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ARTICLE

LIS PENDENS AND FORUM NON CONVENIENS AT THE HAGUE CONFERENCE

*Martine Stückelberg**

I. INTRODUCTION

Peter and Julia are both living in Germany. They buy a package tour of Arizona in a travel agency in Berlin. The travel is organized by a German tour operator and only German tourists are part of the group. While in Phoenix, Julia negligently closes the door of the bus on Peter's hand. Peter suffers from two broken fingers. Can Peter sue Julia in Phoenix District Court?

Civil law and common law countries have a totally different approach to the problem. In most civil law countries, the court will look at the statute. If it provides that the place of the wrongful act is a basis for jurisdiction, the court *must* proceed to consider the case. In most common law countries, on the other hand, the court will have a discretionary power not to exercise its competence. It will look at all the connecting factors, such as the place of residence of the parties and the witnesses, to decide whether it should assert jurisdiction. In a case like this, where both parties and all the witnesses are domiciled in Germany, the court probably will dismiss the case. The discretion not to exercise jurisdiction if the court considers that it is an inappropriate forum, or that another tribunal would be in a better position to hear the case, is called the *forum non conveniens* doctrine. It brings flexibility to the conflict of jurisdiction analysis but conflicts with the civil law idea that jurisdictional issues must be certain and predictable.

The Hague Conference on Private International Law¹ is

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1. The Hague Conference on Private International Law [hereinafter Hague

now trying to draft an international convention on jurisdiction and enforcement of foreign judgments in civil and commercial matters. A preliminary draft convention was adopted by the Special Commission on October 30, 1999.² One of the controversial issues between common law and civil law countries is precisely this issue of *forum non conveniens*. Both legal cultures have good reasons for and against the introduction of such a discretionary power to dismiss in the new convention. On the one hand, a *forum non conveniens* clause would allow a court which has a closer link with the case to make the decision.³ If the evidence, witnesses, and sometimes even the parties are located abroad, a transfer of the case to a more appropriate forum would in many cases decrease the cost and the duration of the proceedings. Furthermore, it might be a good way to fight against forum shopping and to induce the plaintiff to choose a forum which is more appropriate for the adjudication of the case. On the other hand, *forum non conveniens* litigation can be costly and time consuming for both the parties and the court. This would be especially true in many civil law countries where contingency fee agreements are prohibited. Therefore, the plaintiff will have to pay the costs of this preliminary procedure even if, at the end, he has to file a completely new procedure abroad. Another frequent criticism of the doctrine is its lack of predictability due to the discretion left to the courts.

Linked with the question of *forum non conveniens* is the question of *lis pendens*. This is a rule applied in many civil law countries, giving the court first seised of a case a priority for

Conference] is an intergovernmental organization created in 1893 with the purpose, according to Article 1 of its statute, "to work for the progressive unification of the rules of private international law." Forty-six States are now members of the conference. The Hague Conference constitutes a forum for the drafting of multilateral treaties. Those treaties are first discussed in Special Commissions, whose members are governmental delegates, and then adopted at a Plenary Session of the Conference which takes place every four years. See K. Lipstein, *One Hundred Years of Hague Conferences on Private International Law*, 42 INT'L & COMP. L.Q. 553, 557 (1993).

2. The Preliminary Draft Convention on Jurisdiction and Foreign Judgments in civil and commercial matters is available on the Web site of the Hague Conference, at <http://www.hcch.net/e/conventions/draft36e.html> (last visited Oct. 23, 2000) [hereinafter Preliminary Draft].

3. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). See also *New Hampshire Ins. Co. v. Strabag Ban AG*, [1992] I.L.Pr. 478.

deciding that case.⁴ Its primary goal is to avoid parallel proceedings in different courts.⁵ As both *forum non conveniens* and *lis pendens* deal with declining jurisdiction in certain circumstances, they had to be negotiated together in The Hague.

Through a comparative approach, this article suggests that carefully drafted *forum non conveniens* and *lis pendens* clauses could serve the need for both flexibility and predictability of the future convention on jurisdiction and foreign judgments. A limited *forum non conveniens* clause, requiring a court to establish that the forum is clearly inappropriate for the trial of the dispute before ordering a stay of the proceedings, should limit the doctrine to exceptional cases and, therefore, protect the predictability of the application of the convention, but at the same time allow for some flexibility needed in a worldwide convention.

Part II of this article provides background information about conventions on jurisdiction and enforcement of foreign judgments. Parts III and IV discuss the doctrines of *lis pendens* and *forum non conveniens* and their introduction in some international conventions. This leads, in Part V of this article, to a discussion of the declining jurisdiction clauses contained in the preliminary draft. The article concludes that—while the *forum non conveniens* doctrine need not be adopted by civil law countries—there is a need for the introduction of a declining jurisdiction clause in an international convention, such as the Hague Convention.

II. WHY A NEW CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS?

Enforcing judgments is a very critical issue in international civil litigation. Whereas the recognition and enforcement of foreign arbitral awards have been secured for more than 50 years through the New York Convention,⁶ which is now in

4. See, e.g., Swiss Private International Law Act, 29 I.L.M. 1244, art. 9 (1990); *Société A v. S.*, ATF 118 II 1888, Swiss Federal Supreme Court (1992) (in French), available at <http://www.bger.ch> (last visited Feb. 8, 2001).

5. See, e.g., *infra* Parts IIA, B, and C; *Gesellschaft v. Gesellschaft D.*, ATF 123 II 414, Swiss Federal Supreme Court (1997) (in German), available at <http://www.bger.ch> (last visited Feb. 8, 2001).

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

force in more than a hundred States, the enforcement of foreign court judgments has been much more problematic. In 1971, the Hague Conference adopted the first international convention on enforcement of foreign judgments.⁷ Unfortunately, this convention has proven unsuccessful, with only three ratifications.⁸ One important reason underlying this lack of success is the reluctance of most countries to agree on an automatic recognition rule requiring them to give up their right to review the decision of an unknown foreign judge before enforcing it. Regional conventions on the subject have been much more successful. In Europe, the Brussels⁹ and Lugano¹⁰ conventions, ratified by most European countries,¹¹ provide for the automatic recognition and enforcement of any judgment in commercial and civil matters rendered in a contracting State. In South and Central America, nine countries have ratified the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards.¹² Another path followed by the Hague Conference for ensuring the enforcement of foreign judgments is the adoption of conventions limited to one subject, especially in family law.¹³ In the given subject,

7. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 15 AM. J. COMP. L. 362 (1967) [hereinafter 1971 Hague Judgments Convention].

8. Cyprus, the Netherlands and Portugal. Furthermore, those countries never entered into the supplementary bilateral agreements required by the Convention to give effect to its recognition and enforcement mechanisms. *See id.* at art. 21.

9. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, amended in 1978, 1982, and 1989, 1990 O.J. (C 189) 1 [hereinafter Brussels Convention].

10. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9 [hereinafter Lugano Convention]. Its text is almost identical to that of the Brussels Convention.

11. The Brussels Convention is in force among all fifteen members of the European Union. The Lugano Convention has been ratified by Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Iceland, Italy, Luxemburg, Norway, the Netherlands, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. *See* Brussels Convention, *supra* note 9.

12. The Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, 18 I.L.M. 1224 (entered into force June 14, 1980), is enforced in Argentina, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela. Its complement on rules of indirect jurisdiction, the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, May 24, 1984, 24 I.L.M. 468, only has been ratified by Mexico.

