Comparative *Forum Non Conveniens* and the Hague Judgments Convention

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I. INTRODUCTION

The doctrine of forum non conveniens is one part of a complex web of issues relating to the ability of courts to decline jurisdiction in cases connected to more than one legal
system. While the Latin term was first used in Scotland in the late nineteenth century, the doctrine is generally agreed to have its genesis in earlier Scottish cases of the seventeenth century. Both the doctrine and the term appear in most common law systems following the British model, but there often are important differences in the focus and effect of the doctrine from country to country. At base, the doctrine allows a court that has jurisdiction to stay or dismiss proceedings where there is a more appropriate forum for the litigation.

The doctrine of *forum non conveniens* generally is unknown in legal systems following the continental civil law model. Rather than search for the most appropriate forum, most civil law states opt for what is considered to be greater predictability in the rules of jurisdiction, and apply a *lis alibi pendens* analysis when the possibility of parallel litigation in multiple forums arises. This approach emphasizes the plaintiff's choice of forum when forum shopping is possible, placing the focus on where the case is first filed rather than on the appropriateness of one forum as compared to others that are available.

These differences in approach have been the subject of a carefully crafted compromise in the work of the Special Commission of the Hague Conference on Private International Law, which for nearly a decade has been working on a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. That compromise reflects elements of both the common law approach to *forum non conveniens* and the civil law approach to *lis alibi pendens*.

This article begins with a discussion of the application of the *forum non conveniens* doctrine in four common law legal systems. It then briefly notes related concepts applied in the courts of two civil law systems. This discussion is followed in Part IV by a brief history of the negotiations at the Hague Conference on Private International Law for a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters and a review of Articles 21 and 22 of the Interim Text of that Convention created at the June 2001 portion of the Diplomatic Conference.

1. The doctrine of *forum non conveniens* cannot be properly understood in any country without reference to that country's basic rules of jurisdiction. In addition, courts may engage in analysis leading to the declination of jurisdiction in the application of the doctrine of *lis alibi pendens* to prevent parallel litigation, the application of choice of forum clauses selecting another court, and in consideration of requests for antisuit injunctions. While all of these issues are related, this article is limited to a discussion of *forum non conveniens*. For excellent detailed coverage of these related issues, see J.J. FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW (1995), containing a comparative General Report and eighteen National Reports written for the XIVth Congress of the International Academy of Comparative Law, held in Athens, Greece, in August 1994.


II. **FORUM NON CONVENIENS IN COMMON LAW SYSTEMS**

A. **Scotland and England**

While Scotland is a part of the United Kingdom, its legal system developed separately, with significant French civil law influence. Despite this influence, Scotland is credited with generating the concepts that now underlie the common law doctrine of *forum non conveniens* and with giving the doctrine its name.

Scottish cases from as early as the seventeenth century applied the plea of *forum non competens* to go beyond mere claims of lack of jurisdiction and encompass cases in which jurisdiction was clear under the law, but the parties were alien and trial in Scotland was deemed to be inconvenient.\(^4\) This application increasingly became common practice in Scottish cases in the nineteenth century, when *forum non competens* "was available both where the court lacked jurisdiction and where it was not expedient for the due administration of justice to hear the case."\(^5\) In the mid-nineteenth century, Scottish cases recognized that the question was one on the merits,\(^6\) and discussed the concept of "inconvenient forum."\(^7\) Later nineteenth century courts replaced the term *forum non competens* with *forum non conveniens*, recognizing that only a question of discretion, and not of jurisdiction, was involved.\(^8\)

The first step in the application of the doctrine became the presence of an alternative forum:

> [T]he plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.\(^9\)

Despite the term, Scottish *forum non conveniens* cases (and the House of Lords, on appeals from Scotland) in the late nineteenth and early twentieth century noted that "the mere balance of convenience is not enough,"\(^10\) and there had to be some "unfair disadvantage."\(^11\)

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5. *Id.* at 387 n.35 (citing Parken v. Royal Exch. Assurance Co., D. 365 (Sess. 1846) (Scot.); Longworth v. Hope, 3 M. 1049, 1053 (Sess. 1865) (Scot.); Clements v. Macaulay, 4 M. 583 (Sess. 1866) (Scot.).; 7 ENCYCLOPEDIA LAWS OF SCOTLAND 180 (1929)).


7. See *id.* at 909 n.11 (citing Tulloch v. Williams, 8 D. 657 (Sess. 1846) (Scot.); Clements, 4 M. 583); see also *Longworth*, 3 M. at 1058 (“Although questions like the present are ranged in our books under the head of ‘forum competens’ or ‘forum non competens,’ the plea is really not that the one forum is incompetent, but that the other forum ought to be preferred. Where there are two competent forums, the question is, do the ends of justice require that an action brought in the one should be sisted in order that proceedings may be taken or go on in the other?”). *But see Clements*, 4 M. at 593 (“[I]n cases in which jurisdiction is competently founded, a Court has no discretion whether it shall exercise its jurisdiction . . . .”).


9. Sim v. Robinow, 19 R. 665, 668 (Sess. 1892) (Scot.).


11. *Longworth*, 3 M. at 1057 (“It is a valuable discretion, which is vested in every Court, not to exercise its jurisdiction if there are grounds for holding that, by the exercise of that jurisdiction, the defender, who objects to
or a "real unfairness" for the plea to be successful. In 1926, the House of Lords interpreted the lower Scottish courts' development of the doctrine in *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français,***" to read the "conveniens" element of the plea as "appropriate." Thus, it instructed courts to approach the *forum non conveniens* decision as a matter of determining the appropriate forum for a case for which jurisdiction existed in multiple forums.

While the doctrine was first exported to the United States, it also worked its way into English law in the twentieth century. This process involved departure from the 1775 statement of Lord Mansfield in *Mostyn v. Fabrigas* that "it is impossible there ever could exist a doubt, but that a [foreign] subject . . . has as good a right to appeal to the King's Courts of Justice, as one who is born within the sound of Bow Bell." *Mostyn* upheld jurisdiction over residents of the Island of Minorca. Whether this preference of English judges for English courts, despite the nationalities of the parties, was a result of judicial chauvinism, the lack of a crowded docket, or simply the belief that "England . . . is a good place to [forum] shop," reticence to decline jurisdiction when it existed continued until the early twentieth century.

In 1906, the Court of Appeal in *Logan v. Bank of Scotland* stayed proceedings in England between Scottish parties, finding that the case was better tried in Scotland. In doing so, the court made clear that such a stay was appropriate when trial in Scotland would not subject the plaintiff to any injustice and an action in the forum chosen by the plaintiff would subject the defendant to such injustice as to be vexatious and oppressive. In 1936, the Court of Appeal reiterated the *Logan* test in *St. Pierre v. South American Stores (Gath & Chaves) Ltd.*:

(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right to access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied . . . (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b)
the stay must not cause an injustice to the plaintiff. On both the burden of proof
is on the defendant.\textsuperscript{22}

The St. Pierre decision demonstrated the difficult burden on the defendant to succeed
in a motion to stay based on forum non conveniens. The court conceded that “the
[alternative] Chilean Court is a more convenient forum,” noting that the contract involved
was written in Spanish, Chilean law applied to the contract, the events that gave rise to the
suit occurred in Chile, all parties had a substantial connection with Chile, and that expertise
and witnesses would be found in Chile.\textsuperscript{23} In the end, however, the court found that “these
grounds go only to convenience” and did not evidence vexation to the defendant or abuse of
process of the court if the action proceeded in England.\textsuperscript{24}

It was not until the 1970s and 1980s that the House of Lords moved to adopt more
fully the Scottish plea of forum non conveniens.\textsuperscript{25} Prior to the latter half of the 1970s,
English courts would decline jurisdiction only if the defendant could prove both that the
plaintiff would suffer no injustice by trial elsewhere and that the trial in England would be
oppressive or vexatious to the defendant or in some other way constitute an abuse of the
court.\textsuperscript{26} In MacShannon v. Rockware Glass Ltd., Lord Diplock demonstrated the evolution
to the modern doctrine, describing the requirements for obtaining a stay as follows:

In order to justify a stay two conditions must be satisfied, one positive and the
other negative: (a) the defendant must satisfy the court that there is another
forum to whose jurisdiction he is amenable in which justice can be done between
the parties at substantially less inconvenience or expense, and (b) the stay must
not deprive the plaintiff of a legitimate personal or juridical advantage which
would be available to him if he invoked the jurisdiction of the English court[.]\textsuperscript{27}

The current application of the forum non conveniens doctrine in English courts is
framed by the 1986 opinion of Lord Goff of Chieveley in Spiliada Maritime Corp. v.
Cansulex Ltd.\textsuperscript{28} The case involved both a motion to set aside service outside of the
jurisdiction (service ex juris) by leave of court under Order 11 of the Rules of the Supreme
Court and an alternative motion to stay proceedings on the ground of forum non
conveniens.\textsuperscript{29} Lord Goff expressed his “doubt whether the Latin tag forum non conveniens
is apt to describe this principle. For the question is not one of convenience, but of the
suitability or appropriateness of the relevant jurisdiction.”\textsuperscript{30} He then went on to develop a
six point outline of the application of the modern doctrine of forum non conveniens in
England and Scotland:

1) “[A] stay will only be granted . . . where the court is satisfied that there is
some other forum, having competent jurisdiction, which is the appropriate
forum for the trial of the action.”\textsuperscript{31}

23. \textit{Id.} at 397.
24. \textit{Id.} at 397–98.
25. The Abidin Daver, 1 A.C. 398 (H.L. 1984); MacShannon v. Rockware Glass Ltd., 1 A.C. 795 (H.L.
27. \textit{MacShannon}, 1 A.C. at 812.
29. \textit{Id.} at 467.
30. \textit{Id.} at 474.
31. \textit{Id.} at 476.
2) "In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay."

