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NOTE SUR LA QUESTION DU «*FORUM NON CONVENIENS*» DANS LA PERSPECTIVE D'UNE CONVENTION DOUBLE SUR LA COMPÉTENCE JUDICIAIRE ET L'EXÉCUTION DES JUGEMENTS

établie par le Bureau Permanent

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NOTE ON THE QUESTION OF "*FORUM NON CONVENIENS*" IN THE PERSPECTIVE OF A DOUBLE CONVENTION ON JUDICIAL JURISDICTION AND THE ENFORCEMENT OF DECISIONS

drawn up by the Permanent Bureau

Document préliminaire No 3 d'avril 1996 à l'intention de la Commission spéciale de juin 1996 sur la question de la reconnaissance et de l'exécution des jugements étrangers en matière civile et commerciale

Preliminary Document No 3 of April 1996 for the attention of the Special Commission of June 1996 on the question of the recognition and enforcement of foreign judgments in civil and commercial matters

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During the meeting of the Special Commission of June 1994 on the question of recognition and enforcement of foreign judgments in civil and commercial matters, the mechanism of *forum non conveniens* was broadly discussed and raised certain concerns. According to item 32 of the Conclusions drawn up by the Permanent Bureau, "*it seemed that a consensus might emerge in favour of allowing a limited possibility for application of the theory of* forum non conveniens *in specific cases to be determined and on the condition that a mechanism of co-ordination be instituted in the convention. The essence of this mechanism would be that, where the court of a Contracting State considers that the court of another Contracting State is better placed than it is to judge the case pending before it, under circumstances which might be set out in the convention, it would stay proceedings before it until that other court has declared itself to have jurisdiction. If this second court refuses to exercise jurisdiction, the first court would then have to decide the case on the merits*".

During the discussions, it was recognized that the problem deserved to be studied in somewhat more depth. At the meeting on general affairs and policy of the Conference, the representatives of States who had an interest in this mechanism had committed themselves to work with the Permanent Bureau in order to provide information. Overviews drawn up by certain governments on this topic will be found as annexes to this Note.

It should above all be pointed out for purposes of information that the question of *forum non conveniens* was the subject of a significant publication. This is the book entitled *Declining Jurisdiction in Private International Law, Reports to the XIVth Congress of the International Academy of Comparative Law*, Athens, August 1994, General Report by J.J. Fawcett, Clarendon Press, Oxford 1995. This collective work studies the positive laws of the following countries: Argentina, Australia, Belgium, Canada-common law provinces, Canada-Quebec, Finland, France, Germany, United Kingdom, Greece, Israel, Italy, Japan, the Netherlands, New Zealand, Sweden, Switzerland, United States of America; and Professor Fawcett offers a remarkable synthesis of these which, with the author's and the publisher's consent, is reproduced as Annex E to this Note. The body of this Note will be limited therefore to taking up the problem of *forum non conveniens* and some related questions in the perspective of the preparation of a double convention drawing its inspiration from the Brussels and Lugano Conventions.

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I *Forum non conveniens* and exorbitant jurisdiction

In the first edition of his treatise on private international law from the point of view of Scots law, A.E. Anton revealed that the Scottish doctrine of *forum non conveniens* had at its origin the purpose of fighting against abuses of personal service of process carried out on the territory of the forum – which normally results in its having jurisdiction – where the litigation has no serious or reasonable connection with the said forum.[1] This doctrine which may be defined "as a general discretionary power for a court to decline jurisdiction on the

[1] See for details the document submitted by the United Kingdom (Annex D).

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Lors de la réunion de la Commission spéciale de juin 1994 sur la question de la reconnaissance et de l'exécution des jugements étrangers en matière civile et commerciale, le mécanisme du *forum non conveniens* a été largement abordé et a suscité certaines inquiétudes. Selon le point 32 des Conclusions établies par le Bureau Permanent *«il a semblé qu'un consensus pourrait se dégager pour que la convention admette une possibilité limitée d'application de la théorie du forum non conveniens, dans des cas à préciser, et à condition qu'un mécanisme de coordination soit institué dans la convention. L'essentiel de ce mécanisme serait que lorsque le tribunal d'un Etat contractant estime que le tribunal d'un autre Etat contractant est mieux placé que lui pour juger de l'affaire en cause, dans une hypothèse qui pourrait être décrite dans la convention, il surseoit à statuer jusqu'à ce que le tribunal à saisir en second lieu se déclare compétent. Si ce tribunal refuse sa compétence, le tribunal premier saisi devrait statuer au fond.»*.