13. *See, e.g.*, Hague Convention on the Recognition of Divorces and Legal Separations, June 1, 1970, 16 AM. J. COMP. L. 580 (1968) [hereinafter Convention

for example, maintenance obligations or children's adoptions, foreign decisions will be enforced by the contracting States.¹⁴

Today, the United States is not a party to any convention on the recognition and enforcement of foreign judgments. There were many discussions about a bilateral convention with the United Kingdom in the 1970s, but no agreement could be reached.¹⁵ Probably as a consequence of this situation, in May 1992, the United States suggested to the Hague Conference that the subject of recognition and enforcement of foreign judgments be placed again on the Conference agenda.¹⁶

In June 1992, the Hague Conference established a Working Group to report to the Plenary Session on whether to proceed with negotiations for a new convention on recognition and enforcement of foreign judgments.¹⁷ The Working Group found that one of the weaknesses of the 1971 Hague Judgments Convention is the fact that it is a simple convention, governing only the question of enforcement of foreign judgments, without any agreement on jurisdiction.¹⁸ The experts suggested that a new convention should be negotiated, but in the form of a double convention, containing both grounds for jurisdiction and rules on the enforcement of foreign judgments.¹⁹ Therefore,

on Divorces]; Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations, Oct. 2, 1973, 21 AM. J. COMP. L. 154 (1973) [hereinafter Convention on Maintenance Obligations]; Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Convention on Intercountry Adoption]; Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391, 1396 (not yet in force) [hereinafter Children Convention].

14. See Convention on Maintenance Obligations, *supra* note 13; Convention on Intercountry Adoption, *supra* note 13.

15. See generally Peter North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219 (1979) (one of the causes of the failure to reach an agreement is the refusal by the United Kingdom to grant an automatic recognition of the high punitive damages awarded by American juries).

16. See *Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments*, Prel. Doc. No. 17, May 1992, in 1 PROCEEDINGS OF THE SEVENTEENTH SESSION, HAGUE CONFERENCE OF PRIVATE INTERNATIONAL LAW 231 (1995).

17. See Matthew H. Adler, *If We Build It, Will They Come? – The Need for a Multilateral Convention on the Recognition of Civil Monetary Judgements*, 26 LAW & POLY INT'L BUS. 107 (1994).

18. *Conclusions of the Working Group Meeting on Enforcement of Judgments*, Prel. Doc. No. 19, Nov. 1992, in 1 PROCEEDINGS OF THE SEVENTEENTH SESSION, HAGUE CONFERENCE OF PRIVATE INTERNATIONAL LAW 257 (1995).

19. See *id.* See also Catherine Kessedjian, *International Jurisdiction and For-*

the question of jurisdiction, and with it the question of the introduction of a *forum non conveniens* clause, needed to be addressed.

A Special Commission on the question of jurisdiction, recognition, and enforcement of foreign judgments was set up after the eighteenth Plenary Session of the Conference. The Commission's purpose was to prepare a draft convention on jurisdiction and foreign judgments. The Commission met several times between 1997 and 1999. The question of the adoption of a *forum non conveniens* and/or a *lis pendens* clause was one of the issues where a consensus was difficult to reach.²⁰ During its last session, in October 1999, the Commission finally adopted a preliminary draft convention.²¹ It contains both a *lis pendens* clause (article 21)²² and an article entitled "exceptional circumstances for declining jurisdiction" (article 22),²³ which is, in fact, a *forum non conveniens* clause. Both articles will be discussed in Part V of this paper.²⁴ However, before going to this analysis, a presentation of the doctrines of *lis pendens* and *forum non conveniens* will follow.

III. DECLINING JURISDICTION: *FORUM NON CONVENIENS* AND *LIS PENDENS*

A. Forum Non Conveniens: A Comparative Approach

Forum non conveniens is a common law doctrine giving to the courts a discretionary power to refuse to exercise jurisdic-

ign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law, Prel. Doc. No. 7, Apr. 1997, at <http://www.hcch.net/e/workprog/jdgm.html>. For a more detailed discussion of the differences between simple, mixed and double conventions, see Arthur T. Von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOK. J. INT'L L. 24 (1998).

20. Several different proposals for *forum non conveniens* or declining jurisdiction clauses have been made mainly by common law countries, while most civil law countries expressed their opposition to a discretionary power to dismiss.

21. The text of the preliminary draft convention is available online. See Preliminary Draft, *supra* note 2. The diplomatic conference which will draw up the final text of the Convention will be divided into two sessions: the first to be held in June 2001, and the second at the end of 2001, or the beginning of 2002.

22. See Preliminary Draft, *supra* note 2, at Annex A.

23. See *id.* at Annex B.

24. See discussion *infra* Part V.

tion in certain circumstances.²⁵ Courts will look at several factors to decide whether it is appropriate to exercise jurisdiction in a specific case. Private interest factors include, for instance, the domicile or place of incorporation of the parties, the ease of access to evidence, the links between the dispute and the forum and the applicable law.²⁶ Public interest factors, which are taken into account mainly in the United States, include the workload of the courts and the burden of jury duty.²⁷

Forum non conveniens is not a uniform doctrine. Each common law country has its own conditions on a *forum non conveniens* dismissal. The origin of the doctrine is to be found principally in Scotland in the eighteenth century.²⁸ Until the middle of the twentieth century, the exception was very limited and a dismissal only could be ordered if the forum was "oppressive or vexatious" to the defendant.²⁹ During the second half of this century, the *forum non conveniens* doctrine developed widely in the various common law countries. Some form of *forum non conveniens* now has been adopted by most, if not all, common law countries, often referring to British precedents on the question.³⁰

The leading British case is *Spiliada Maritime Corp. v. Cansulex Ltd.*,³¹ in which the House of Lords established a two-step analysis. First, the defendant must show the availability of another clearly more appropriate forum, *i.e.*, one "in which the case could be tried more suitably for the inter-

25. See GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 289-366 (3d ed. 1996).

26. See *Piper Aircraft Co.*, 454 U.S. at 241.

27. See *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947) (for the United States' doctrine).

28. See BORN, *supra* note 25, at 289; Paul R. Beaumont, *A United Kingdom Perspective on the Proposed Hague Judgments Convention*, 24 *BROOK. J. INT'L L.* 75, 76 (1998); Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of forum non conveniens in the United States, the United Kingdom, and Germany*, 16 *LOY. L.A. INT'L & COMP. L. REV.* 455, 459 (1994).

29. See, e.g., *Atlantic Star v. Bona Spes*, [1974] 1 App. Cas. 436.

30. For a presentation of the declining jurisdiction rules of eighteen different countries, see JAMES J. FAWCETT, *DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW, REPORTS TO THE XIVTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, ATHENS, AUGUST 1994* (1995).

31. [1987] 1 App. Cas. 460 (appeal taken from Eng.) (suit by a Liberian corporation for damages on its ship caused by the cargo of the Canadian defendants, similar action against the same defendants already pending in England).

ests of all the parties and for the ends of justice."³² Second, if the defendant has made a prima facie case for a *forum non conveniens* dismissal, the plaintiff can show that there are circumstances by reason of which justice requires that the British court exercise its jurisdiction.³³ This is a much broader test than the initial "oppressive or vexatious" test³⁴ and requires that all factors relevant to the interests of the parties and to the ends of justice are taken into consideration.