3) If jurisdiction is a matter of right in England, as opposed to jurisdiction ex juris in which the plaintiff must request leave to serve the defendant outside the jurisdiction, then "the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum . . . . [I]f, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas."

4) While not every case presents a "natural forum' . . . 'with which the action had the most real and substantial connection," the court must look at connecting factors including (1) the availability of witnesses, (2) the law governing the relevant transaction, and (3) the places where the parties reside or carry on business.

5) If there is no other available forum "which is clearly more appropriate for the trial of the action," the court will refuse a stay.

6) If "there is some other available forum which prima facie is clearly more appropriate for the trial of the action," the court ordinarily will grant a stay. At this point, however, the burden of proof shifts to the plaintiff, who may prove "circumstances by reason of which justice requires that a stay should nevertheless not be granted."

Cases subsequent to Spiliada have further refined the analysis, providing greater certainty to a doctrine that otherwise is characterized by substantial discretion on the part of the trial court. One commentator has summarized these refinements in a series of points for determining the "appropriate" forum under Spiliada:

1) The applicable law is a relevant factor whenever it has been agreed by the parties or would be the same in the alternative forum. It is a significant factor in favour of the forum that is applying its own law when the issues of law are important to determining the outcome of the case and are complex and disputable.

2) The fact that litigation is pending in another forum is a significant factor if the proceedings there have reached a stage which has had some impact upon the dispute between the parties.

32. Id.
33. Id. at 477.
34. Id. at 478 (quoting The Abidin Daver, 1 A.C. at 415 (Keith of Kinkel, L.)).
35. See id.
36. Id.
37. Id.
38. Id.
39. Lord Templeman, in Spiliada, expressed strong support for the discretionary authority of the trial court in the application of the doctrine: "[I]t seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge . . . . An appeal should be rare and the appellate court should be slow to interfere." Id. at 465.
3) The convenience of witnesses is a relevant factor unless the dispute is primarily one of law and there is little scope for oral evidence but it is rarely a significant factor unless the dispute is primarily factual rather than legal or a considerable amount of evidence is to be given in a foreign language.

4) The convenience of the parties is a relevant factor in making it difficult for a defendant to object to being sued in his own forum (the place where he is habitually resident or domiciled) or for a plaintiff to object to the alternative forum when that is his own forum.

5) The geographical place with which the dispute is closely connected, eg [sic] the place of performance of the contractual obligation in question, is a relevant factor.

6) If a negative declaration is being sought in one forum and a positive remedy in another forum then this is a factor in favour of the latter forum.

7) If third parties or other defendants can be joined to the action in one forum but not in the alternative forum then this is a significant factor in favour of the former.

8) If related litigation has already taken place in one forum and not in the alternative forum and this has enabled the lawyers in the former forum to acquire expertise of relevance to the present litigation then this is a relevant factor in favour of the former forum.

9) A forum will be reluctant to decline to exercise jurisdiction if it would require the alternative forum to rule on questions of public policy of the former forum that are central to a resolution of the litigation.

10) Differences between one forum and the alternative forum in terms of costs, damages and delays are of little or no relevance to determining appropriateness.

11) If the defendant is unable to state an arguable defence on the merits in the forum or in the alternative forum then this is a significant factor in favour of the former forum in order to avoid wasting time.

12) The jurisdiction in which a tort or delict is committed is prima facie the most appropriate forum to hear the tort or delict action.\(^{40}\)

The most recent statement of the House of Lords on the doctrine of *forum non conveniens* came in July 2000 in the case of *Lubbe v. Cape PLC*.\(^{41}\) In an action by South African citizens involving exposure to asbestos in South Africa, brought against the English parent company of several South African subsidiaries, the court rejected the defendant’s request for a stay that would allow the case to be heard instead in South Africa.\(^{42}\) In the lead opinion, Lord Bingham of Cornhill summarized the modern doctrine of *forum non conveniens* in England as follows:

>>[T]he Court’s first task is to consider whether the defendant who seeks a stay is able to discharge the burden resting upon him not just to show that England is


\(^{41}\) *Lubbe v. Cape PLC*, [2000] 1 W.L.R. 1545 (H.L.) (appeal taken from Eng.).

\(^{42}\) *Id.* at 1546.
not the natural or appropriate forum for the trial but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is had to the fact that jurisdiction has been founded in England as of right . . . . At this first stage of the inquiry the court will consider what factors there are which point in the direction of another forum . . . . If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, that is likely to be the end of the matter. But if the court concludes at that stage that there is some other available forum which prima facie is more appropriate for the trial of the action it will ordinarily grant a stay unless the plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this second stage the court will concentrate its attention not only on factors connecting the proceedings with the foreign or the English forum . . . but on whether the plaintiff will obtain justice in the foreign jurisdiction. The plaintiff will not ordinarily discharge the burden lying upon him by showing that he will enjoy procedural advantages, or a higher scale of damages or more generous rules of limitation if he sues in England; generally speaking, the plaintiff must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the English forum. It is only if the plaintiff can establish that substantial justice will not be done in the appropriate forum that a stay will be refused.43

The Lubbe decision ultimately determined that, despite the availability of an alternative forum in South Africa, differences in systems of legal aid, contingent fee arrangements, and the handling of group claims meant that the plaintiffs would be unlikely to obtain justice in South Africa as a result of inadequate funding for legal representation.44 It is notable that Lord Bingham specifically stated that “public interest considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the Court has to make.”45 Thus, as the twenty-first century begins, the English law of forum non conveniens applies a most appropriate forum concept. The current formulation of the doctrine allows plaintiffs to prevent a stay by showing that trial in the alternative forum would not do justice and relies entirely on private-interest factors to determine both the appropriateness of each forum and the availability of justice.

B. The United States

The concept of forum non conveniens was evident as early as 1801 in the United States in Willendson v. Forsoket, where a federal district court in Pennsylvania declined to exercise jurisdiction over a Danish sea captain sued for back wages by a Danish seaman, stating that “[i]f any differences should hereafter arise, it must be settled by a Danish tribunal.”46 This dismissal was based on notions of justice and “reciprocal policy,”47 looking very much like the approach to forum non conveniens developing in Scotland at the time. Other nineteenth and early twentieth century state and federal cases, while acknowledging the existence of jurisdiction, refused to decide cases between foreign parties,

43. id. at 1554.
44. id. at 1561.
45. id.
47. id.
arising on foreign soil, and/or requiring the application of foreign law.\textsuperscript{48} These concepts became crystalized and named “forum non conveniens” in a 1929 article in the \textit{Columbia Law Review} by Paxton Blair.\textsuperscript{49}

U.S. law on \textit{forum non conveniens} now is anchored in a set of Supreme Court decisions that defines the parameters of the doctrine as it is applied in all U.S. courts.\textsuperscript{50} The 1947 case of \textit{Gulf Oil v. Gilbert} was the first Supreme Court decision directly to address the question of “whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of \textit{forum non conveniens}.”\textsuperscript{51} A Virginia resident brought a suit in a federal district court in New York against a Pennsylvania corporation that was doing business in Virginia, alleging negligence resulting in an explosion and fire that destroyed the