Lors des débats il avait été reconnu que le problème méritait d'être un peu plus approfondi. Lors de la réunion sur les affaires générales et la politique de la Conférence, les représentants d'Etats intéressés par ce mécanisme avaient consenti à collaborer avec le Bureau Permanent pour donner des informations. On trouvera en annexe des aperçus établis par certains gouvernements sur cette matière.

Il convient surtout de noter sur le plan de l'information que la question du *forum non conveniens* a fait l'objet d'une importante publication. Il s'agit du livre intitulé *Declining Jurisdiction in Private International Law, Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994 General Report by J.J. Fawcett, Clarendon Press, Oxford 1995*. Cet ouvrage collectif étudie le droit positif des pays suivants: Argentine, Australie, Belgique, Canada-Provinces de *Common Law*, Canada-Québec, Finlande, France, Allemagne, Royaume-Uni, Grèce, Israël, Italie, Japon, Pays-Bas, Nouvelle-Zélande, Suède, Suisse, Etats-Unis et le Professeur J.J. Fawcett en fait une remarquable synthèse qui, avec le consentement de l'auteur et de l'éditeur, est reproduite en Annexe E à cette Note. La présente Note se bornera donc à aborder le problème du *forum non conveniens* et quelques questions y afférentes dans la perspective de l'établissement d'une convention double s'inspirant des Conventions de Bruxelles et de Lugano.

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I *Forum non conveniens* et compétences exorbitantes

Dans la première édition de son traité sur le droit international privé écossais A.E. Anton révélait que la doctrine écossaise du *forum non conveniens* avait à l'origine pour but de lutter contre les abus de la signification à personne effectuée sur le territoire du for – ce qui entraîne normalement sa compétence – lorsque le litige n'a aucun lien sérieux ou raisonnable avec ledit for[1]. Cette doctrine, qui peut être définie «comme une faculté générale du juge de se dessaisir pour le motif que le for approprié pour connaître de l'affaire se trouve à

[1] Voir, pour plus de détails, le document soumis par le Royaume-Uni (Annexe D).

basis that the appropriate forum for trial is abroad or that the local forum is inappropriate"[2] was broadly developed thereafter in the common law systems and the United States where personal service has taken on particularly exorbitant proportions, for example, when it is carried out in the course of an airline flight above a certain territory.

In other systems which do not have the doctrine of *forum non conveniens* as a general doctrine, the exorbitant jurisdiction to be sanctioned by the mechanism of *forum non conveniens* in a specific manner could be the forum of the patrimony, of the domicile or of the nationality of the plaintiff (see for example Article 429 *c*, paragraph 15, of the Dutch Code of Civil Procedure in matters of family law, which applies to any matter which must be brought before the court by request, including among others all questions of family law).[3]

The tendency which emerged provisionally from the Special Commission's discussions would be indeed to adopt a double convention establishing a list of "good" bases for jurisdiction and forbidding the use of the "bad" bases for jurisdiction, the exorbitant grounds for jurisdiction (enumerated in the Brussels and Lugano Conventions (Article 3) as well as in the Protocol to the Hague Convention on Enforcement of Decisions (Article 4)). In such a hypothesis, the treaty mechanism is substituted entirely for the mechanism of *forum non conveniens* in order to eliminate the exorbitant bases for jurisdiction, the "improper *fora*".

In principle – and this is already a first element for reflection and discussion – it will be necessary to examine, even in the hypothesis of a "complete" double convention in the style of Brussels/Lugano on the worldwide scale, whether a total exclusion of the mechanism of *forum non conveniens* is justified, as is the case on the regional (European) scale.[4] That will depend, among others, on the degree of precision with which the "good" bases for assuming jurisdiction are defined and on the character (*quasi* automatic or not) of the system of recognition and enforcement adopted in the future convention.

Obviously, in any case, there could only be question of a mechanism (1) based on the idea of co-ordination among courts (a denial of justice must in particular be avoided at any price) and (2) established according to objective criteria to be defined by the convention, otherwise the reasoning of *forum non conveniens* would bring a risk of reintroducing the arbitrary element which was precisely what one wanted to avoid (see below under VI).