The U.S. Supreme Court has not adopted this two-step analysis, but instead proceeds to a weighing of private and public interest factors in order to decide whether an alternative forum would be substantially more convenient or appropriate.³⁵ The principle is that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."³⁶ Nevertheless, in *Piper Aircraft Co. v. Reyno*,³⁷ the Supreme Court explained that a plaintiff's choice of his home forum deserves deference because it is reasonable to assume that this forum is convenient. As a foreign plaintiff, by definition, does not sue in his home forum, his choice of forum deserves less deference.³⁸ This is considered discriminatory by many foreign countries and will be discussed further with the analysis of the *forum non conveniens* clause of the preliminary draft convention.³⁹

32. See Paul Beaumont, *Great Britain Report to the XIVth Congress of the International Academy of Comparative Law*, in FAWCETT, *supra* note 30, at 207; Richard G. Fentiman, *Jurisdiction, Discretion and the Brussels Convention*, 26 CORNELL INT'L L.J. 59 (1993).

33. See Beaumont, *supra* note 32.

34. See *Atlantic Star*, 1 App. Cas. at 436.

35. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). See also BORN, *supra* note 25, at 289-366; Louis F. Del Duca & Georges A. Zaphiriou, *United States of America Report to the XIVth Congress of the International Academy of Comparative Law*, in FAWCETT, *supra* note 30, at 401.

36. *Gulf Oil*, 330 U.S. at 508.

37. 454 U.S. 235 (motion to dismiss granted in a suit by the estates of several Scottish citizens killed in an air crash accident in Scotland against the U.S. manufacturers of the aircraft and the propellers).

38. *Id.* at 256. In *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842, 845 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987), the district court applied this principle, holding that the Indian plaintiffs' choice of a United States forum should not be given the deference which would be given to the choice of a United States plaintiff. Therefore, the court dismissed the action, though the defendant was a New York corporation sued in its home forum.

39. See *infra* Part IV.

The Australian doctrine of *forum non conveniens* is interesting because it is more restrictive than the U.S. and British doctrines and, therefore, probably more acceptable for civil law countries.⁴⁰ In 1988, the Australian High Court, in *Oceanic Sun Line Special Shipping Co. v. Fay*,⁴¹ refused to follow the evolution of the British doctrine of *forum non conveniens* reflected in *Spiliada*. Taking as its departure point the traditional “vexatious or oppressive” test, the Australian High Court adopted a “clearly inappropriate forum” test.⁴² Instead of looking—as do the modern British and American doctrines—to whether there is a “clearly more appropriate forum” abroad, the Australian doctrine focuses on whether the Australian forum is “clearly inappropriate,” *i.e.*, seriously and unfairly burdensome, prejudicial, or damaging to the defendant.⁴³ Justice Deane’s opinion for the court explained that “[i]t is a basic tenet of our jurisprudence that, where jurisdiction exists, access to the courts is a right. It is not a privilege which can be withdrawn otherwise than in clearly defined circumstances.”⁴⁴

40. See Peter Prince, *Bhopal, Bougainville and OK Tedi: Why Australia's Forum Non Conveniens Approach is Better*, 47 INT'L & COMP. L.Q. 573 (1998); Judd Epstein, *Australian Report to the XIVth Congress of the International Academy of Comparative Law*, in FAWCETT, *supra* note 30, at 79.

41. *Oceanic Sun Line Special Shipping Co. Inc. v. Fay*, [1988] 165 C.L.R. 197 (confirmed and clarified in *Voth v. Manildra Flower Mill Pty.*, [1990] 171 C.L.R. 538).

42. *Id.* at 247.

43. *Id.*

44. *Id.* at 252. In addition to the various *forum non conveniens* doctrines cited *supra*, it should be mentioned that at least two civil law jurisdictions know some sort of *forum non conveniens*. The Quebec Civil Code contains a *forum non conveniens* rule which reads: “Even though a Quebec 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.” Quebec Civil Code, art. 3135. In Japan, there is a “special circumstances” rule which allows a court to dismiss a case for lack of jurisdiction if “sustaining the Japanese court’s jurisdiction would result in contradicting the principles of securing fairness between the parties and maintaining the proper and prompt administration of justice.” *Mukoda v. Boeing Co.*, 31 JAPANESE ANN. INT’L L. 216, 217 (1988). See also Masato Doguchi, *Japanese Report to the XIVth Congress of the International Academy of Comparative Law*, in FAWCETT, *supra* note 30, at 303.

B. Lis Pendens

One factor courts will generally look to, in the application of the *forum non conveniens* exception, is whether there is a parallel litigation between the parties in another country. If the foreign court seized of the case appears to be appropriate to decide the case, and its judgment is likely to be recognized in the forum, the existence of a parallel litigation will be a strong factor in favor of a *forum non conveniens* stay or dismissal. But there is no obligation for the court to stay or dismiss the case, and it also might decide that it is better to let both proceedings go forward. To avoid parallel litigations, common law countries sometimes use antisuit injunctions; whereby the court enjoins the defendant from filing or pursuing litigation abroad. Those unilateral injunctions often have been criticized as a hostile intervention in the judicial sphere of a foreign country.⁴⁵ They will not be discussed further here, but it seems quite clear that they should not be the way to resolve conflicts of jurisdiction among the members of the future convention.

Most civil law countries do not have a *forum non conveniens* doctrine, nor do they use antisuit injunctions. In order to limit parallel litigations, they apply a rule called *lis pendens*.⁴⁶ According to this rule, if two courts are seized of a dispute between the same parties, involving the same cause of action, the court second seized must stay or dismiss the case in favor of the court first seized.⁴⁷ It is a 'first in time' rule, allowing only the court first seized to decide the case on the merits. This rule is very widely applied to solve domestic parallel litigations in civil law countries.⁴⁸ Several countries also apply it in favor of a foreign court, if the court second seized

45. See, e.g., Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314 (1997).

46. See, e.g., *Société A v. S.*, ATF 118 II 1888, Swiss Federal Supreme Court (1992) (in French), available at <http://www.bger.ch> (last visited Feb. 8, 2001); Parts A, B, and C; *Gesellschaft v. Gesellschaft D.*, ATF 123 II 414, Swiss Federal Supreme Court (1997) (in German), available at <http://www.bger.ch> (last visited Feb. 8, 2001).

47. See, e.g., Brussels Convention, *supra* note 9, at art. 21; Swiss Private International Law Act, 29 I.L.M. 1244, art. 9 (1990).

48. See, e.g., *Société A v. S.*, ATF 118 II 1888, Swiss Federal Supreme Court (1992) (in French), available at <http://www.bger.ch> (last visited Feb. 8, 2001).

considers that a decision susceptible to being recognized in the forum is likely to be rendered within a reasonable time in the foreign court.⁴⁹ In the hypothetical case detailed in the introduction, assume that Peter files a first case in Phoenix against Julia, and then decides to file a second action in Berlin. The German court will determine whether a decision is likely to be taken by the court in Phoenix within a reasonable time and whether this decision would be enforceable in Germany. If this recognition prognostic is positive, the German court will stay the action until a decision is rendered by the Phoenix court.

Inside Europe, a strict *lis pendens* rule has been adopted in the Brussels and Lugano conventions.⁵⁰ The conditions for its application are that two (or more) actions be pending in two (or more) different contracting States and that both actions involve the same parties and the same cause of action.⁵¹ If the competence of the court first seised is not yet established, the court second seised *must* suspend its proceedings.⁵² Once the first court has established that it has jurisdiction over the case, the court second seised *must* decline jurisdiction.⁵³

One of the problems which was raised by the application of the *lis pendens* clause of the Brussels and Lugano conventions, is the definition of the "same cause of action" condition: Does an action seeking substantive relief have the same cause of action as an action by the "natural defendant" seeking a determination that it has no obligation to the "natural plaintiff"? In the hypothetical set forth before, assume that Julia has filed an action against Peter in Berlin seeking a declaration of non-liability before Peter's filing of his claim in Phoenix. Under the

49. For example, France, Germany, Quebec, and Switzerland.

50. Article 21 of the Brussels and Lugano Conventions reads:

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting 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. 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.

