered to the Principle of Territorial Sovereignty.

The *Sabbag* case concerned the international jurisdiction of an Israeli Rabbinical court to adjudicate a claim filed by a woman in order to force her husband to provide her with a get.⁵⁸ This couple, which resided in Monaco, had separated from several years earlier and even divorced in accordance with the laws of Monaco. Still, even seven years after the civil divorce proceedings concluded, the husband kept holding to his refusal to provide his wife with a get, despite the wife's efforts to convince him to do so.⁵⁹

Under Jewish law, the act of a Jewish religious divorce is strictly a private one.⁶⁰ Despite the religious context and possible perverse effects over the spouse and over third parties, such as children as the result of a subsequent relationship between the wife and another man,⁶¹ both the husband and the wife can actually refuse to get a divorce.⁶² As a result, Jewish husbands can "anchor" their wives and

⁵⁸ *Sabbag*, IsrSC 59(4) at 824.

⁵⁹ *Id.* at 829.

⁶⁰ See AYELET SHACHAR, MULTICULTURAL JURISDICTIONS 58 (2001); AVIAD HACHOHEN, THE TEARS OF THE OPPRESSED – AN EXAMINATION OF THE AGUNAH PROBLEM: BACKGROUND AND HALAKHIC SOURCES vii-viii (2004).

⁶¹ Children produced by a union between an anchored woman and another man are considered under Jewish law to be "illegitimate" – a status which carries several severe implications, such as a prohibition against marrying anyone except other illegitimate children. See, e.g., RACHEL BIALE, WOMEN AND JEWISH LAW: AN EXPLORATION OF WOMEN'S ISSUES IN HALAKHIC 103 (New York, 1984).

⁶² Under Jewish law, the wife can also refuse to be extended with a get from her husband, and thus she too cannot be compelled to execute a religious divorce against her will. However, while chained wives cannot in any way enter into a religious marriage with another man (or even carry an intimate relationship with another man), Jewish husbands whose wives refuse to divorce them, even despite an order issued by the court, can obtain a permission from religious authorities to marry a second wife. See HACHOHEN, *supra* note 60, at viii.

chain them to the religious marriage,⁶³ even if the parties divorce under the relevant state law.⁶⁴ On the other hand, as a result of the immense discomfort that arose in the face of the human tragedy by which many Jewish women were struck when their husbands refused to release them from the religious marriage, known as the “plight of the Agunah,” the Rabbinical Court in Israel was equipped with certain unique coercive measures that can be used to pressure a person to extend his consent to the get.⁶⁵ Of course, the ability of chained wives to apply to the Rabbinical Court to use its unique powers against chaining husbands is dependent upon whether the Rabbinical Court can entertain jurisdiction over the defendant-husband. Considering the fact that many Jewish chained women worldwide, who are neither citizens nor residents of Israel, would like to resort to the unique powers of the Israeli Rabbinical courts for that purpose, as Rabbinical courts or other authorities at their own place of residence cannot effectively assist in unchaining them, the international jurisdiction of the Israeli Rabbinical court becomes an issue.

⁶³ These wives are called “Chained Wives” or, in Hebrew: “Agunot.” See BIALE, *supra* note 61, at 102-03.

⁶⁴ Such anchoring often results in wives being chained for long periods of time or husbands abusing the Ghet as a means of blackmailing their wives into giving up their property and custody rights in exchange for the husband’s consent to grant the Ghet. See AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* 57-58 (Cambridge Univ. Press 2001). For Jewish Israeli chained wives, matters are made even worse, especially in terms of divorce and subsequent results, where Israeli state law directly refers to the legal results dictated by Jewish law. Section 1 of the Rabbinical Court Jurisdiction Law mandates that “matters of marriage and divorce of Jews in Israel, citizens of Israel or residing in Israel, are to be adjudicated solely by the Rabbinical courts.” See Rabbinical Court Jurisdiction Law (Marriage and Divorce) 7 LSI 139, Section 1 (1953) (Isr.). Thus, Jewish Israeli chained wives cannot remarry even under state law.