The possibility cannot, however, be excluded of having a convention which goes less far than a double (complete) convention and which, without eliminating exorbitant bases for jurisdiction at the litigation stage, sanctions their use at the level of recognition and enforcement of judgments rendered against a defendant who is integrated into one of the Contracting States. The mechanism is well-known since it is illustrated by the Protocol to the Hague Convention on the Enforcement of Decisions and Article 59 of the Brussels and Lugano Conventions.[5]

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[2] Fawcett, *op. cit.*, p. 10.

[3] According to this provision, "the court does not have jurisdiction if the request does not have a sufficient connection with the legal system of the Netherlands" (translation by the Permanent Bureau).

[4] *Cf.* P. Lagarde, *Le principe de proximité dans le droit international privé contemporain, Cours général de droit international privé, Recueil des Cours* (1986), I, p. 151: "This rigidity [of the rules for judicial jurisdiction and for *lis pendens* in the Brussels Convention] may be understood in the federalistic perspective of the Convention. When all is said and done, the courts of the Member States belong to the same legal order and, to this extent, the rules of the Convention may be assimilated to the rules for domestic jurisdiction. And since the Member States, and in any case the six founding States, have a rigid system of jurisdiction, it is quite natural that they have welcomed the rigid system of the Convention in their mutual relations." (Translation by the Permanent Bureau.)

[5] Article 59, first paragraph, reads as follows:
"*This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3.*"

l'étranger ou que le for local n'est pas approprié»[2] a été largement développée ensuite dans les systèmes de *common law* et aux Etats-Unis où la signification à personne a pu prendre des proportions particulièrement exorbitantes, par exemple lorsqu'elle est effectuée au cours d'un voyage aérien au-dessus d'un certain territoire.

Dans d'autres systèmes, qui ne connaissent pas la doctrine du *forum non conveniens* en tant que théorie générale, la compétence exorbitante à sanctionner par le mécanisme du *forum non conveniens* de manière spécifique pourrait être le for du patrimoine, du domicile ou de la nationalité du demandeur (voir par exemple l'article 429 *c*, paragraphe 15, du Code de procédure civile néerlandais en matière de droit de famille qui s'applique à toute matière qui doit être introduite devant les tribunaux par requête, entre autres toutes les questions de droit de famille[3]).

La tendance qui s'est dégagée provisoirement des discussions de la Commission spéciale serait en effet d'adopter une convention double établissant une liste des «bons» chefs de compétence et interdisant l'emploi des «mauvais» chefs de compétence, les compétences exorbitantes (énumérées tant dans les Conventions de Bruxelles et de Lugano (art.3) que dans le Protocole à la Convention de La Haye sur l'exécution des jugements (art.4)). Dans une telle hypothèse le mécanisme conventionnel se substitue, en principe, entièrement au mécanisme du *forum non conveniens* pour éliminer les compétences exorbitantes, le *improper fora*.

En principe, car – et c'est là déjà un premier élément de réflexion et de discussions – il faudra examiner, même dans l'hypothèse d'une convention double «complète» style Bruxelles/Lugano à l'échelle mondiale, si une exclusion totale du mécanisme du *forum non conveniens* se justifie, comme cela est le cas à l'échelle régionale (européenne)[4]. Cela dépendra, entre autres, du degré de précision dont on définira les «bons» chefs de compétence et du caractère (quasi automatique ou non) du système de reconnaissance et d'exécution admis dans la future convention.

Evidemment, en toute hypothèse, il ne saurait être question que d'un mécanisme 1) basé sur l'idée de coordination entre juges (il faudra notamment éviter à tout prix le déni de justice) et 2) établi selon des critères objectifs à définir par la Convention, sinon le raisonnement de *forum non conveniens* risquerait de réintroduire l'élément arbitraire que l'on veut justement éviter (voir ci-après sous VI).

On ne peut toutefois exclure la possibilité d'une convention qui aille moins loin qu'une convention double (complète) et qui, sans éliminer les compétences exorbitantes au stade du litige, sanctionne leur emploi au niveau de la reconnaissance et de l'exécution des jugements rendus contre un défendeur intégré dans l'un des Etats contractants. Le mécanisme est bien connu car illustré par le Protocole à la Convention de La Haye sur l'exécution des jugements et l'article 59 des Conventions de Bruxelles et de Lugano[5].

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[2] Fawcett, *op.cit.*, p. 10 (traduction du Bureau Permanent).