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\item[48] See, e.g., Canadian Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413 (1932) (recognizing that discretion to decline otherwise valid jurisdiction was not exclusive to admiralty courts); Slater v. Mexican Nat’l R.R. Co., 194 U.S. 120 (1904) (affirming the lower court’s decision to dismiss the case after reasoning that the events leading to the action occurred in Mexico and Mexican law would govern the action, even though the plaintiffs were U.S. citizens residing in Texas); Collard v. Beach, 87 N.Y.S. 884, 885–86 (N.Y. App. Div. 1904) (stating “the calendars of the courts of this state are congested, and, it being difficult to administer speedy justice to litigants who are obliged to submit their controversies to our courts and have no other forum, it is eminently proper that we should refuse jurisdiction over actions for tort that properly belong in another forum.”); The Infanta, 13 F. Cas. 37, 39 (S.D.N.Y. 1848) (No. 7,030) (commenting that the court often “discountenanced actions by foreign seamen against foreign vessels not terminating their voyages at this port, as being calculated to embarrass commercial transactions and relations between this country and others in friendly relations with it.”); Johnson v. Dalton, 1 Cow. 543, 548 (N.Y. Sup. Ct. 1823) (“Our courts may take cognizance of torts committed on the high seas on board a foreign vessel, where both parties are foreigners; but on principles of comity, as well as to prevent the frequent and serious injuries that would result, they have exercised a sound discretion . . . .”); Gardner v. Thomas, 14 Johns. 134, 137 (N.Y. Sup. Ct. 1817) (“There may be cases, however, where the refusal to take cognizance of causes for such torts may be justified by the manifest public inconvenience and injury which it would create to the community of both nations” and holding that this, where both parties were British and the suit arose out of a tort committed on a British vessel at sea, was such a case for dismissal); Mason v. Ship Blairceau, 6 U.S. (2 Cranch) 240, 264 (1804) (deciding that a case filed in federal district court in Maryland should be heard, but recognizing the courts prerogative to weigh “public convenience” factors to decide whether to maintain jurisdiction where the parties were both foreign); Willendson, 29 F. Cas. at 1284 (“It has been my general rule not to take cognizance of disputes between the masters and crews of foreign ships.”).


\item[50] The Supreme Court has not provided a clear answer to the question of whether, under \textit{Erie R. Co. v. Tompkins}, 304 U.S. 64 (1938), the \textit{forum non conveniens} issue is a matter of state or federal law. \textit{See, e.g.,} Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981) (citations omitted):

In previous \textit{forum non conveniens} decisions, the Court has left unresolved the question whether under \textit{Erie R. Co. v. Tompkins}, 304 U.S. 64 (1938), state or federal law of \textit{forum non conveniens} applies in a diversity case. The Court did not decide this issue because the same result would have been reached in each case under federal or state law. The lower courts in these cases reached the same conclusion: Pennsylvania and California law on \textit{forum non conveniens} dismissals are virtually identical to federal law. Thus, here also, we need not resolve the \textit{Erie} question.

While the doctrine of \textit{forum non conveniens} developed first in state courts, federal courts generally have followed the rule that, because the doctrine is essentially a procedural venue rule, they are permitted under \textit{Erie} to follow the federal doctrine in diversity cases. Justice Scalia seems to have affirmed that rule in \textit{American Dredging Co. v. Miller}, where he referred to the doctrine as a federal procedural rule, stating that “federal courts will continue to invoke jurisdiction in appropriate cases, whether or not the state in which they sit chooses to burden its judiciary with litigation better handled elsewhere.” Am. Dredging Co. v. Miller, 510 U.S. 443, 454 n.4 (1994). At the same time, however, the decision in \textit{American Dredging} held that a state statute removing admiralty cases from \textit{forum non conveniens} analysis was valid and effective. \textit{Id.} at 452–53. In federal question cases, of course, the \textit{Erie} analysis is not a problem because both the substantive and procedural laws to be applied are federal.

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plaintiff's warehouse in Virginia. The district court dismissed the case under the doctrine of *forum non conveniens* on the grounds that the case would be better tried in Virginia. The Second Circuit Court of Appeals reversed, but the Supreme Court held that the doctrine did apply. Justice Jackson stated that, in U.S. courts, "the proposition that a court having jurisdiction must exercise it, is not universally true . . . ." He also found the doctrine of *forum non conveniens* to apply specifically when jurisdiction does exist, noting that it "can never apply if there is absence of jurisdiction or mistake of venue."

*Gilbert* makes clear that *forum non conveniens* is a doctrine that gives the court substantial discretion when more than one forum is available for the trial of an action:

In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.

The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. . . .

. . .

Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.

Such discretion is to be used judiciously, however, and "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." In exercising its discretion, the trial court is to weigh both private interest and public interest factors:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

52. *Id.* at 501.
56. *Id*.
57. *Id.* at 506–08 (citation omitted).
58. *Id.* at 508.
Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.59

In his dissent in Gilbert, Justice Black expressed favor for a court exercising jurisdiction if it exists, and for the proposition that any authority to do otherwise should emanate from the legislature.60 He characterized the majority's holding as a clear balancing of conveniences:

The Court does not suggest that the federal district court in New York lacks jurisdiction under this statute or that the venue was improper in this case. But it holds that a district court may abdicate its jurisdiction when a defendant shows to the satisfaction of a district court that it would be more convenient and less vexatious for the defendant if the trial were held in another jurisdiction.61

Thus, the development of the doctrine in the lower federal courts became fixed in the Supreme Court.62

In Koster v. Lumbermens Mutual Casualty Co., decided the same day as Gilbert, the Court addressed questions about the relationship between the parties and the forum in the application of the forum non conveniens doctrine.63 This was a derivative suit brought by a policy holder of a mutual insurance company, alleging breach of fiduciary duties. The plaintiff filed suit in his home forum, the Eastern District of New York, against defendants from Illinois.64 Justice Jackson, again writing for the majority, recorded the deference courts should provide to the plaintiff's choice of forum:

59. Id. at 508-09 (citation omitted).
60. Id. at 513 (Black, J., dissenting).
61. Id. at 512-13 (Black, J., dissenting) (citations omitted).
62. Although many states have adopted the federal doctrine since Gilbert, other states have followed their own paths. For good discussions on state examples of forum non conveniens, see Karolyn King, Open "Borders"—Closed Courts: The Impact of Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113 (1994) and John W. Joyce, Forum Non Conveniens in Louisiana, 60 LA. L. REV. 293 (1999). For example, the Texas Supreme Court abolished its state doctrine of forum non conveniens on grounds that a state statute precluded such discretionary dismissals. Dow Chem. Co. v. Castro-Alfaro, 786 S.W.2d 674 (Tex. 1990); see also King, supra, at 1124-26. The Texas legislature responded by enacting legislation permitting state courts to apply the doctrine where foreign plaintiffs sue U.S. defendants for personal injuries suffered abroad resulting from violations of Texas or U.S. law. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (Vernon 2002). This exception is more in line with the modern trend in federal courts to deter forum shopping by foreign plaintiffs in already crowded dockets. Another interesting example is Washington, where the state Supreme Court has rejected the Piper premise that a foreign plaintiff's choice of forum is presumptively inconvenient. Myers v. Boeing Co., 794 P.2d 1272 (Wash. 1990); see also King, supra, at 1127-28. New York decisions have been read to eliminate the first prong of the federal analysis: proof of an alternative, appropriate forum is not considered to be an essential part of the test. See Joyce, supra, at 310.
64. Id. at 519.
Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff’s home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff’s convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court’s own administrative and legal problems.65

Despite this deference to the plaintiff’s choice, the Court nonetheless held dismissal on forum non conveniens grounds to be appropriate since in a derivative suit the individual plaintiff acts on behalf of all similarly situated persons, and in a matter involving internal affairs of a corporation, the conveniences often weigh in favor of the forum in which the corporation is located.66 While such suits are not required to be resolved in the home forum of the corporation, “the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice”67 and “the plaintiff was utterly silent as to any reason of convenience to himself or to witnesses and as to any advantage to him in expense, speed of trial, or adequacy of remedy if the case were tried in New York.”68

In 1948, Congress responded to the Gilbert and Koster decisions by enacting a venue provision that transformed the way in which federal courts handle problems of forum shopping and docket congestion in domestic cases. Section 1404(a) of Title 28 of the U.S. Code provides that, “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”69 The result of this provision is that diversity cases involving citizens of the United States are now dealt with as venue-transfer cases, rather than under the doctrine of forum non conveniens.70

Two other developments regarding jurisdiction also have served to limit the application of the doctrine. The refinement of the “minimum contacts” due process analysis to limit the reach of long-arm statutes through cases such as International Shoe Co. v. Washington,71 World-Wide Volkswagen Corp. v. Woodson,72 and Asahi Metal Industries Co., Ltd. v. Superior Court,73 means that many cases in which arguments of inconvenient forum can be made are disposed of on jurisdictional grounds.74 In addition, the Supreme