See Brussels Convention, *supra* note 9, at art. 21. See also Peter E. Herzog, *Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?*, 43 AM. J. COMP. L. 379 (1995).

51. See *id.*

52. See *id.*

53. See *id.*

European Court of Justice case law,⁵⁴ both actions (the declaratory action and the tort action) would be deemed to have the same object. Therefore, the *lis pendens* clause would be applied by the court in Phoenix and Peter would be forced to litigate his claim in Berlin. This gives to the natural defendant, if he is quick enough, the ability to select the forum he prefers and causes a "race to court" which often has been criticized.⁵⁵ As we will see hereafter, the Special Commission added a specific paragraph to the *lis pendens* article of the Convention to deal with this problem.⁵⁶

In the United States, the Supreme Court, in *Landis v. North American Co.*,⁵⁷ recognized the inherent power of a district court, in case of parallel proceedings in two different federal courts, to stay the proceedings. The Supreme Court required that the benefit and hardship of a stay be balanced before deciding whether to grant the motion and remanded the case to the District Court for further examination under those principles. This balancing test is closer to a *forum non conveniens* analysis than to the strict *lis pendens* rule found in civil law countries.⁵⁸ In a later case, *Colorado River Water Conservation District v. United States*,⁵⁹ the Supreme Court distinguished the situation of parallel proceedings between two federal courts and between a state and a federal court. The Supreme Court held that federal courts have a duty to adjudicate controversies properly before them, and, therefore, cannot stay a federal action in favor of a state action unless some exceptional conditions are realized.⁶⁰ There is no Supreme

54. Case 406/92, *Ship Tatry v. Ship Maciej Rataj*, [1994] E.C.R. I-5439.

55. See Herzog, *supra* note 50.

56. See *infra* Part V.D.

57. 299 U.S. 248 (1936) (suit by two holding companies against the Securities & Exchange Commission contesting the constitutionality of the Holding Company Act, stayed by the district court to await a decision on the validity of the Act by another district court in a pending litigation between the Commission and a third company).

58. Furthermore, as the parties were not the same in both proceedings, a stay under a strict *lis pendens* rule would probably not have been granted.

59. 424 U.S. 800 (1976) (suit by the United States in district court regarding water rights to the Colorado River, dismissed because of a parallel state court action filed by one of the defendants in the federal action).

60. In this case, the Supreme Court held that because of the clear federal policy to avoid piecemeal adjudication of water rights in a river system, such special circumstances were realized and the dismissal of the federal action was justified. *Id.* at 819.

Court decision on the question of a stay because of a parallel proceeding in a foreign country. Therefore, some lower courts have followed *Landis* and exercised a discretionary power to stay in case of parallel proceedings, while others have applied *Colorado River* and required exceptional circumstances before ordering a stay.⁶¹ In any case, even if a court decides that it has a discretionary power to stay according to *Landis*, there is no mandatory stay of the action, as would be the case under a strict *lis pendens* doctrine.⁶²

C. *The Need to Combine Both Approaches*

As an analysis of the United States decisions reveals, the doctrines of *forum non conveniens* and *lis pendens* are closely related. A flexible *lis pendens* clause, giving both the first and the second court seised an opportunity to stay the proceedings if the other court appears to be more appropriate to resolve the case, comes quite close to the *forum non conveniens* doctrine. The main differences are that the *forum non conveniens* doctrine does not require the existence of parallel proceedings, and that if there are such parallel proceedings, it does not necessarily try to avoid the continuation of both.

In the negotiation in The Hague, the questions of *forum non conveniens* and *lis pendens* were linked together,⁶³ the former being the traditional common law rule for declining jurisdiction, the latter being the civil law rule on the subject. The flexibility of the former and the predictability of the latter had to be combined to find a solution agreeable to both legal traditions.

61. See BORN, *supra* note 25, at 459.

62. Nevertheless, it should be noted that at least one United States uniform act contains a strict *lis pendens* clause: the Uniform Child Custody Jurisdiction and Enforcement Act § 206 (1997) [hereinafter UCCJEA]. This section provides that if a court determines that a child-custody proceeding has been commenced in another State having jurisdiction under the Act, the second court shall stay its proceeding, communicate with the other court, and if the first court exercises its jurisdiction, dismiss the proceeding. This Act also contains a limited *forum non conveniens* clause requiring the court to determine both that it is an inconvenient forum and that another court is a more appropriate forum. See UCCJEA at § 207 (1997).

63. See Lipstein, *supra* note 1, at 557.

IV. DECLINING JURISDICTION AND INTERNATIONAL CONVENTIONS

A. *The Situation Under the Brussels Convention*

In view of the success of the Brussels Convention,⁶⁴ its approach to the question of declining jurisdiction deserves a careful analysis. It is clear that a worldwide convention, as the Hague Conference proposes, raises some additional problems which more easily could be resolved in the ambit of a regional convention. Nevertheless, among the members of the Brussels Convention are both civil law and common law countries and, therefore, the questions of *lis pendens* and *forum non conveniens* were raised.

The Brussels Convention was first signed in 1968, at a time when all the members of the European Economic Community were civil law countries. Therefore, quite naturally, the Convention does not contain any *forum non conveniens* clause. For the avoidance of parallel proceedings among member States, it contains a strict *lis pendens* rule giving priority to the court first seised.⁶⁵ So far, no discretion is left to the courts on jurisdictional matters.

Nevertheless, the Convention contains one slightly open clause under "related actions."⁶⁶ It gives to the court second seised some discretion to stay a case if a related action is pending in another contracting State.⁶⁷ In this situation, the *lis pendens* rule does not apply because the second action does not involve the same cause of action and the same parties. Therefore, the court is not bound to stay the proceedings. Neverthe-

64. See Brussels Convention, *supra* note 9.

65. See *id.* at II(b).

66. Article 22 of the Brussels Convention reads:

[1] Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings. [2] A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions. [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.

Id. at art. 22.

67. See *id.*

less, it can stay or dismiss the case, if it determines this is appropriate. This is probably the clause which is the closest to the *forum non conveniens* doctrine, but its application is limited to situations where related actions are pending. Furthermore, only the second judge seised has the discretion to stay the case, *i.e.*, the court first seised cannot stay or dismiss, even if the second forum is clearly more appropriate and even if the second court refuses to stay or dismiss.

When the United Kingdom and Ireland joined the European Economic Community in 1979, they tried to negotiate the introduction of a *forum non conveniens* clause in the Brussels Convention.⁶⁸ They wanted to retain the ability to dismiss a case under *forum non conveniens* grounds. This was refused by the other European States which argued that the Convention itself had selected convenient fora, all of them having some links to the case. Furthermore, in Article 4, the Convention prohibits, by way of a list, exorbitant fora (*e.g.*, the place of the assets, the “forum arresti,” the “tag-jurisdiction”). Therefore, there was no real need for a *forum non conveniens* clause. The British and Irish delegations finally acquiesced. While the report does not address this issue, one possible reason is that they took into consideration the limited geographic area of the Brussels Convention and the growing integration of the European market, both of which reduce the burden for a defendant to be sued in one or another of the European countries. In this context, the need for judicial certainty was more compelling than the need for flexibility.