[3] Selon cette disposition, «le tribunal n'est pas compétent si la requête ne présente pas un lien suffisant avec le système juridique des Pays-Bas» (traduction du Bureau Permanent).

[4] *Cf.* P. Lagarde, Le principe de proximité dans le droit international privé contemporain, Cours général de droit international privé, *Recueil des Cours* (1986), I, p.151: «*Cette rigidité* [sc. des règles de compétence judiciaire et de litispendance de la Convention de Bruxelles] *peut se comprendre dans la perspective fédérative de la Convention. A la limite, les tribunaux des Etats membres appartiennent tous à un même ordre juridique et, dans cette mesure, les règles de la Convention peuvent être assimilées à des règles de compétence interne. Et puisque les Etats membres, en tout cas les six Etats fondateurs, ont un système de compétence rigide, c'est tout naturellement qu'ils ont accueilli le système rigide de la Convention dans leurs rapports mutuels*».

[5] L'article 59, paragraphe premier, se lit comme suit:
«*La présente convention ne fait pas obstacle à ce qu'un Etat contractant s'engage envers un Etat tiers, aux termes d'une convention sur la reconnaissance et l'exécution des jugements, à ne pas reconnaitre une décision rendue, notamment dans un autre Etat contractant, contre un défendeur qui avait son domicile ou sa résidence habituelle sur le territoire de l'Etat tiers lorsque, dans un cas prévu par l'article 4, la décision n'a pu être fondée que sur une compétence visée à l'article 3 deuxième alinéa*».

In such a hypothesis, certainly, the systems which have the *forum non conveniens* mechanism might continue to use it in order to fight at the level of direct assumption of jurisdiction against exorbitant grounds for jurisdiction and no one could complain of this since the utilization of such grounds for jurisdiction would be sanctioned by the treaty at the level of enforcement!

Finally, it is known that in the mechanism of the Brussels and Lugano Conventions the exorbitant bases for jurisdiction accepted in the general law of the Contracting States may be utilized against persons domiciled outside of the Contracting States. If such a mechanism were taken up in a future Convention, the utilization of *forum non conveniens* to fight against the exorbitant bases for jurisdiction adopted in a Contracting State would have no interest for the other Contracting States since the defendant would have no connection with them.

II *Forum non conveniens* and *lis pendens*[6]

The legal systems which have the doctrine of *forum non conveniens* often utilize it in order to permit a court before which an action has been brought to decline the exercise of jurisdiction or to stay the proceedings if the court of another State is seised of the same action. The staying of the proceedings may be based on the fact that the foreign judge appears to be better placed to exercise jurisdiction over the case, or simply to avoid the entry of contradictory or incompatible judgments. In other legal systems the exception based on *lis pendens* is an autonomous *procedural institution* which has its own rules: for example, this exception will work in favour of the first court whose jurisdiction is invoked, the foreign court will have to be competent according to certain rules adopted by the forum which must rule on the exception, the judgment to be handed down by the foreign judge must be enforceable in the country of the court which is ruling on the exception, etc.

If the perspective of a double convention is considered, there should be no doubt that a rule on the *lis pendens* exception would have to be adopted in order to avoid pointless proceedings, abuse of process and conflicts of judgments at the level of enforcement. This rule will have to be more or less rigid, of such a type that, depending on the case, it will eliminate the mechanism of *forum non conveniens* (rigid rule of Article 21 of the Brussels/Lugano Conventions)[7] or will superimpose itself on this mechanism (if the rule is flexible). A pure and simple reproduction of the rigid rule of Article 21 in a convention of worldwide scope would bring a risk of posing certain problems. Can one on the worldwide scale, as do the Brussels and Lugano Conventions, leave it to the national systems to define the concept of "the court first seised"? Is it reasonable, on the worldwide scale, to attribute in all circumstances, and without any reservations an automatic prize to the party who acts the most quickly – and this may be a question of several days or weeks only – to be sure of being the first to bring proceedings before a court? Should the parties be thus encouraged to avoid seeking a friendly settlement of the issues?[8]

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[6] See, in particular, Fawcett, *op. cit.*, pp. 27-46 and the document submitted by the United Kingdom (under B) (Annex D).

[7] According to Article 21: "*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." (Text as amended by the Convention of 1989 on the accession of Spain and Portugal.)

[8] *Cf.* the critique in Fawcett, *op. cit.*, pp. 24-25.