⁶⁵ The Rabbinical Courts Jurisdiction Law (Enforcing Divorce Decrees), 1995 specifies several such measures, to be used in cases in which the Rabbinical court decides that the person, whether it is the husband or the wife, should divorce their spouse, but that person refrains from abiding by the court’s decree (to grant the Ghet). Consider some of these measures: Section 2(a) empowers the court to stay that person’s exit from Israel; prevent that person from holding an Israeli passport; prevent that person from holding a driver’s license; prevent that person from being nominated or elected to a public office; prevent that person from practicing a regulated profession or operate a licenced business; prevent that person from holding a bank account or from withdrawing cheques from a bank account. Section 2(b)(2) empowers the court to foreclose that person’s assets. Section 3(a) authorises the court to have that person arrested, under certain conditions, for a periods of time of up to ten years. See Rabbinical Court Jurisdiction Law (Enforcing Divorce Decrees) 7 LSI 139, Section 2 (1995) (Isr.).

In the *Sabbag* case, several attempts by both French and Israeli Rabbis to influence the husband to unchain his wife, as well as similar attempts made by several Israeli religious judges, all failed.⁶⁶ The husband kept holding to his refusal to release his wife and announced that he did not acknowledge the authority of any religious court whatsoever.⁶⁷ Moreover, the Rabbinical courts of Lyon and Paris declared their inability to adjudicate the dispute.⁶⁸ In light of her severe distress, the wife filed a claim in the Jerusalem Rabbinical Court to force the husband to provide her with a get and to force him to pay her maintenance.⁶⁹ When the husband later came to Israel for a visit, his wife immediately petitioned the Rabbinical Court, which in turn issued an order preventing the husband from leaving Israel.⁷⁰ The husband retaliated by petitioning the High Court of Justice, demanding that the detaining order be abrogated and that he be allowed to leave Israel.⁷¹ Before deciding the case, the Justices of the High Court of Justice suggested that the parties accept a compromise: that the husband deposit a get with a trustee, following which the parties would litigate their Jewish divorce before a Rabbinical court in France and that court's ruling would bind them.⁷² However, the husband declined to compromise and the High Court of Justice had no choice but to decide the case.⁷³ The husband's petition was granted and a majority of the High Court of Justice ruled that the Israeli Rabbinical courts do not entertain international jurisdiction to adjudicate the claims filed by the wife.⁷⁴

In its opinion, the majority explained that the Israeli legislature has limited the international jurisdiction of Israeli Rabbinical courts as it stated, in Section 1 of the Rabbinical Court Adjudication Law (Marriage and Divorce), 1953, that "matters of marriage and di-

⁶⁶ HCJ 6751/04 *Sabbag v. The Rabbinical Court of Appeals* [2004] IsrSC 59(4) 817, 841.

⁶⁷ *Id.* at 841, 865 ("[T]he [husband] has already disclosed his opinion. . . according to which there exists no forum whatsoever in which he wishes to litigate the divorce, and although he said during court hearings in Israel that he would agree to litigate in a French Rabbinical court, his past approach and the comments of these courts speak for themselves.").

⁶⁸ *Id.* at 842-43, 856. The exact reasoning behind this declaration remains unclear, as the High Court of Justice refrained from attempting to ascertain the reason for the alleged "inability." However, at a minimum, the Court should have clarified this point.

⁶⁹ *Id.* at 824, 841.

⁷⁰ *Id.* at 824.

⁷¹ *Id.*

⁷² *Sabbag v. The Rabbinical Court of Appeals* at 827, 842.

⁷³ *Id.* at 827.