Nevertheless, a problem arose under the Brussels Convention regarding cases with important links with a non-contracting State. In *Re Harrods (Buenos Aires) Ltd.*,⁶⁹ the English Court of Appeal had to deal with a conflict between majority and minority shareholders (both Swiss companies) of a company registered in England, but having all of its activities in Argentina where it was registered to do business.⁷⁰ The minority shareholders filed a complaint against the company in

68. See Peter F. Schlosser, *Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom to the Brussels Convention*, 1979 O.J. (C 59) 78.

69. [1991] 3 W.L.R. 397 (Eng. C.A. 1990).

70. *Id.*

England based on its seat.⁷¹ The Court of Appeal held that the proper forum was in Argentina because all the disputed facts took place in Argentina and, therefore, Buenos Aires clearly was a more appropriate forum for this dispute.⁷² The court further held that, as the more convenient forum was located outside the boundaries of the Brussels Convention, the Convention did not have to be applied, though both parties were domiciled in contracting States.⁷³ This decision has been appealed to the House of Lords, which requested an opinion from the European Court of Justice. The case settled before the opinion of the European Court was given.

This case did raise an interesting problem. The plaintiff had a reasonable expectation to be able to sue a company having its seat within the Brussels Convention territory, at the place of the defendant's seat. The Convention does not provide for an exception to its scope of application when there is a more appropriate forum in a non-contracting State. Therefore, one could wonder whether the defendant should be permitted to avoid the application of the Convention, including the important benefit to the plaintiff of having a judgment enforceable throughout the European Union, simply by demonstrating a closer link with a non-contracting State. On the other hand, the Convention does not expressly address this situation and the English courts understandably are reluctant to devote scarce judicial resources to cases with only minimal links to the United Kingdom.⁷⁴

71. *Id.*

72. *Id.*

73. *Id.*

74. See generally Richard G. Fentiman, *Jurisdiction, Discretion and the Brussels Convention*, 26 CORNELL INT'L L.J. 59 (1993); Wendy Kenett, *Forum non conveniens in Europe*, 54 CAMBRIDGE L.J. 552 (1995); Christophe Bernasconi, *La théorie du forum non conveniens - un regard suisse*, 14 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHT 3 (1994); Hélène Gaudemet-Tallon, *Le "forum non conveniens," une menace pour la convention de Bruxelles?*, 80 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 491 (1991); PETER HUBER, *DIE ENGLISCHE FORUM-NON-CONVENIENS-DOKTRIN UND IHRE ANWENDUNG IM RAHMEN DES EUROPÄISCHEN GERICHTSSTANDS- UND VOLLSTRECKUNGSÜBEREINKOMMENS* (1994); Christian Kohler, *Staatsvertragliche Bindungen bei der Ausübung internationaler Zuständigkeit und richterliches Ermessen, Bemerkungen zur Harrods-Entscheidung des englischen Court of Appeal*, in VERFAHRENSGARANTIE IM NATIONALEN UND INTERNATIONALEN PROZESSRECHT, Festschrift Franz Matscher, 251 (1993); Peter North, *La liberté d'appréciation de la compétence (jurisdictional discretion) selon la Convention de Bruxelles*, in NOUVEAUX ITINÉRAIRES

B. The Hague Children and Adults Conventions

A *forum non conveniens* like clause has been introduced in two recent Hague conventions, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded in October 1996,⁷⁵ and the Convention on the International Protection of Adults, adopted by the Special Commission of the Hague Conference, in October 1999.⁷⁶

The principle of the Children convention is that the competent authorities are those of the State of the child's habitual residence, subject to one major exception regarding the divorce of the parents.⁷⁷ All other potentially competent authorities, such as the courts of a State of which the child is a national or with which the child has substantial connections, are excluded. In order to deal with exceptional cases where the authority of the child's habitual place of residence is not the best place to take a decision, the drafters of the convention introduced a kind of *forum non conveniens* clause authorizing the authority of the child's habitual residence to decline jurisdiction and stay the proceedings in favor of one of the other authorities mentioned in Article 8, if this is in the child's best interest.⁷⁸ Con-

EN DROIT, HOMMAGE A FRANÇOIS RIGAUX, 373 (1993).

75. See Children Convention, *supra* note 13. See also Paul Lagarde, Explanatory Report on the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (Jan. 15, 1997), at <http://www.hcch.net/e/conventions/expl34e.html>.

76. A provisional edition of the text of the Convention on the International Protection of Adults (Oct. 1999) is available at <http://www.hcch.net/e/conventions/text35e.html> [hereinafter Adults Convention].

77. Children Convention, *supra* note 13, at arts. 5, 12.

78. *Id.* at art. 8. The article states:

1. By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either, request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

2. The Contracting States whose authorities may be addressed as provided in the preceding paragraph are, (a) a State of which the child is a national, (b) a State in which property of the child is located, (c) a State

versely, the authorities of a contracting State other than that of the child's habitual residence might request the authorization from the authorities of the child's place of residence to exercise jurisdiction.⁷⁹ In both cases, the requesting authority might address its request directly to the foreign authority, or invite the parties to make such a request.

This is an innovative mechanism both ensuring that jurisdiction will be exercised by the authorities best situated to analyze the underlying dispute and protecting the parties against a denial of justice as the first State retains jurisdiction until the second State accepts its jurisdiction. Furthermore, as the mechanism is clearly exceptional and the potential alternative courts are limited, it should not cause excessive litigation over jurisdictional questions. A similar mechanism can be found in Article 8 of the Adults Convention.⁸⁰

Some delegates at The Hague have suggested the adoption in the Convention on jurisdiction and foreign judgments of a clause inspired by the Children Convention.⁸¹ This clause would have allowed a court, considering whether a court of another contracting State would be better placed to adjudicate the case, either to request the alternative court to assume jurisdiction, or to suspend consideration of the case and invite the parties to introduce such a request before the court of the alternative State. The proposed article also provided, in its third paragraph, that the courts concerned may proceed to an exchange of views. This was an interesting attempt to stimulate a better cooperation among the courts of the contracting States. But many problems have been raised in relation to this proposal. First of all, it was not clear what sort of procedure would be followed when a court would request another to exercise jurisdiction: Would the second court take a formal decision without having been seized by the parties? Would it only be a

whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, (d) a State with which the child has a substantial connection.

3. The authorities concerned may proceed to an exchange of views.

4. The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Id.

79. *Id.* at art. 9.

80. Adults Convention, *supra* note 76, at art. 8.

81. See Children Convention, *supra* note 13.

prima facie decision? How would the rights of the parties be protected, what kind of appeal would be allowed? Communication problems, including language problems, also were raised. More than those practical problems, which probably could have been solved with time, the proposition for more cooperation between judges in civil and commercial matters raised a fear that too much informal communication between judges would be allowed, without possible control by the parties.

Indeed, the adoption of this solution in the Children and Adults Conventions was linked with some elements specific to these conventions. First of all, procedures for the protection of children or adults are not necessarily adversarial in their nature. The judge must protect the person's best interests and, therefore, the balance between the parties is not the same as in commercial disputes. Furthermore, as these conventions generally limit the competent forum to the place of the protected person's habitual residence, giving the plaintiff no choice of forum, all parties might agree that another tribunal would be more appropriate to take the necessary measures. Even the alternative fora, if the *forum non conveniens* doctrine applies, are strictly limited. This increases the predictability of the jurisdictional question under these conventions. For all those reasons, a transposition of this solution into the future convention on judgments might be difficult.