Dans une telle hypothèse, certes, les systèmes qui connaissent le mécanisme du *forum non conveniens* pourraient continuer à l'utiliser pour lutter au niveau de la compétence directe contre les compétences exorbitantes et nul ne pourrait s'en plaindre puisque l'utilisation de telles compétences serait sanctionnée par le traité au niveau de l'exécution!

Enfin, on sait que dans le mécanisme des Conventions de Bruxelles et de Lugano les compétences exorbitantes admises par le droit commun des Etats contractants peuvent être utilisées à l'encontre de personnes domiciliées hors des Etats contractants. Si un tel mécanisme était repris dans la convention en projet, l'utilisation du *forum non conveniens* pour lutter contre les compétences exorbitantes admises dans un Etat contractant n'intéresserait en rien les autres Etats contractants puisque le défendeur n'a aucun lien avec eux.

II *Forum non conveniens* et litispendance[6]

Les systèmes juridiques qui connaissent la doctrine du *forum non conveniens* l'utilisent souvent pour permettre à un juge saisi d'une action de se dessaisir ou de surseoir à statuer si le juge d'un autre Etat est également saisi de la même action. Le sursis à statuer peut être fondé sur le fait que le juge étranger paraît mieux placé pour être chargé de l'affaire ou encore pour éviter un conflit de jugement contradictoire ou incompatible. Dans d'autres systèmes juridiques l'exception de litispendance est une *institution de procédure* autonome qui a ses règles propres: par exemple l'exception jouera au profit du tribunal premier saisi, le tribunal étranger devrait être compétent selon certaines normes admises par le for saisi de l'exception, le jugement à rendre par le juge étranger doit être susceptible d'exécution dans le pays du for saisi de l'exception, etc.

Si l'on se place dans la perspective d'une convention double, il ne fait pas de doute que l'on devra adopter une règle sur l'exception de litispendance pour éviter les procédures inutiles, les abus de procédure et les conflits de jugements au niveau de l'exécution. Cette règle pourra être plus ou moins rigide, de sorte que selon le cas elle éliminera le mécanisme du *forum non conveniens* (règle rigide de l'article 21 des Conventions de Bruxelles/Lugano)[7] ou se superposera à celui-ci si la règle est flexible. La reprise pure et simple de la règle rigide de l'article 21 dans une convention à vocation mondiale risque de poser certains problèmes. Est-ce que l'on peut, à l'échelle mondiale, comme le font les Conventions de Bruxelles/Lugano, laisser aux systèmes nationaux le soin de définir la notion «du tribunal premier saisi»? Est-il raisonnable, à l'échelle mondiale, d'attribuer dans toutes circonstances, une prime automatique et sans réserve à la partie qui agit le plus vite – et cela peut être une question de quelques jours ou semaines seulement – et s'assurer en premier de la compétence du juge?[8] Faut-il ainsi encourager les parties à éviter à chercher des solutions à l'amiable?

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[6] Voir notamment Fawcett, *op.cit.*, p.27-46 et le document soumis par le Royaume-Uni (sous B) (Annexe D).

[7] Selon l'article 21: «*Lorsque les demandes ayant le même objet et la même cause sont formées entre les mêmes parties devant des juridictions d'Etats contractants différents, la juridiction saisie en second lieu sursoit d'office à statuer jusqu'à ce que la compétence du tribunal premier saisi soit établie.*
Lorsque la compétence du tribunal premier saisi est établie, le tribunal saisi en second lieu se dessaisit en faveur de celui-ci». (Texte tel que modifié par la Convention d'adhésion de l'Espagne et du Portugal de 1989).

[8] *Cf.* la critique dans Fawcett, *op.cit.*, p. 24-25.

The example of a flexible rule may, moreover, be found in the *exception for related actions* appearing in Article 22 of the Brussels/Lugano Convention.[9] Indeed, in cases of related actions where certain conditions are fulfilled, the court is free to decline jurisdiction or not to decline jurisdiction in favour of the foreign court before which the action was first brought or before which the principal action was brought. The criteria utilized in order to bring *forum non conveniens* into play may also be used to assess the desirability of applying the exception for related causes if the example of the Brussels and Lugano Conventions is followed. It should be recalled that, in the Brussels and Lugano systems, the fact that two actions are related constitutes only an exception to the jurisdiction of the court which is the second to be seised; the fact of being connected to a pending action is not, in itself, a basis for assuming jurisdiction.[10] It is worth thinking about the possibility of going further in a worldwide convention, and accepting direct jurisdiction based on such a connection in order to avoid dispersion of the *fora* with all the attendant risks of irreconcilable decisions.