65. Id. at 524.
66. Id. at 524–25, 530–31.
67. Id. at 527.
68. Id. at 531.
74. See Ronald A. Brand, Due Process, Jurisdiction and a Hague Judgments Convention, 60 U. PITT. L. REV. 661, 669–87 (1999); see also Jacqueline Duval-Major, One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff, 77 CORNELL L. REV. 650, 663 (1992) (“The doctrine of forum non conveniens has diminished in importance given the modern development of the ‘minimum contacts’ test for personal jurisdiction. The increased reliance by courts on the ‘minimum contacts’ notion of personal jurisdiction, when taken in concert with modern applications of venue and subject matter jurisdiction, satisfies requirements of fairness and reasonableness embedded in the Due Process Clause of the Fifth Amendment. A proper personal jurisdiction inquiry should dispose of many cases in which the choice of forum is truly inconvenient.”) (citations omitted).
Court's decision in *Shaffer v. Heitner* has limited *in rem* jurisdiction over a nonresident defendant having scarce connections with a forum.\(^{75}\)

In 1981, the Supreme Court decided *Piper Aircraft Co. v. Reyno*, further defining the modern doctrine of *forum non conveniens* in U.S. courts.\(^{76}\) A wrongful death action was brought in California state court by Scottish plaintiffs against defendants from Ohio and Pennsylvania, based on an airplane crash in Scotland.\(^{77}\) The action was removed to federal district court and then transferred under Section 1404(a) to Pennsylvania.\(^{78}\) The plaintiff admitted forum shopping in order to get more favorable laws regarding liability, capacity to sue, and damages.\(^{79}\) The district court granted a motion for dismissal based on *forum non conveniens*, but the Third Circuit reversed.\(^{80}\) In ultimately holding that the action of the district court was a proper application of the doctrine of *forum non conveniens*, the Supreme Court rejected the contention that significant differences in substantive law should prevent such dismissal:

> The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.\(^{81}\)

Thus, "dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery."\(^{82}\) This does not prevent a difference in law from being a factor considered by the Court, however: "[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice."\(^{83}\)

Justice Marshall's opinion for the majority in *Piper* noted that the development of the Section 1404(a) transfer rules, while drafted "in accordance with the doctrine of *forum non conveniens*," gave the district courts greater ability to transfer under the statute than to dismiss under the common law doctrine of *forum non conveniens*.\(^{84}\) Thus, there is a greater flexibility to relocate a case within the federal system than to dismiss when the alternative forum is outside the United States.

In refining the *forum non conveniens* analysis, the *Piper* decision makes clear that consideration begins with the determination that an adequate alternative forum exists.\(^{85}\) If it does, then the court must apply the private interest and public interest analysis set out in

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75. *Shaffer v. Heitner*, 433 U.S. 186 (1977) (holding that jurisdiction over a nonresident defendant could not be based solely on a statutory rule that intangible property of the defendant that is unrelated to the cause of action is located in the state).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 239–44.
81. *Id.* at 247.
82. *Id.* at 250.
83. *Id.* at 254.
84. *Id.* at 253.
85. *Id.* at 254 n.22.
Gilbert. The Piper majority read Koster to require that the "plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum," thus justifying more favorable treatment of a resident or citizen plaintiff than of a foreign plaintiff. This distinction, however, was not based on the nationality of the party so much as on the determination of convenience in applying the private factor test of Gilbert:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference. 8

Based on the Supreme Court's guidance, our understanding of how courts should address the degree of deference to be given to a plaintiff's choice of a U.S. forum is essentially as follows: The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. Stated differently, the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for forum non conveniens. Thus, factors that argue against forum non conveniens dismissal include the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense. On the other hand, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a forum non conveniens motion by showing that convenience would be better served by litigating in another country's courts.

Id. at 71-72 (citations omitted). The Second Circuit invited the U.S. Attorney General to file an amicus curiae brief on this issue, including comments on "how, if at all, the question presented is affected by treaty obligations of the United States, including any treaty obligations concerning reciprocal access to courts by nationals of other countries." Id. at 69 n.2. The Justice Department declined the request, but provided some comment in a letter in response to the request. Id.

Some courts have applied a domestic plaintiff standard to foreign plaintiffs from countries that are party to a Treaty of Friendship, Navigation and Commerce with the United States; such treaties consistently include a provision requiring nondiscriminatory treatment of nationals of the other state. See, e.g., Irish Nat'l Ins. Co. v. Aer Lingus Teoranta, 739 F.2d 90 (2d Cir. 1984) (giving the foreign plaintiff's choice of forum the same weight as that of a domestic plaintiff because the United States had such a treaty with Ireland); Petroquimica de Venezuela, S.A. v. M/T Trade Resolve, 823 F. Supp. 143, 150 (S.D.N.Y. 1993) (stating "because such a treaty [Treaty of Friendship, Navigation, and Commerce] exists between the United States and Venezuela . . . no discount may be imposed upon the initial choice of a New York forum solely because certain plaintiffs are Venezuelans"); Roman v. Aviateca S.A., Civ A. No. H-96-142, 1996 U.S. Dist. LEXIS 21789 (S.D. Tex. May 22, 1996) (refusing plaintiff equal access rights to the United States court because a Treaty of Friendship, Navigation, and Commerce between the United States and Nicaragua had been abolished). But cf.
One of the problems defendants raised in *Piper* was their inability to implead potential third-party defendants who would be available in a Scottish court. While this was not determined to be unfair, it was considered burdensome, and "[f]inding that trial in the plaintiff's chosen forum would be burdensome ... is sufficient to support dismissal on grounds of *forum non conveniens*."^90^

The most recent pronouncement by the Supreme Court on the modern doctrine of *forum non conveniens* came in *American Dredging Co. v. Miller.*^91^ Writing for the majority, Justice Scalia stated that the doctrine "is nothing more or less than a supervening venue provision, permitting displacement of ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined."^92^ He emphasized that the doctrine has developed in response to court administrative and private litigant problems that often result from a plaintiff's misuse of venue. Thus, the doctrine serves to discourage plaintiffs from forum shopping. "The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application ... make uniformity and predictability of outcome almost impossible."^95^ This lack of uniformity is accepted because the doctrine serves as a procedural rule, and not as a substantive rule affecting the primary conduct of litigants.^96^

The *Gilbert-Koster-Piper* factors remain the foundation of the *forum non conveniens* doctrine in U.S. courts. Thus, the analysis begins by considering whether an adequate alternative forum exists. If it does, then the court considers the private interest and public interest factors set out in *Gilbert.* A plaintiff's choice of a forum with more favorable law is not dispositive, and a foreign plaintiff's choice generally is given even less deference than that of a domestic plaintiff. A court often will impose conditions on a defendant asserting a *forum non conveniens* defense in order to insure that the foreign forum is in fact available. Conditions may include submitting to service of process and jurisdiction in the alternative forum, waiving any statute of limitations defenses, agreeing to be bound by any

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Murray v. British Broad. Corp., 81 F.3d 287 (2d Cir. 1996) (refusing to give a foreign plaintiff's choice of forum the same deference as a domestic plaintiff's choice even though an international convention provided that any copyright action would be governed by the laws of the jurisdiction in which a plaintiff sought relief).

89. *Piper*, 454 U.S. at 259.
90. Id.
92. Id. at 453.
93. Id. at 450.
94. Id.
95. Id. at 455.
96. Id. at 454.
97. See, e.g., *In re Silicone Breast Implants Liability Litigation*, 887 F. Supp. 1469 (N.D. Ala. 1995) (dismissing all but one action brought by foreign plaintiffs against various manufacturers based in the United States for harm caused from defective breast implants, but allowing an action filed by certain plaintiffs from New Zealand to continue because a New Zealand statute prevented a remedy in their home forum); *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.2d 1220 (3d Cir. 1995) (holding that excessive delay in processing the action in the alternative Indian jurisdiction was extreme enough to render that forum inadequate).
98. *Gilbert*, 330 U.S. at 508–12. For a good example of the modern trend in assessing private interest factors, see *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824 (5th Cir. 1993).
100. See, e.g., *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1986), cert. denied, 484 U.S. 871 (1987) (granting dismissal on grounds of *forum non conveniens* while requiring the defendant to submit to the jurisdiction of the courts of India, to waive any statute of limitations defenses, and to agree to discovery in India according to the Federal Rules of Civil Procedure).
judgments rendered by the alternate forum, and complying with special rules on the production of evidence and witnesses.\(^{101}\)

Two additional considerations that may come into play in a *forum non conveniens* analysis are the existence of related proceedings abroad and forum selection clauses. While the existence of related proceedings abroad is an important factor,\(^{102}\) it is not alone dispositive in a *forum non conveniens* analysis.\(^{103}\)

C. Canada

In Canada, the doctrine of *forum non conveniens* has developed on two tracks: one in the common law provinces and one in Québec.