V. *FORUM NON CONVENIENS* AND *LIS PENDENS* IN THE PRELIMINARY DRAFT CONVENTION

A. *The Policy Debate Over the Introduction of a Forum Non Conveniens Clause*

The question of the inclusion of a *forum non conveniens* clause in the future convention on jurisdiction and foreign judgments is very controversial. Common law countries on one side are used to a *forum non conveniens* doctrine which they perceive as an indispensable tool for a fair exercise of justice. The doctrine is, in particular, a way to fight against forum-shopping. Indeed, given all the advantages American courts

offer to plaintiffs in comparison to most other courts around the world, there is a high incentive to sue in this country.⁸²

Furthermore, though clearly limited, the grounds of jurisdiction contained in the preliminary draft cannot ensure a sufficient link with the forum in every situation. For instance, one jurisdictional basis which is included in the preliminary draft convention is the place of the wrongful act.⁸³ There are circumstances where this place might have very little connection with the dispute. In the hypothetical case discussed above, where a German tourist is injured in Arizona by another German tourist, the connections with Arizona are very weak; both parties are residing in Germany and all the potential witnesses are German. Nevertheless, the court in Phoenix will have jurisdiction. The plaintiff will have many reasons to sue his opponent in the United States and the burden for the defendant to have to defend herself in Arizona will be very high.

Civil law countries, on the other hand, are afraid of this new exception offered to the defendants; which increases the duration and the costs of civil litigation. They deplore the absence of predictability of the doctrine and its discretionary character. Furthermore, some countries have raised constitutional objections against the principle of a discretionary power to dismiss when a ground for jurisdiction exists.

One halfway solution proposed at The Hague is to make the clause optional. This would mean that each country could decide whether or not the *forum non conveniens* clause will be applied by its courts. It would probably result in each country maintaining its actual practice on the question. If members finally find a consensus on common bases of jurisdiction in civil and commercial matters, it would be unfortunate to keep such a wide, non-harmonized exception. Furthermore, it would bring uncertainty in the application of the convention if the parties cannot know in advance whether the clause will be applied or not. Finally, this would generate shaky situations. Could a court refuse to exercise its jurisdiction though the

82. Those advantages include, in particular, the broad discovery power of U.S. courts, the availability of jury trials, the propensity toward high awards and the contingency agreements for lawyers' fees. See Kevin M. Clermon & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995).

83. See Preliminary Draft, *supra* note 2, at art. 10.

alternative forum does not recognize the *forum non conveniens* doctrine? Shall the alternative forum be bound to accept jurisdiction? Should a court second seised stay the case though the court first seised is clearly inappropriate for the adjudication of the case but does not recognize the *forum non conveniens* doctrine? For all those reasons, the option is not a satisfactory solution and has not been retained in the preliminary draft.

Civil law and common law countries are not as far apart on the question of judicial discretion as it might appear on sight. Judicial discretion is not totally unknown to the civil law countries. Even under the Brussels Convention, which clearly rejected a *forum non conveniens* exception, courts have the discretionary power to stay a case if a related case is pending in the courts of another contracting party.⁸⁴ And among common law countries, different *forum non conveniens* doctrines have existed since the second half of this century and still exist in different parts of the world.⁸⁵ Some common law courts have expressed concerns about the unpredictable nature of the *forum non conveniens* doctrine and tried to remedy the problem. Generally, the acceptance of *forum non conveniens* in common law countries, and its rejection in civil law countries is not unanimous. Several American scholars have criticized the *forum non conveniens* doctrine, insisting on its unpredictable nature.⁸⁶ On the other hand, several scholars in continental Europe have expressed the desire that some flexibility be introduced in their closed system of jurisdiction and have even advocated the adoption of a *forum non conveniens* doctrine.⁸⁷

84. See Brussels Convention, *supra* note 9, at art. 17.

85. See FAWCETT, *supra* note 30.

86. See, e.g., David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353 (1994); *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990) (especially the concurring opinion of Justice Doggett).

87. See, e.g., CLAUDE BLUM, *FORUM NON CONVENIENS, EINE DARSTELLUNG DES ANGLO-AMERIKANISCHEN DOKTRIN UND DIE ANWENDUNGSMÖGLICHKEITEN IM KONTINENTALEN RECHT AM BEISPIEL DER ZÜRCHER ZIVILPROZESSORDNUNG* (1979); Paul Lagarde, *Le principe de proximité dans le droit international privé contemporain, Cours général de droit international privé*, 196 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 142 (1986) (Lagarde's principle of proximity states that a legal relationship shall be governed by the law of the country with which it has the closest connection); Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 KAN. L. REV. 9 (1996).

Under the Brussels Convention, it was felt that the benefit of certainty in international relations outweighed the need for flexibility. By strictly limiting the jurisdictional basis, the parties considered that no *forum non conveniens* clause would be needed. But this was possible because of the regional character of the convention. The differences between the judicial systems, the cultural gaps, and the burden of having to sue in a foreign country are much higher in a worldwide convention. Whereas the system adopted in the preliminary draft of required and prohibited bases of jurisdiction should avoid so-called exorbitant bases of jurisdiction—like the tag—jurisdiction or the *forum arresti*—it preserves a gray area where the contracting States will be free to apply their own jurisdictional rules, as long as they do not conflict with the prohibited rules.⁸⁸ Therefore, there will be no complete control over the jurisdictional rules applied by the member States.

Because it will not be possible to avoid all cases where the connections of the dispute to the forum will be very weak, and to take into account the different legal systems to be represented among the members of the convention, some sort of *forum non conveniens* rule should be adopted. It should be a means to improve cost and time efficiency by choosing a forum closer to the facts of the cases, the witnesses, and the evidence. At the same time, by introducing a *forum non conveniens* clause, the contracting parties should be careful to not introduce a supplementary tool for dilatory tactics. Therefore, the discretion of the court should be clearly limited and the exceptional character of the doctrine should be underlined.⁸⁹

At this stage, the Australian doctrine is especially promising. Australian courts share with civil law countries the principle that, if jurisdiction exists, access to the courts is a right that cannot be withdrawn except in clearly defined circumstances.⁹⁰ But they also agree that there are situations where the dispute has so little connection with the forum that the court is “clearly inappropriate” to adjudicate the case and the procedure should be stayed in favor of the alternative court. The “clearly inappropriate” test focuses on the advantages and disadvantages of proceeding in the forum, instead of having to

88. See Von Mehren, *supra*, note 19.

89. See Schlosser, *supra* note 87, at 43.

90. See *Oceanic Sun Line Special Shipping*, 165 C.L.R. at 252.

do a comparative analysis with a foreign forum.⁹¹ It is much easier for a judge to evaluate whether the forum is clearly inappropriate in a specific case—because of the weakness of the connections between the forum and the dispute—than to make a comparative advantage analysis of a foreign forum. This limited test also will be more predictable for the parties, especially if the criteria to be examined by the judge are clearly determined.

At the same time, this test is not so far away from the British and American “clearly more convenient” test.⁹² Indeed, the Australian High Court in *Voth* referred to the factors of appropriateness mentioned in *Spiliada* in order to decide whether the Australian forum was clearly inappropriate. According to Justice Mason, “the ‘clearly inappropriate forum’ test is similar and, for that reason, is likely to yield the same result as the ‘more appropriate forum’ test in the majority of cases.”⁹³ The result only will be different in those cases where another, more appropriate forum exists, but the court seised is not clearly inappropriate. Unlike most common law countries which have rather broad bases of jurisdiction, the convention will set a limited number of competent fora which will generally have a sufficient link with the dispute. Therefore, the cases where circumstances are such that the designated forum will be “clearly inappropriate” should be rather rare. Accordingly, the increased burden upon the court to decide such issues should be limited.