III Choice of court clauses and *forum non conveniens*

In the international order, a choice of court clause tends to have a double effect. On one hand it serves as a basis for or simply reinforces the jurisdiction of the "chosen court" and, on the other hand, it creates lack of jurisdiction on the part of the "excluded" courts, those which might have had jurisdiction if there had not been such a clause. This double effect of "prorogation" and "derogation" is subject to various rules in comparative law. In the countries which accept the theory of *forum non conveniens*, it is for the court, whether it be chosen or excluded, to decide whether it accepts this prorogation or this derogation. In other legal systems the inclusionary effect may be accepted but not the exclusionary effect, or conversely, or yet these effects are accepted only for certain matters and not for others, for example if the question being litigated is outside of the scope of party autonomy, or the matter at issue involves protecting certain categories of persons, consumers, workers, etc.

In the perspective of a convention, there is no doubt that a rule should be adopted on choice of court clauses. If the rule is as rigid as that of Article 17, which provides for the *exclusive jurisdiction* of the court which is chosen, the doctrine of *forum non conveniens* will no longer have any role. (The case, important in practice, of actions including a third person in the choice of court clause may require special examination.) In case of a more flexible rule, the States which accept *forum non conveniens* will not be subject to reproach for utilizing this mechanism in order to ensure this flexibility.[11]

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[9] This article provides: "*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.*
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.
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."

[10] *Cf.* H. Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano* (2nd ed.), No 297.

[11] Indeed, in the common law systems the courts have discretion to declare that they are not convenient *fora* but only in exceptional circumstances, for example, if the defendant proves that the operation of the choice of court clause would be unjust. See Fawcett, *op. cit.*, pp. 57-58.

L'exemple d'une règle flexible peut d'ailleurs être trouvé dans *l'exception de connexité* figurant dans l'article 22 de la Convention de Bruxelles/Lugano[9]. En effet, en cas d'actions connexes lorsque certaines conditions sont réunies, le juge est libre de se dessaisir ou de ne pas se dessaisir au profit du juge étranger premier saisi ou saisi de l'action principale. Les critères utilisés pour faire jouer le *forum non conveniens* pourront également être utilisés pour apprécier l'opportunité d'une exception de connexité si l'on suit l'exemple des Conventions de Bruxelles et de Lugano. Il convient de rappeler que, dans les systèmes Bruxelles/Lugano, le fait que deux actions sont connexes ne constitue qu'une exception à la compétence du juge saisi en second lieu; la connexité n'est pas, en soi, un chef attributif de compétence[10]. On peut s'interroger sur la possibilité d'aller, dans une convention mondiale, plus loin et admettre une compétence directe fondée sur la connexité pour éviter une dispersion des fors avec tous les risques de décisions inconciliables.

III Clauses d'élection de for et *forum non conveniens*

Dans l'ordre international une clause d'élection de for tend à avoir un double effet. D'une part, fonder ou simplement conforter la compétence du «juge élu» et d'autre part créer l'incompétence des juges «exclus» c'est-à-dire ceux qui auraient pu être compétents s'il n'y avait pas eu de clause. Cet effet double de prorogation et de dérogation est soumis à des règles diverses en droit comparé. Dans les pays qui admettent la théorie du *forum non conveniens* il appartiendra au juge, qu'il soit élu ou exclu, de décider s'il accepte cette prorogation ou cette dérogation. Dans d'autres systèmes juridiques l'effet prorogatoire peut être admis mais non l'effet dérogatoire ou inversement ou encore ces effets ne sont admis que pour certaines matières et non d'autres, par exemple si la question en litige est soustraite de l'autonomie de la volonté ou qu'il s'agit de protéger certaines catégories de personnes, consommateurs, travailleurs, etc.

Dans la perspective d'une convention il ne fait pas de doute qu'une règle devrait être adoptée sur l'accord d'élection de for. Si la règle est aussi rigide que celle de l'article 17 qui fonde la *compétence exclusive* du for élu, la doctrine du *forum non conveniens* n'aura plus à jouer. (Le cas, important dans la pratique, des actions incluant un tiers à la clause d'élection de for peut nécessiter un examen spécial) En cas de règle plus flexible on ne pourra pas reprocher aux Etats qui admettent le *forum non conveniens* d'utiliser ce mécanisme pour assurer cette flexibilité[11].