⁷⁴ *Id.* at 839.

voiced by Jews in Israel, citizens of Israel or residing in Israel, are to be adjudicated solely by the Rabbinical courts.”⁷⁵ In this context, the Supreme Court noted that both the husband and the wife in the case at hand were neither citizens of Israel nor residents thereof, thus leaving the Rabbinical courts in Israel without jurisdiction in accordance with Section 1.⁷⁶ The majority went on to examine whether the Israeli Rabbinical courts may assume international jurisdiction by force of Section 4 of the Rabbinical Court Adjudication Law, which states that “where a Jewish wife sues her Jewish husband or his estate for maintenance in a Rabbinical court otherwise than in connection with divorce, the plea of the defendant that a Rabbinical court has no jurisdiction in the matter shall not be heard.”⁷⁷ Although it has long been held that Section 4 does not mandate the existence of the terms of jurisdiction dictated by Section 1, the section discussing Israeli citizenship or residency,⁷⁸ the majority in the *Sabbag* case nevertheless decided that the wife’s maintenance claim against the husband did not fall within the scope of Section 4 because “it is not truly a maintenance claim otherwise than in connection with divorce but rather a maintenance claim in certain connection with divorce and actually inseparably dependent upon the divorce.”⁷⁹ The majority also held that the main purpose of Section 4 is to serve as a source of jurisdiction for Rabbinical courts to adjudicate maintenance claims filed by women within the confines of a marriage.⁸⁰

The majority also stated that “one should not view the maintenance claim as an independent claim. . . in the circumstances of this case the maintenance claim was not filed in an honest and sincere manner, but was meant to overcome the obstacle of the Rabbinical court’s lack of jurisdiction, and find a loophole that would enable to subject the husband to the Rabbinical court’s jurisdiction to adjudicate the divorce claim, thus allowing the divorce and get issues to be resolved.”⁸¹ Such an insincere claim did not merit, according to the majority, the exercise of jurisdiction by the Rabbinical Court nor did it merit the issuing of any coercion measures upon the husband while preventing him from going back home.⁸² The majority concluded with the following statement:

⁷⁵ *Id.* at 829-30.

⁷⁶ *Id.* at 831.

⁷⁷ Rabbinical Court Adjudication Law (Marriage and Divorce) § 4 (1953); *Sabbag*, IsrSC 59(4) at 832.

⁷⁸ *Sabbag v. Rabbinical Court of Appeals* at 832 (citing relevant cases).

⁷⁹ *Id.* at 833, 834.

⁸⁰ *Id.* at 833.

⁸¹ *Id.* at 834, 836.

⁸² Justice Elyakim Rubinstein dissented. In his dissent, the Justice opined that the maintenance claim filed by the wife should be considered a claim for enlarged

This proceeding raises several significant questions which concern the appropriate ways to solve the phenomenon of get refusals among Jewish communities worldwide. The pertinent question that arises is what are the jurisdictional limits of Israeli Rabbinical courts to adjudicate such disputes and utilize its arsenal of coercion measures upon foreign spouses who have no connection to Israel, whether in the context of get refusal or in other contexts; What are the jurisdictional limits of Israeli Rabbinical courts with regard to Jewish communities abroad?

These jurisdictional questions are difficult and complex from various aspects. In connection with get refusal they raise the question of how the need to change prevailing jurisdictional rules of Israeli Rabbinical courts relate to the ability and capability of developing the Jewish law regarding get refusals in order to supply Jewish adjudication authorities abroad with sufficient coercion measure.

As of now, it is impossible to tackle the phenomenon of get refusals between Jewish spouses having no connection to Israel by subjecting them to the jurisdiction of the Israeli Rabbinical court. . . .⁸³

The *Sabbag* ruling is problematic.⁸⁴ Had this case been decided according to the Principle of Territorial Sovereignty, the conclu-

maintenance, because she is prevented from remarrying, as this term is construed by the Halakha (the collective corpus of Jewish law). In such a case, the Justice continued, Section 4 applies and the Rabbinical court can exercise jurisdiction in this case. See *id.* at 834 (Rubinstein, J., dissenting).