B. Article 22 of the Preliminary Draft: Exceptional Circumstances for Declining Jurisdiction

The *forum non conveniens* clause adopted by the Commission allows the suspension of a case, in *exceptional circumstances*, if the court seised is *clearly inappropriate* to decide the case and if a court of another State has jurisdiction and is *clearly more appropriate* to resolve the dispute.⁹⁴ The first part of the test is similar to the one under the Australian doc-

91. *Id.*

92. See *McEvily v. Sunbeam-Oster Co., Inc.*, 878 F. Supp. 337 (D.R.I. 1994); *Beigel & Sandler v. Weinstein*, 1993 WL 189920 (N.D. Ill. 1993); *Black & Decker, Inc. v. Sunbeam Corp.*, 1994 WL 865386 (N.D. Ill. 1994).

93. See *Voth*, 171 C.L.R. at 538.

94. See Preliminary Draft, *supra* note 2, at art. 22.

trine of *forum non conveniens*; the court must establish that it is not an appropriate forum for resolving the dispute.⁹⁵ The clause then adds a second condition, similar to the British and American doctrines, requiring that another forum be clearly more appropriate.⁹⁶ The clause finally requires that the other forum has jurisdiction over the disputes. It is only when those three conditions are fulfilled that a court can suspend its proceedings. Therefore, the clause is strictly limited to exceptional cases.

Once the case is stayed in the original court, the plaintiff must bring the proceedings in the alternative, more appropriate, forum. If he does not take the necessary steps to re-file the case within the time specified by the original court, the case can be dismissed.⁹⁷ After the alternative court is seised of the case, the original court only can decline to exercise jurisdiction if the alternative State determines to exercise its jurisdiction.⁹⁸ Otherwise, the original court must proceed with the case.⁹⁹ This mechanism between the original and the alternative court shall ensure that the case will be considered by a competent court and that the plaintiff will not be sent from court to court.

Article 22 contains an illustrative list of factors to be taken into account by the court in its decision.¹⁰⁰ The first factor is "any inconvenience to the parties in view of their habitual residence."¹⁰¹ This factor shall refer not only to the question of the traveling difficulties a party may encounter, but also to the question e.g. of the language used in the alternative forum or the access to lawyers.

The next factor is the nature and location of the evidence and the procedures for obtaining such evidence.¹⁰² The availability of judicial assistance at the place where the evidence is located indeed might be highly relevant for the resolution of

95. See *Oceanic Sun Line Special Shipping*, 165 C.L.R. at 208-215.

96. See *Lubbe & Others v. Cape PLC*, [2000] 2 Lloyd's Rep. 383 HL.

97. See Preliminary Draft, *supra* note 2, at art. 22, para. 5(a).

98. *Id.*

99. *Id.* at para. 5(b).

100. *Id.* at para. 2.

101. *Id.* at para. 2(a).

102. *Id.* at para. 2(b).

the case.¹⁰³ This is a factor generally considered for *forum non conveniens* dismissals.

The third factor is the applicable time limitations.¹⁰⁴ This certainly should be taken into consideration by the court when deciding upon a *forum non conveniens* stay. Some proposals for a *forum non conveniens* clause even made the absence of a time bar a condition for the stay or dismissal. But it would be difficult for a court to decide upon the time limitation which would apply in the alternative forum. To have it as an element to be taken into consideration is, therefore, probably a better solution.

The last factor is the possibility of enforcement.¹⁰⁵ As the application of the doctrine is not limited to contracting States, it is important that the court takes into consideration the possibility of enforcement of the alternative court's decision.

The question as to whether the list of factors should be illustrative or exhaustive was much debated in the Commission.¹⁰⁶ On the one hand, it is difficult to establish an exhaustive list of factors to be taken into consideration in the application of the *forum non conveniens* clause. The benefit of the *forum non conveniens* doctrine is to be adaptable for the needs of each case. It is, therefore, not necessarily possible to draft an exhaustive list of factors covering all possible situations. Further, it is not certain that an exhaustive list would bring more predictability to the convention. The factors would necessarily need to be broad enough to cover different possible situations, and, therefore, their interpretation might differ widely from one court to another. On the other hand, with an open list of factors, there is a risk that some courts will take into account elements which discriminate among local and foreign plaintiffs.

This is especially true in view of *Piper Aircraft*, which justifies a more favorable treatment of local plaintiffs than foreign plaintiffs.¹⁰⁷ In order to address this concern, without

103. See, e.g., *Mukoda v. Boeing Co.*, 31 JAPANESE ANN. INT'L L. 216, 217 (1988).

104. Preliminary Draft, *supra* note 2, at art. 22, para. 2(c).

105. *Id.* at para. 2(d).

106. Hague Conference on Private International Law, Preliminary Document 11, at art. 22, para. 2, available at <http://www.hcch.net/e/workprog/jdgm.html> (last visited Nov. 7, 2000) [hereinafter Document 11].

107. 454 U.S. at 256.

limiting the flexibility of the *forum non conveniens* clause to given factors, the Commission decided to add a specific paragraph stating that "a court shall not discriminate on the basis of the nationality or habitual residence of the parties." This drafting is not convincing. The point is clearly to avoid the reality that courts favor resident plaintiffs to the detriment of foreign plaintiffs. The exclusion of the nationality as a factor for dismissal is quite straightforward. But the exclusion of the residence is more questionable. Indeed, as we have seen, residence is a factor to be considered if one wants to promote the proximity between the court and the case. In the preliminary draft, the residence criterion has been limited, but it nevertheless exists. For instance, the habitual residence of the defendant in the forum shall be taken into consideration against a dismissal on *forum non conveniens* grounds. Therefore, it is not the factor of the residence as such which should be excluded, but the discrimination in its application. If there is a sufficient link between the dispute and the forum, the case should not be dismissed because the court does not want to spend scarce judicial resources for foreign plaintiffs. In this sense, a proposal has been made to blacklist the factor of whether the plaintiff is a taxpayer in the forum.¹⁰⁸ This proposal had the advantage of highlighting the really blacklisted element, the discrimination against foreign plaintiffs.¹⁰⁹ Indeed several delegations are requesting a guarantee of national treatment without discrimination, as contained in many international conventions.

The application of the exception must be requested by one of the parties no later than at the time of the first defense on the merits.¹¹⁰ It seems that even the plaintiff could request a *forum non conveniens* stay, but it would appear rather abusive for a plaintiff first to file an action in a given forum, and then to request its stay because the chosen forum would be inappropriate.

Paragraph four of Article 22 authorizes a court to request a security from the defendant, in order to satisfy any decision of the alternative court on the merits.¹¹¹ The security is even

108. See Document 11, *supra* note 106, at art. 22, para. 3.

109. *Id.*

110. Preliminary Draft, *supra* note 2, at art. 22, para. 1.

111. *Id.* at para. 4.

mandatory if the alternative court has jurisdiction only under Article 17 (in which case the enforcement of the decision will not benefit from the convention), unless he has sufficient assets in the alternative State or in another State where the court's decision could be enforced.¹¹² The same rule should apply in case of a stay in favor of a non-contracting State. The problem has been raised in The Hague that this might force the defendant to reveal where his assets are located. Nevertheless, the defendant has the choice either not to contest the jurisdiction of the first court, or to provide a security, or to show that he has enough assets to ensure the enforcement of the decision in the alternative State. Therefore, the inconvenience for the defendant does not outweigh the need for protection of the plaintiff's claim.