1. Common Law Provinces

The common law Canadian provinces have seen a continuous evolution of the process by which a court has discretion to decline otherwise validly established jurisdiction. While commentators state that "*forum non conveniens* achieved general acceptance at an earlier time in... Canada... than in England,"\(^{104}\) Canadian *forum non conveniens* principles have developed from English law.\(^{105}\)

The original development of the doctrine in Canada contained a distinction between "an action commenced by service *ex juris*, governed by *forum non conveniens*," and "an action commenced by service within the jurisdiction, governed by a test which centered on the tortured phrase 'oppressive or vexatious' as the appropriate standard."\(^{106}\) The result was a general lack of clarity prior to the 1993 decision of the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*—the case defining the modern *forum non conveniens* doctrine in Canada.\(^{107}\) *Amchem* was not a garden variety *forum non conveniens* case in which the defendant in an action moves to stay or dismiss and take the case to another jurisdiction. Instead, it involved an action first brought in Texas by multiple plaintiffs alleging injury from exposure to asbestos, followed by an action by the Texas defendants in British Columbia for an antisuit injunction, and then a corresponding request by the original plaintiffs in Texas for their own antisuit

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\(^{102}\) See, e.g., William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1676 (1992) ("The presence of related litigation abroad is another powerful factor favoring dismissal. There are significant advantages in having all the parties interested in apportioning a limited source of recovery assert their claims in one forum, not only to avoid inconsistent factual findings, but also ‘to spare the litigants the additional costs of duplicate lawsuits.’") (citation omitted).

\(^{103}\) See id.


\(^{106}\) McEvoy, supra note 104, at 5.

The British Columbia trial court and British Columbia Court of Appeal both granted the antisuit injunction, but the Supreme Court of Canada reversed. In doing so, the Court determined that in order to “arrive at more specific criteria” on the granting of antisuit injunctions, it is necessary to consider when a foreign court has departed from our own test of forum non conveniens to such an extent as to justify our courts in refusing to respect the assumption of jurisdiction by the foreign court and in what circumstances such assumption amounts to a serious injustice.

Thus, the Canadian court analyzed Canadian forum non conveniens law in order to determine the level of deference owed to the Texas court’s refusal to dismiss its action on the basis of forum non conveniens, and to determine whether a Canadian antisuit injunction was appropriate.

The Amchem court adopted the forum non conveniens test announced by the House of Lords in Spiliada, noting the importance of a review of “connecting factors” in order to determine the appropriateness of the forum chosen by the plaintiff. Like the House of Lords in Spiliada, the Canadian court stated that “the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff.” The Canadian court, however, took two turns not found in the Spiliada decision. First, in weighing the relevant factors, it determined that “there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum.” Second, the Canadian court applied the same test to questions of service outside the jurisdiction (service ex juris) as it applied to questions of forum non conveniens.

The second of the Amchem additions to the forum non conveniens doctrine sets Canadian law apart from its cousins in other common law jurisdictions. Thus, in Canada:

[T]he test for establishing jurisdiction and the test for deciding whether or not to exercise that jurisdiction are the same. . . .

The effect of this similarity of criteria may well explain why some courts in common law provinces examine the forum non conveniens issue without a prior consideration of their jurisdictional competence. In other words they jump directly to the forum non conveniens discussion, even where the defendant is contesting jurisdiction simpliciter.

Considerations applied to motions to dismiss based on forum non conveniens grounds are also taken into account in determining jurisdiction in the first instance (jurisdiction simpliciter).

109. Id. at 940.
110. Id. at 915.
111. See id. at 930-40.
112. Id. at 915.
113. Id. at 921.
114. Id. at 919.
115. Id. at 920.
In 472900 B.C. Ltd. v. Thrifty Canada Ltd., the British Columbia Court of Appeal applied the Amchem test to a request that the trial court decline to accept jurisdiction over a case having ties to both British Columbia and Ontario. Examining the House of Lords decision in Spiliada, the court referred to Lord Sumner’s comments that “it is wiser to avoid use of the word “convenience” and to refer rather, as Lord Dunedin did, to the appropriate forum.” Importantly, however, the court also clearly noted the shift from the traditional standard of the forum non conveniens doctrine to the modern rule, stating that “[t]here is now no burden on the applicant to establish that the action would be vexatious, oppressive and/or an abuse of the process of the court.” The case ultimately was decided on the basis of a non-exclusive Ontario choice of forum clause and the fact that an action had been filed also in Ontario, where the court had first refused a stay. Thus the “great significance which must now be given to the matter of comity between provinces” favored holding that the stay be granted.

The combination of jurisdiction simpliciter and forum non conveniens was dealt with explicitly in Westec Aerospace Inc. v. Raytheon Aircraft Co., a British Columbia case that illustrates both the jurisdiction/forum non conveniens distinction and the application of the Amchem test. Westec (a British Columbia corporation) licensed to Raytheon (a Kansas corporation) the right to use certain computer software. When the license was terminated a dispute arose as to whether all hardware and software was properly returned to Westec. Raytheon first brought an action in Kansas seeking a declaration that it had not breached the agreement. Westec then filed suit in British Columbia claiming breach. The lower British Columbia court first ruled that jurisdiction simpliciter existed because Westec had demonstrated that “either Raytheon or the subject matter of the dispute has a real and substantial connection with” British Columbia, and that there was a “good arguable case that brings the action within the rule relied on for effecting service ex juris.” The real question for the lower court then became “whether this court should exercise its discretion and take jurisdiction given that largely parallel proceedings have been commenced and advanced to the close of pleadings in Kansas.” The trial court then stated the test to be applied:

Where jurisdiction simpliciter exists, a defendant that contends the action should not be entertained bears the onus of demonstrating that the courts of another jurisdiction are sufficiently more appropriate for the resolution of the dispute to displace the forum the plaintiff has selected.... The factors commonly considered are the parties’ residences and places of business, the jurisdiction where the cause of action arose and where the damage was suffered, juridical

118. Id. at 617 (citing Spiliada Mar. Corp. v. Cansulex Ltd., 1 A.C. 460 (H.L. 1987)). “[T]he Latin tag, however inapt to describe the principle, is so widely used that it is sensible to retain it. But it is important to keep in mind that it refers, not to the more convenient forum, but to the appropriate forum.” Id.
119. Id. at 617–18. “Such matters can, of course, still be relied on in aid of the application to stay because, if they can be established, the jurisdiction in which that would occur can hardly be the appropriate one. But the absence of such factors is no longer a basis for refusing the application to stay.” Id. at 618.
121. Id. at 628–29.
123. Id.
124. Id. at 501.
125. Id.
126. Id.
128. Id.
advantages and disadvantages, convenience and expense, the governing law and the difficulty of its proof, and the existence of any parallel proceedings.\cite{129}

Of particular interest was the lower court’s approach to the location of witnesses, which it dealt with by stating that, “the facilities for video conferencing on a world-wide basis that are now available in this court go a long way to rendering the expense and convenience of bringing witnesses to trial a consideration of declining importance in an application of this kind.”\cite{130} The court ultimately relied on the fact that Westec was the natural or “true plaintiff,” and Raytheon “claims only a declaration that it owes nothing.”\cite{131} Thus, Westec was entitled to the benefit of the juridical advantage, and Raytheon’s request for a forum non conveniens stay was dismissed.\cite{132} This is an interesting result in light of the Interim Text of the Hague Convention, discussed in Section IV.B infra, which in Article 21(6) provides that normal lis pendens rules do not apply where the action in the court first seised is in the nature of a request for a negative declaratory judgment.\cite{133}

2. Québec

Québec is a civil law jurisdiction and would consequently be expected not to have adopted the doctrine of forum non conveniens. The adoption of Québec Civil Code Article 3135, however, clearly defies such expectations by providing that “[e]ven though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.”\cite{134} Therefore, unlike the common law development in other Canadian provinces, which blends forum non conveniens and jurisdiction simpliciter in cases requiring service ex juris, the Québec court must first determine that it has jurisdiction before it considers the question of forum non conveniens. Article 3137 of the Québec Civil Code on lis alibi pendens provides further codification of a court’s discretionary power to decline jurisdiction when a parallel action is pending in a foreign court, if the foreign action “can result in a decision which may be recognized in Québec.”\cite{135}

One additional Civil Code provision adds to this evolution in Québec. Article 3148 provides that there is no jurisdiction in a Québec court when a valid choice of court clause refers the case to a foreign court.\cite{136} Thus, a strict reading of Articles 3148 and 3135 together makes a forum non conveniens analysis technically unnecessary when a defendant proves the existence of a choice of court clause directing the case to a foreign forum. The Québec court would not have jurisdiction, so it could not decline to exercise it under Article 3135. The irony is that Article 3148 would not appear (at least technically) to prevent a forum non conveniens analysis when combined with Article 3135 when the plaintiff brings the case in a Québec court based on a choice of court clause directing the case to Québec. The court would then have jurisdiction, and the defendant could assert the right to discretionary declination of that jurisdiction under Article 3135.\cite{137}

\begin{itemize}
\item \cite{129} Id.
\item \cite{130} Id.
\item \cite{131} Id.
\item \cite{132} Id.
\item \cite{133} Interim Text, supra note 3, art. 21(6).
\item \cite{134} Art. 3135 Civ. Code Que. (2001) (Can.).
\item \cite{135} Id. art. 3137.
\item \cite{136} Id. art. 3148.
\item \cite{137} For further discussion of the Quebec Civil Code provisions, see Saumier, supra note 116, at 129–33.
\end{itemize}
D. Australia

In 1988, the High Court of Australia, in Oceanic Sun Line Special Shipping Co. Inc. v. Fay, declined to follow House of Lords formulation of the forum non conveniens doctrine in Spiliada. Thus, in Australia:

A party who has regularly invoked the jurisdiction of a competent court has a prima facie right to insist upon its exercise and to have his claim heard and determined . . . . In this country, [certain] special categories of cases have not traditionally encompassed a general judicial discretion to dismiss or stay proceedings in a case within jurisdiction merely on the ground that the local court is persuaded that some tribunal in another country would be a more appropriate forum.