⁸³ *Id.* at 837 (majority opinion).

⁸⁴ The Rabbinical Court Jurisdiction Law (Marriage and Divorce) 7 LSI 139 (1953) (Isr.) was amended in 2005 to include provisions (Sections 4A, 4B and 4C) that grant Israeli courts with international jurisdiction in divorce cases, even if either: (1) the defendant alone is domiciled in Israel; (2) both parties are citizens of Israel; (3) the plaintiff was domiciled in Israel in the year preceding the claim and she resided in Israel for at least a year prior to filing the claim; (4) the plaintiff is domiciled in Israel and the spouse's last common domicile was in Israel; (5) the plaintiff is both a citizen of Israel and domiciled in Israel; (6) the plaintiff is an Israeli citizen and resided in Israel for year during the two years preceding the claim; (7) the parties are Jews married in accordance with Jewish law, divorced according to the secular law of a foreign country, the plaintiff is an Israeli citizen, and the claim is only for a Jewish divorce; or (8) the parties are Jews married in accordance with Jewish law, the plaintiff is an Israeli citizen staying in Israel at the time in which the claim is filed, and at that time divorce of any kind is impossible in the county in which the parties were lastly domiciled. Of course, even under the terms of this new regime, the chained wife in the *Sabbag* case would have been

sion of the majority would have been correct. In such a case, the Principle of Territorial Sovereignty would be used to construe Section 4 and, while the Israeli legislature would still be entitled to reject the Principle of Territorial Sovereignty, it would be required to do so in a clear manner.⁸⁵ To the extent that Section 4 reflects an intention to overcome the jurisdictional limit set by the Principle of Territorial Sovereignty, the wording of Section 4 indicates that the Israeli legislature granted the Israeli Rabbinical courts with jurisdiction to adjudicate a claim for maintenance filed by Jewish women otherwise than in connection with divorce. However, construing the wording of Section 4 in accordance with the theory of Territorial Sovereignty reveals that the Israeli legislature did not specifically grant similar extra-territorial jurisdiction with regard to get claims. Thus, under the theory of Territorial Sovereignty and given that the actual dispute with her husband concerned the issue of the get, Section 4 cannot be read as enabling the Rabbinical court to adjudicate the wife's claims.

On the other hand, inasmuch as the dominating theory of international jurisdiction is the JERDT, one cannot escape the conclusion that the majority in the *Sabbag* case, with all due respect, erred in its interpretation of Section 4. From an Israeli point of view, the parties litigating in the case at hand are foreigners. So is the dispute that was brought by the plaintiff before the Israeli court. This dispute had nothing to do with Israel and the plaintiff's behavior was blatant forum shopping. One could therefore argue that it is inappropriate for Israeli courts to adjudicate such a dispute. However, the Basic Law: Human Dignity and Liberty protects the constitutional rights of foreigners as well.⁸⁶ Thus, even foreigners enjoy a constitutional right of access to court. Assuming that the wording of Section 4 can uphold an interpretation according to which Section 4 applies to the wife's claim for maintenance,⁸⁷ the real question posed by the JERDT is how to limit the Israeli Rabbinical Court's jurisdiction to adjudicate the wife's claim, considering the wife's constitutional right of access to court. In this context, one can hardly disagree that the real dispute with her husband concerns the get. Indeed, the majority in the *Sabbag* case

left without a remedy. It seems that the only cure for her would have been to apply for Israeli citizenship or change her place of residency.

⁸⁵ See HCJ 279/51 Amsterdam v. Minister of Finance [1952] IsrSC 6 945, 971.

⁸⁶ The Basic Law: Human Dignity and Liberty speaks of "a person" or "any person." Section 2 states that "[t]here shall be no violation of the life, body or dignity of any person as such." Section 3 states that "[t]here shall be no violation of the property of a person." Section 4 states that "[a]ll persons are entitled to protection of their life, body and dignity."