C. *What Lis Pendens Clause?*

The presence of a *forum non conveniens* clause does not obviate the need for a *lis pendens* clause. Indeed, in order not to waste scarce judicial resources and to prevent lengthy multiple international procedures, a *lis pendens* clause preventing the same case from being tried twice is very important. Furthermore, the risk of contradictory judgments, whose enforcement would be impossible because of this contrariety, would undermine the application of the convention. Therefore, the court second seised should be required to stay the proceedings, and not simply permitted within its discretion to do so, as under a *forum non conveniens* approach to parallel litigation.

At a certain point in the Hague negotiation, the adoption of a *lis pendens* rule combined with some *forum non conveniens* elements had been suggested.¹¹³ This was a first step in introducing some flexibility in the convention, without having a pure *forum non conveniens* clause. It allowed the court first seised—if it determined that the court second seised in another contracting State had jurisdiction and was manifestly more appropriate to resolve the dispute—to stay the proceedings and direct the concerned party to request the court second seised to exercise jurisdiction. The proposed clause combined predictabil-

112. *Id.*

113. See Document 11, *supra* note 106, at para. 2.

ity and flexibility by opening to the court first seised the doctrine of *forum non conveniens*, while imposing on the court second seised the obligation to respect the *lis pendens* rule giving priority to the court first seised. The limit of this proposal was that it supposed the existence of parallel proceedings. Therefore, the defendant who wanted to apply for a *forum non conveniens* stay would first have had to file a case with the court which he considered appropriate, before arguing in the court first seised for a *forum non conveniens* dismissal.

Eventually, the commission opted for a broader solution: the preliminary draft contains both a *lis pendens* rule and a *forum non conveniens* clause. Therefore, the *forum non conveniens* exception can be raised independently from any parallel proceedings.

D. Article 21 of the Preliminary Draft: Lis Pendens

The *lis pendens* rule adopted in the preliminary draft is a rather traditional rule requiring the suspension of the proceedings by the court second seised of a case already pending in another court. Nevertheless, many details have been added in order to deal with some problems existing under the traditional *lis pendens* doctrine. Each of those characteristics will be analyzed below.

First, the rule applies only when parallel proceedings are pending in the courts of different contracting States.¹¹⁴ It does not apply when one of the courts seised is not a member to the convention.¹¹⁵ Paragraph four of Article 21 specifically states that the rule must be applied by the court second seised even if its jurisdiction is based on national law in accordance with Article 17.¹¹⁶ This was necessary in order not to allow the use of national grounds of jurisdiction, where a contracting State would be barred from exercising jurisdiction under the Convention.

Another concern was the definition of "the same causes of action."¹¹⁷ The commission adopted the words "irrespective of the relief sought," which gives a broad scope to the expression

114. See Preliminary Draft, *supra* note 2, at art. 21, para. 1.

115. See *id.*

116. *Id.* at para 4.

117. See *supra* Part III.B.

“same causes of action.”¹¹⁸ With this precision, the *lis pendens* clause also shall apply to the relationship between an action for the execution of a contract and an action arguing for the nullity of the same contract. At the same time, a majority of the Commission did not want to allow negative declaratory actions filed only in order to force the natural plaintiff to act in a specific forum.¹¹⁹ Therefore, a sixth paragraph was added to make the *lis pendens* rule inapplicable when the first action is a negative declaratory action.¹²⁰ This paragraph goes even further, in that it reverses the rule by mandating that the first court suspend the proceedings if the court second seised is expected to render a decision capable of being recognized under the Convention.¹²¹ This is an interesting attempt to avoid the use of declaratory actions for jurisdictional purposes, while keeping with the objective of limiting parallel litigations.

Paragraph one excludes the application of the *lis pendens* clause when the court second seised has exclusive jurisdiction under Article 4 (choice of court),¹²² or 12 (other exclusive jurisdictions).¹²³ This results already from Articles 4, 12 and 17, which prevent any contracting State from exercising jurisdiction when another contracting State has an exclusive jurisdiction over the matter.¹²⁴

One of the problems encountered by the Commission in the drafting of the *lis pendens* clause is the determination of the relevant time for the “first in time” rule. The drafting adopted in paragraph five of Article 21 should place the parties in an equivalent position; whatever the procedural rules of the States where the actions are filed.¹²⁵ The relevant time will be the filing with the court, unless the complaint was first to be served, in which case the time of reception by the authority responsible for service or by the defendant himself will be controlling.¹²⁶

118. Preliminary Draft, *supra* note 2, at art. 21, para. 1.

119. *See id.* at para. 6.

120. *See id.*

121. *Id.* at para. 6(b).

122. *Id.* at para. 1.

123. *Id.*

124. Preliminary Draft, *supra* note 2, at arts. 4, 12, 17.

125. *Id.* at art. 21, para. 5.

126. *Id.*

The seventh paragraph of Article 21 reserves the application of the *forum non conveniens* exception by the court first seized which can, on the application of a party, determine that the court second seized is clearly more appropriate to decide the case and let this court decide.¹²⁷ But the application of the *forum non conveniens* clause by the court second seized, advocated by some delegations, has been rejected by the Commission. Indeed, if the second court seized simply could decide that the first court is inappropriate to resolve the case in order to keep the right to exercise its jurisdiction, the *lis pendens* clause would have lost an important part of its power to limit parallel litigations.

VI. CONCLUSION

The drafting of an international convention requires openness and flexibility to weigh the pros and cons of different possible rules adopted in different part of the world. This is a difficult task as everyone is immersed within their own legal and cultural background. *Forum non conveniens* is typically a doctrine which developed only in one part of the world. Whether it should be introduced in civil law countries is a delicate question and there may not be a real need for it. But, the introduction of a declining jurisdiction clause in an international convention is clearly desirable. Indeed, because many countries rely on *forum non conveniens* to regulate the exercise of jurisdiction, a ban of this doctrine would require an in depth reform of their respective legal systems. The United States, for instance—which has a very plaintiff friendly system that almost automatically induces forum shopping—needs a *forum non conveniens* exception to regulate access to its courts. Furthermore, a limited *forum non conveniens* doctrine would ensure a more efficient allocation of the judicial resources of the contracting parties. Given the fact that the convention will contain a well defined, limited number, of possible fora, a narrow *forum non conveniens* doctrine should be sufficient.

The test adopted in the preliminary draft requiring that the forum be inappropriate and that another more appropriate forum have jurisdiction, sets a good standard for the introduction of some limited flexibility in the convention. The listing of

127. *Id.* at para. 7.

factors to be taken into consideration also shall be a useful guide for the courts and, therefore, improve the predictability of the decisions. Together with a declining jurisdiction clause, there is a need for a *lis pendens* clause fighting against the waste of judicial resources caused by parallel proceedings. The combination of *forum non conveniens* and *lis pendens* in the preliminary draft convention is a good compromise. Meeting both the expectations of the common law countries, in terms of flexibility, and of the civil law countries, in terms of legal certainty and predictability, it could well be the key to the resolution of one of the obstacles that has, until now, prevented agreement on a wider convention on jurisdiction and foreign judgments.

ANNEX A : ARTICLE 21 *LIS PENDENS*

(PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS)

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 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.
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 seized 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 seized -

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

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

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

ANNEX B: ARTICLE 22 EXCEPTIONAL CIRCUMSTANCES FOR DECLINING JURISDICTION

(PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS)

1. In exceptional circumstances, when the jurisdiction of the court seized 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, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.

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.