This approach was further developed by the High Court’s decision in 1990 in Voth v. Manildra Flour Mills Pty. Ltd., in which the court stated:

First, a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise. Secondly, the traditional power to stay proceedings which have been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between the parties in the particular case. Thirdly, the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay. Finally, the jurisdiction to grant a stay or dismiss the action is to be exercised “with great care” or “extreme caution.”

These cases demonstrate that Australian courts have chosen to stay with the traditional theory of forum non conveniens requiring proof of process that is oppressive, vexatious or abusive, rather than the more modern approach in other common law countries that focuses on the concept of the appropriate forum. The Australian court was “not persuaded that there exists any real international consensus favouring a particular solution to the question” of forum non conveniens.

139. Id. at 40–41 (Deane, J.).
141. Id. at 138. While each Australian state has its own rule on forum non conveniens, they seem to produce similar results. In Gutnick v. Dow Jones & Co., No. 7763 of 2000 BC 200104980, at *39 (Sup. Ct. Vict., Common L. Div. Aug. 28, 2001), LEXIS, Victorian Unreported Judgments, the Victoria Supreme Court considered that state’s Rule 7.05(2)(b) that allows a court to decline jurisdiction when “Victoria is not a convenient forum” to be the same as the common law test applied in Voth. Id. para. 90.
III. RELATED DOCTRINES IN CIVIL LAW SYSTEMS

A. Germany

No express provision of German law allows for a forum non conveniens doctrine. Nonetheless, some German courts have declined jurisdiction in cases using reasoning relatively similar to common law forum non conveniens decisions. In 1961, the Bavarian Supreme Court (Oberlandesgericht) declined jurisdiction where a less expensive trial was available in an alternative forum. Similarly, a court in Hamburg required a “sufficient domestic element” as a prerequisite to upholding a choice of court clause selecting that court in a contractual agreement, choosing instead to treat the clause as a mere presumption of the forum’s appropriateness. A Frankfurt court even went so far as to refer explicitly to the forum non conveniens doctrine in declining jurisdiction in a non-contentious matter with perpetuatio fori jurisdiction (a child custody matter).

Article 101(1)(2) of the German Federal Constitution, designed to prevent manipulations in determining the judge in a particular case, guarantees every individual claimant a legal judge. Thus, it has been said that “an integration of the forum non conveniens doctrine would only be permissible if the specific legal judge could be determined with sufficient degree of certainty.” Some have gone so far as to argue that dismissals based on forum non conveniens would violate the right of a person to have recourse to a court of law (Justizgewährungsanspruch), which is derived from the principle that a state is to be governed by the rule of law (Rechtsstaatsprinzip). This is consistent with a rigid view of jurisdiction favored by many in Germany:

The majority view favors legal certainty against the individual flexibility offered by the forum non conveniens doctrine. The majority bases its opinion on the patent rigidity of German procedural law, which acknowledges few and exclusive exceptions. The legislature intends to provide little discretion at the jurisdictional level.

B. Japan

Japan similarly appears to take a rather rigid civil law approach to jurisdictional issues. Still, a 1986 case applied the doctrine of “special circumstances” to reach a result very similar to that found in common law forum non conveniens cases. In Sei Mukoda, the family of a victim of a Taiwanese airline accident in Taiwan sued two U.S. companies (Boeing and United Airlines). The Tokyo District Court held that “if a venue for local
territorial competence provided in the Code of Civil Procedure (CCP) is located in Japan, it would accord with the principle of justice and reason to sustain the jurisdiction of the Japanese court, unless we find some special circumstances.”

It went on to state, that “[s]uch special circumstances exist where, in light of the concrete facts of the case concerned, sustaining the Japanese court’s jurisdiction would result in contradicting the ideas of promoting impartiality between the parties and fair and prompt administration of justice.” Finding that it would be difficult to secure a fair trial in Japan, since crucial evidence in Taiwan would not be available due to a lack of diplomatic relations, the court focused on four factors to determine the fairness of continuing the proceedings in Japan:

1) whether Taiwanese courts should dismiss on account of lack of international jurisdiction,

2) whether the plaintiffs had enough money to bring an action in Taiwan,

3) whether a Taiwanese court should not dismiss the claim on account of prescription, and

4) whether the plaintiffs could enforce the judgment they might obtain in Taiwan.

The court ultimately dismissed the case on the grounds that special circumstances made the assertion of jurisdiction by a Japanese court unreasonable.

Two important differences exist between the Japanese doctrine of “special circumstances” and the common law (especially the U.S.) doctrine of forum non conveniens. First, only private factors are considered in the application of the Japanese doctrine of “special circumstances.” These private factors include the “relative ease of access to source of proof, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance thereof, the enforceability of a judgment, and other relative advantages and obstacles to a fair, proper and prompt trial.” Second, Japanese courts cannot stay a case or dismiss with conditions: “[T]here are only two choices for Japanese courts, either to sustain jurisdiction or to dismiss the case completely.”

C. The Brussels Convention and Regulation

Current continental European civil law practice is perhaps best demonstrated by the provisions of the European Convention on Jurisdiction and Enforcement of Judgments in

151. Id. at 217.
152. Id.
153. Id. at 218.
154. Id. at 218–19.
155. Id. at 219.
156. Id.
157. Id. For a more complete discussion of this case, see Masato Dogauchi, A View From the Far East: The Hague Draft Convention from the Perspective of Japan, Paper Delivered at a Seminar Sponsored by the Union Internationale des Avocats (April 20–21, 2001) (on file with author). A revised version of this paper is scheduled for publication in 45 JAPANESE ANN. INT’L L. (forthcoming 2002).
158. Dogauchi, supra note 157, § II(b)(5).
159. Id.
160. Id. One further distinction may be considered to create a third difference. The “special circumstances” doctrine can be applied to sustain jurisdiction as well as to deny it. Id. (citing X (Husband) v. Y (Wife), 50 MINSHO 1451 (Sup. Ct., June 24, 1996), reprinted in 40 JAPANESE ANN. INT’L L. 132 (1997) (sustaining jurisdiction in a divorce case in accordance with principles of justice, where the case could not be refiled in Germany)).
Civil and Commercial Matters, better known as the Brussels Convention. First created in 1968 by the six original Member States of the European Economic Community (EEC), the Brussels Convention became effective in all Member States as enlargement occurred. While the numbering of articles has changed, the new Brussels Regulation contains rules, for the most part, identical to the Brussels Convention it replaces.

The Brussels Regulation provides a comprehensive approach to jurisdiction and the recognition and enforcement of judgments. In doing so, it makes no provision for the doctrine of *forum non conveniens*, thereby operating to prohibit the application of the doctrine within the European Union system. Instead, the Brussels Regulation combines the creation of jurisdiction through contractual choice of court clauses in Article 23 with a strict rule of *lis pendens* in Article 27. This *lis pendens* rule reads as follows:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.


162. See Brussels Convention, *supra* note 161, at (C 27) 1.

163. *But see In re Harrods (Buenos Aires) Ltd.*, 1992 Ch. 72 (Eng. C.A.), in which the English Court of Appeal stayed proceedings, holding that the case had “the most real and substantial connection” with an Argentine court and that leave to grant service outside the United Kingdom under Order 11, Rule 1(2)(b), was not appropriate. Id. at 73–74. Thus, the court determined that when the alternative forum is not a Brussels Convention Contracting State, the English courts can use the traditional English doctrine of *forum non conveniens* to stay the English proceedings, despite jurisdiction based on the defendant’s place of domicile under Article 2 of the Brussels Convention. Id. at 73.