⁸⁷ As already mentioned, in Justice Rubinstein's dissent, he agreed that the wording of Section 4 does uphold such an interpretation. See *Sabbag*, IsrSC 59(4) at 860 (Rubinstein, J., dissenting).

clearly acknowledged it.⁸⁸ However, identifying the real dispute should have been used to tilt the decision in favor of the wife, and not to her detriment. Indeed, contrary to the insinuations made by the majority in the *Sabbag* case, the distinct conclusion arising from this case concerns the fact that the wife did not have any other forum in the whole wide world in which she could effectively litigate the get dispute with her husband. Inasmuch as the phenomenon of foreign plaintiffs attempting to litigate a dispute in Israel is the subject matter, one need differentiate between a situation in which the plaintiff does so because she seeks a relief that can be granted by an Israeli court but cannot be granted elsewhere (a classic situation of forum shopping), and a situation in which the petition to the Israeli court emanates from the fact that the defendant is doing everything he can to evade the litigation, and does so by arguing against the international jurisdiction of any possible court.⁸⁹ In the *Sabbag* case, the matter at hand did not concern only the relief to be granted to the wife, and the various measures of coercion that can be exercised by the Rabbinical courts in Israel, but first and foremost the very issue of litigating the get dispute with the husband. In this context, not only had the husband announced that he does not acknowledge the authority of any religious court whatsoever, but the Rabbinical courts of Lyon and Paris declared their inability to adjudicate the dispute.⁹⁰ Thus, the Court should have at least inquired whether or not the wife has an alternative effective forum in which to litigate the get dispute with her husband, even if such an alternative forum could not provide her with the same relief that Israeli Rabbinical courts can issue. The majority refrained from doing so, and instead settled on commenting that “the problem of Chained Jewish women who are citizens and residents of foreign countries, and who have no significant connection to Israel, might find a solution, even if partial, within the confines of the local law in the parties’ place of residence.”⁹¹

⁸⁸ HCJ 6751/04 *Sabbag v. The Rabbinical Court of Appeals* [2004] IsrSC 59(4), 817, 834.

⁸⁹ Justice Rubinstein referred to the opinion of Dr. Michael Vigoda, the head of the Hebrew Law Department at the Ministry of Justice, who opined that Israeli private international law acknowledges the expansion of jurisdiction to the extent that the plaintiff does not have any other forum to which he can apply. *See id.* at 858 (citing CA 3868/95 *Verber v. Verber* [1998] IsrSC 52(5) 817, 846-47; HCJ 297/77 *Chen v. The District Rabbinical Court* [1979] IsrSC 31(3) 678, 679.

⁹⁰ *Id.* at 842.

⁹¹ *Id.* at 835.

V. CONCLUSION

Something is wrong with the Israeli law of international jurisdiction. The *Sabbag* judgment brought with it sad news for Jewish Chained wives who are not citizens or residents of Israel and whose husbands refuse to provide them with a get. The *Sabbag* ruling has also left a somewhat bitter taste of justice not being done. However, a critical examination of another judgment of the Israeli Supreme Court, which was actually rendered on the very same day the *Sabbag* judgment was issued, would have revealed a striking character of the Israeli law of international jurisdiction: the absence of a clear choice of a guiding rationale that could prompt consistent case law. The current article thus attempted to speak in favor of an effort to make such a choice.

The article also attempted to introduce a new theory of international jurisdiction, which could also enrich the possibilities facing Israeli lawmakers in the future as they come to make the above mentioned choice. The new theory—the JERDT—seems to already be influencing, at least to some degree, Israeli case law—as was demonstrated in the in context of serving with process to a business agent—and thus becomes a serious competitor to the traditional theories of international jurisdiction, especially to the infamous Principle of Territorial Sovereignty.