164. Brussels Regulation, *supra* note 161, art. 23:

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

   (a) in writing or evidenced in writing; or
   (b) in a form which accords with practices which the parties have established between themselves; or
   (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

165. *Id.* art. 27.

166. *Id.*
With this rule, the Brussels system creates a strict race to the courthouse. The first court seised captures jurisdiction, and an action filed in the court of a second Member State must be stayed, and ultimately dismissed, in favor of the first action.¹⁶⁷

IV. THE HAGUE CONVENTION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

A. The History of the Negotiations

In May of 1992, Edwin Williamson, then Legal Adviser at the U.S. Department of State, wrote the Secretary General of the Hague Conference on Private International Law proposing that the Conference take up the negotiation of a multilateral convention on the recognition and enforcement of judgments.¹⁶⁸ The Seventeenth Session of the Hague Conference, in May of 1993, decided to study the matter further through a Special Commission Session.¹⁶⁹

The United States, prior to the meeting of the Special Commission established pursuant to this decision, submitted a report proposing a “mixed” convention.¹⁷⁰ As part of

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¹⁶⁷. Brussels Regulation, supra note 161. Provisions affecting this process include the following:

Article 28
1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29
Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30
For the purposes of this Section, a court shall be deemed to be seised:
1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or
2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.


¹⁷⁰. Arthur T. von Mehren, Recognition Convention Study: Final Report (on file with author). Single (sometimes referred to as “simple”) conventions, deal only with indirect jurisdiction and apply only to the decision of the court asked to enforce a foreign judgment—thus, jurisdiction of the court issuing a judgment is considered “indirectly” by the second court in deciding whether to recognize the judgment of the issuing court. Double conventions, like Brussels and Lugano, not only deal with recognition, but also provide direct jurisdiction rules applicable in the court in which the case is first brought—thus addressing the matter from the outset and generally preempting the need for indirect consideration of the issuing court’s jurisdiction by the court asked to recognize the resulting judgment. The mixed convention is a variation on the double convention, providing rules for both jurisdiction and recognition of judgments, but not purporting to be exhaustive in its lists of allowed and prohibited bases of jurisdiction. Thus, it does not “cover the entire field,” and leaves some bases of jurisdiction available,
the Final Act of its Eighteenth Session, held in October of 1996, the Hague Conference decided to include the question of a convention on jurisdiction and the recognition of judgments on the Agenda of its nineteenth session.\textsuperscript{171} Under the mixed convention approach, there would exist a list of required bases of jurisdiction and a list of prohibited bases of jurisdiction.\textsuperscript{172} Judgments founded on required bases of jurisdiction would be entitled to recognition under the convention.\textsuperscript{173} Since courts should not take jurisdiction on bases on the prohibited list, only limited exceptions to recognition would apply.\textsuperscript{174} Any jurisdictional basis not included on one of the two lists would be permitted, but a resulting judgment would not be entitled to recognition under the convention.\textsuperscript{175} Instead, such judgments would be subject to review in the recognizing court in the manner applicable absent a treaty.\textsuperscript{176} The 1992 Hague Working Group recommended the negotiation of a mixed convention.\textsuperscript{177}

The formal negotiations began with a two week meeting of the Special Commission on international jurisdiction and the effects of foreign judgments in civil and commercial matters in June of 1997.\textsuperscript{178} The next session of the Special Commission was held in March of 1998,\textsuperscript{179} but it was not until a meeting in November of 1998 that the first document containing draft language for some convention provisions was issued by the Drafting Committee.\textsuperscript{180} That document included the first draft of provisions, including the text that became Articles 21 (on \textit{lis pendens}) and 22 declining jurisdiction (on \textit{forum non conveniens}) in the 2001 Interim Text.\textsuperscript{181} The draft document was considered further during two weeks in June and one week in October of 1999, at which a Preliminary Draft Convention text was produced.\textsuperscript{182} A Diplomatic Conference originally was contemplated for fall 2000.\textsuperscript{183} After a letter from Jeffrey Kovar, Assistant Legal Adviser for Private International Law at the U.S. State Department, indicated substantial problems with the


\textsuperscript{172} von Mehren, supra note 170, at 28–29.

\textsuperscript{173} See id.

\textsuperscript{174} See id. at 29–30.

\textsuperscript{175} See id. at 29.

\textsuperscript{176} See id. at 30.

\textsuperscript{177} Conclusions of the Working Group Meeting on Enforcement of Judgments, Hague Conference on Private Int'l. Law, Doc. L.c. ON No. 2 (93) (on file with author).


\textsuperscript{181} Id.


PDC text, however, it was decided to delay the Diplomatic Conference, and to adjust the procedural rules under which the draft text would be considered. Thus, the Diplomatic Conference was split into parts, with the first part held in June 2001 (at which a consensus, rather than a majoritarian, process applied). This resulted in the Interim Text, full of alternatives, variations, and bracketed language, indicating failure to agree on many specific matters, but including the early compromise on lis pendens and forum non conveniens.

B. The Interim Text and Forum Non Conveniens

While the comparative discussion set forth above would suggest a rather dramatic difference between the common law forum non conveniens and civil law lis alibi pendens approaches, this was in fact one of the areas of early compromise in the Hague Conference negotiations. This compromise combined elements of the lis pendens approach in Article 21 of the Interim Text with the inclusion of a modified forum non conveniens provision in Article 22.188 These articles are set forth in full in the Appendix to this paper, along with portions of Articles 4 (choice of court) and 27 (verification of jurisdiction) which have importance to the compromise found in Articles 21 and 22.189

Article 21 begins with a basic lis pendens rule providing that:

When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction under [the required jurisdiction rules of the Convention] ... and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under [the Convention] ... 190

Thus, the Brussels approach is the first element of the compromise. This is tempered, however, by several additional aspects of Article 21. The third and sixth paragraphs of Article 21 prevent the “Italian torpedo” strategy by which a party may take advantage of a strict lis pendens rule by rushing to file a negative declaratory judgment action against the natural plaintiff in a court in which proceedings will take so long as to frustrate the natural process of litigation. The third paragraph, therefore, allows a court second seised to go ahead with the case if “the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.”191 The sixth paragraph goes on to provide that where the action in the court first seised is for a negative declaratory judgment, the normal lis pendens rules do not apply, and “the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of

185. Brand, supra note 183, at 586.
186. Id.
187. See generally Interim Text, supra note 3.
188. Id. arts. 21, 22.
189. Id. arts. 4, 21, 22, 27; see Appendix, infra.
190. Id. art. 21(1).
191. Interim Text, supra note 3, art. 21(3).
being recognised under the convention.” 192 Finally, the seventh paragraph ties Article 21 to Article 22 by providing that the *lis pendens* rules shall not apply if the court first seised determines, under Article 22, that it should decline jurisdiction in favor of another court. 193

Article 22 then incorporates a variation of the doctrine of *forum non conveniens*, providing that the court first seised, if it does not have exclusive jurisdiction under the convention rules, may “[i]n exceptional circumstances... on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another state has jurisdiction and is clearly more appropriate to resolve the dispute.” 194 Thus, the *forum non conveniens* rule of Article 22 brings in four specific requirements:

1) The court must not have exclusive jurisdiction under the convention;
2) The case must involve “exceptional circumstances”;
3) The court seised must be a “clearly inappropriate” forum; and
4) Another state with jurisdiction must provide a “clearly more appropriate” forum. 195

This constitutes an adoption of the “appropriate forum” test found in Scotland, England, and Canada, but apparently sets the threshold higher than do the cases in those countries. The text also provides four non-exclusive factors to be weighed in determining what is an appropriate forum:

a) any inconvenience to the parties in view of their habitual residence;
b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
c) applicable limitation or prescription periods;
d) the possibility of obtaining recognition and enforcement of any decision on the merits. 196

While the list includes what would commonly be considered private interest factors, it does not explicitly exclude consideration of public interest factors. Thus, it takes no position on the differences that exist in this regard in major common law jurisdictions.

Article 22(3) attempts to prevent a protectionist approach to the application of the convention rule on *forum non conveniens* by stating that “[i]n deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.” 197

Thus, a court should not be able to openly give greater deference to the forum choice of a citizen plaintiff over that of a foreign plaintiff. It is not clear, however, whether this prevents the type of balancing of conveniences applied in cases like *Irragorri v. United Technologies Corp.*, in which the Second Circuit Court of Appeals ruled that favoring a

192. *Id.* art. 21(6).
193. *See id.* art. 21(7).
194. *Id.* art. 22(1).
195. *See id.*
196. *Id.* art. 22(2).
197. *Id.* art. 22(3).
domestic plaintiff’s choice of forum is a natural result of balancing of conveniences, and
not necessarily the application of discrimination against foreign plaintiffs.198

Unlike the U.S. doctrine, Article 22 makes no specific provision for placing conditions
on the grant of a stay or dismissal based on forum non conveniens. It does, however,
provide that a court may “order the defendant to provide security sufficient to satisfy any
decision of the other court on the merits,” and it requires such an order where jurisdiction in
the “other court” is not a required basis under the Convention, unless the defendant
establishes that the resulting judgment in the other court would clearly be enforceable in an
appropriate jurisdiction.199

Two other provisions affect the compromise found in Articles 21 and 22. Article 4
provides that a valid choice of court clause creates exclusive jurisdiction in the court of the
contracting state chosen by the parties.200 Thus, there is no possibility that the Article 22
forum non conveniens concept can be used to send the case to an alternative forum if the
forum seised is the one chosen by the parties. While the Convention may preempt this rule
for consumer contracts,201 at least for business-to-business commercial contracts, a choice of
court clause would both create jurisdiction and prevent a forum non conveniens claim from
allowing divergence from the chosen forum. Finally, Article 27(3) provides, that “[r]ecognition or enforcement of a judgment may not be refused on the ground that the court
addressed considers that the court of origin should have declined jurisdiction in accordance
with Article 22.”202 Thus, a court asked to recognize a judgment from a court in another
contracting state may not deny recognition or enforcement because it believes the court of
origin should have exercised its right under Article 22 to decline to exercise its jurisdiction:

V. CONCLUSION

An ideal international litigation system should provide results that are predictable
enough to allow parties to plan their relationships and to project likely outcomes when
disputes arise. At the same time, an ideal system should resolve disputes in a manner that is
fair and equitable for all those involved. Traditional civil law concepts of lis alibi pendens
are based on a demand for certainty, but can result in an unhelpful heightening of tensions
between disputants by encouraging a race to the courthouse and allowing a case to proceed
in a forum that is not the natural forum for the dispute. The common law development of
the doctrine of forum non conveniens, on the other hand, seeks litigation in the proper
forum, but at the risk of extra litigation over which forum is the most appropriate. Both
systems are aimed at legitimate goals, but neither provides a perfect combination of
predictability, efficiency, and equity in all cases.

The above survey of approaches taken by the courts of various common law countries
in applying the doctrine of forum non conveniens demonstrates that while variations exist in
the way the doctrine is applied, there are nonetheless common foundations and general

198. Irragorri v. United Techs. Corp., 274 F.3d 65, 73 (2d Cir. 2001) (en banc) (“It is not a correct
understanding of the rule to accord deference only when the suit is brought in the plaintiff’s home district. Rather,
the court must consider a plaintiff’s likely motivations in light of all the relevant indications. We thus understand
the Supreme Court’s teachings on the deference due to plaintiff’s forum choice as instructing that we give greater
deference to a plaintiff’s forum choice to the extent that it was motivated by legitimate reasons, including the
plaintiff’s convenience and the ability of a U.S. resident plaintiff to obtain jurisdiction over the defendant, and
diminishing deference to a plaintiff’s forum choice to the extent that it was motivated by tactical advantage.”).
199. Interim Text, supra note 3, art. 22(4).
200. Id. art. 4.
201. Id. art. 7.
202. Id. art. 27(3).
agreement on the need to prevent injustice by seeking the most appropriate forum in which to resolve a transnational dispute. While Australian cases demonstrate a tendency to stay with the traditional high threshold that requires a defendant to prove vexatious and oppressive impact in order to obtain release from the plaintiff’s forum, Scotland, England, Canada, and the United States all have moved from this high threshold to a focus on the appropriate forum. Despite the continued use of the Latin term, in no country does the test focus simply on convenience for the parties or for the court. Rather, the focus most often is on a balancing of private interest factors, with the United States appearing to be alone in its inclusion of public interest factors in the equation by which the most appropriate forum is determined.

The common elements of forum non conveniens doctrine throughout the common law world have been incorporated into the rules found in Article 22 of the Interim Text of a Hague Convention on jurisdiction and foreign judgments in civil and commercial matters. At the same time, this provision is balanced against the lis pendens rules found in Article 21. This combination integrates elements of predictability found in the civil law lis pendens approach with the search for equitable results that underlies the common law forum non conveniens doctrine. That this compromise was reached early in the history of Hague negotiations indicates both the search for common ground and the willingness to reach out to unfamiliar systems in an effort to achieve global benefits. Whether such success can be achieved in the jurisdictional provisions of the same convention remains to be seen. Regardless of the ultimate success or failure of a final convention, Articles 21 and 22 of the Interim Text provide a constructive focus for comparative analysis and set the stage for progress in the world of parallel litigation.
VI. APPENDIX: PROVISIONS OF THE INTERIM TEXT OF THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS*

Article 4 Choice of court

1. If the parties have agreed that [a court or] [the] courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, [that court or those] courts of that Contracting State shall have jurisdiction, provided the court has subject matter jurisdiction and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates [a court or] courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the courts chosen have themselves declined jurisdiction. [Whether such an agreement is invalid for lack of consent (for example, due to fraud or duress) or incapacity shall depend on national law including its rules of private international law.]

Article 21 Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction under Articles [or under a rule of national law which is consistent with these and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12.]

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.

* The appendix contains those portions of Interim Text of the Hague Convention relevant to the article. All footnotes herein retain their original numbering; selected footnotes have been omitted and have been designated using the "*" symbol.

203. It has been proposed to delete the reference in paragraph 1 to "a court" and refer to "the courts" of the chosen country, to meet the concern that paragraph 1 could allow a court to interpret a choice of forum clause in a contract as conferring jurisdiction on a specific court that it would not otherwise be authorised to exercise under national law. There was a general agreement that a choice of forum clause could only confer jurisdiction over the person of the defendant and not in respect of subject matter outside the competence of the chosen court: see the comments of the Co-reporters in Preliminary Document No. 11, at p. 44. However, doubts were expressed whether this proposal was either necessary or appropriate.

204. It was agreed to add the words within brackets in order to make it clear that the lis pendens rule only applies when the court first seised exercises jurisdiction under the Convention: see the Report of the co-reporters, Preliminary Document 11, at p. 86.

205. This proposal sought to make it clear that the lis pendens rule will not only apply where the court first seised is exercising "white list" jurisdiction as such, but also in the case where that court exercises a jurisdiction under national law in a situation that is consistent with "white list" jurisdiction, such as proceedings against a defendant who is habitually resident in that State: see Report of Co-reporters, Preliminary Document 11, at p. 86. There was no consensus on this point.

206. There was no consensus on the insertion of a reference to Article 11 (trusts).
3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised –

   a) when the document instituting the proceedings or an equivalent document is lodged with the court; or

   b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

[As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised –

   a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised; and

   b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

Article 22 Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular –

   a) any inconvenience to the parties in view of their habitual residence;

   b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;

   c) applicable limitation or prescription periods;

   d) the possibility of obtaining recognition and enforcement of any decision on the merits.
3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, or if it is in a non-Contracting State,207 unless the defendant establishes that [the plaintiff's ability to enforce the judgment will not be materially prejudiced if such an order is not made]208 and [sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced].209

5. When the court has suspended its proceedings under paragraph 1,

a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court; or

b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

6. This Article shall not apply where the court has jurisdiction only under Article 17 [which is not consistent with Articles [white list]].210 In such a case, national law shall govern the question of declining jurisdiction.211

[7. The court seised and having jurisdiction under Articles 3 to 15 shall not apply the doctrine of forum non conveniens or any similar rule for declining jurisdiction.]212

Article 27 Verification of jurisdiction

3. Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.

207. It was agreed to insert the words "or if it is in a non-Contracting State" in order to fill a gap in the provision, see the Report of the co-reporters, Preliminary Document 11, at pp. 92–93.

208. The words in the preceding brackets were proposed in substitution of the existing text which were thought to set too high a standard for the defendant to be able to meet on the one hand and still not give the plaintiff the security needed on the other: see the Report of the co-reporters, Preliminary Document 11, at p. 93. There was no consensus on this point.

209. This is the text of the preliminary draft Convention of October 1999.

210. This proposal sought to ensure that the preservation of national rules of forum non conveniens will not apply both where the court seised is exercising "white list" jurisdiction as such, and also in the case where that court exercises a jurisdiction under national law in a situation that is consistent with "white list" jurisdiction, such as proceedings against a defendant who is habitually resident in that State. There was no consensus on this point.

211. This paragraph makes it clear that Article 22 does not apply where the court is only exercising jurisdiction under national law. In that case, the court can apply its own rules of forum non conveniens or similar (if any). This resolves the question raised by the co-reporters in Preliminary Document 11, at p. 89. It was agreed to insert this paragraph.

212. This paragraph was proposed to ensure that national rules of forum non conveniens or similar rules would not be used in relation to "white list" jurisdiction as a means of declining jurisdiction. There was no consensus on this point.