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[9] Cet article dispose: «*Lorsque des demandes connexes sont formées devant des juridictions d'Etats contractants différents et sont pendantes au premier degré, la juridiction saisie en second lieu peut surseoir à statuer.*
Cette juridiction peut également se dessaisir, à la demande de l'une des parties, à condition que sa loi permette la jonction d'affaires connexes et que le tribunal premier saisi soit compétent pour connaître des deux demandes.
Sont connexes, au sens du présent article, les demandes liées entre elles par un rapport si étroit qu'il y a intérêt à les instruire et à juger en même temps afin d'éviter des solutions qui pourraient être inconciliables si les causes étaient jugées séparément.»

[10] *Cf.* H. Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano* (2ème éd.), No 297.

[11] En effet, dans les systèmes de *common law* les tribunaux ont *discretion* pour se déclarer *non conveniens*, mais uniquement dans des circonstances exceptionnelles, par exemple si le défendeur prouve que la mise en jeu de la clause d'élection de for serait injuste. Voir Fawcett, *op.cit.*, p. 57-58.

IV *Forum non conveniens* and reflex effects of exclusive bases for jurisdiction, *lis pendens* exceptions or choice of court clauses operating in favour of the courts of non-Contracting States

Where a double convention, such as the Brussels and Lugano Conventions, establishes a list of bases for assuming jurisdiction which are considered to be reasonable and are offered at the choice of the plaintiff, the plaintiff, upon making a choice, ought to be confident that he can pursue the action in respect of which he will undoubtedly have already invested considerable expenses. It is for the plaintiff to make the choice which he considers to be the most appropriate to his case. In principle, the court should not substitute itself for the plaintiff.

There are cases, however, in which, although a court apparently has jurisdiction under the Convention, it should be permitted to decline to exercise this jurisdiction where the litigation has substantial connections with a non-Contracting State.

A person is domiciled in Germany or in France – both States being Parties to the Brussels Convention. If a lawsuit bears on the ownership of immovables situated in Italy or on the validity of a patent or trademark deposited in Spain, the French or German court of the domicile of the defendant, if it were to receive a petition, should decline the exercise of jurisdiction, for Article 16 of the Brussels and Lugano Conventions gives *exclusive jurisdiction* to the courts of the place where the immovables are situated or where the register of intellectual property is kept.[12]

This is so because the Contracting States thought that the court where the immovables are situated or where the register is kept, was in a better position to decide on a problem of real or intellectual property, since the registers of real property ownership or of the issuance of patents and trademarks can only be modified by an order emanating from a local public or judicial authority. If the defendant is at all times domiciled in France or in Germany and the lawsuit bears on a parcel of real property situated in India or on a patent registered in China – these States not being bound by the Brussels Convention – it can be acceptable for the French or German court to decline to exercise its jurisdiction, for it would be justice badly placed, as in the preceding example, to decide on the ownership of the immovable or the validity of the patent. In order to reach this result, certain countries may utilize the technique of *forum non conveniens*, while others may invoke the reflex effect of the exclusive bases for jurisdiction in favour of the courts of the non-Contracting States.

What has just been said about exclusive jurisdiction is equally true for the case where the exception of *lis pendens* is invoked on the grounds that the court of a non-Contracting State is also exercising jurisdiction in the case. Some will utilize *forum non conveniens* in order to make the exception operate, others will invoke the reflex effect of the initiation of procedures as recognized by the Convention. It will be noted that the Brussels and Lugano Conventions do not speak to the problems here raised, which is regretted by the commentators because the situation remains ambiguous. It would be well that these problems be raised during the Special Commission meeting and it might even be asked whether a new convention should not adopt an express provision.

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[12] Article 16 provides:

"*The following courts shall have exclusive jurisdiction, regardless of domicile:*

1. (a) in proceedings which have as their object rights in rem *in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;*

...

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place;

...".

IV *Forum non conveniens* et effets réflexes des compétences exclusives, des exceptions de litispendance ou des accords d'élection de for jouant en faveur des tribunaux d'Etats non contractants

Lorsqu'une convention double, comme les Conventions de Bruxelles ou de Lugano, établissent une liste de compétences considérées comme raisonnables offertes au choix du demandeur, celui-ci lorsqu'il a opéré un choix doit être assuré de pouvoir poursuivre l'action à l'occasion de laquelle il aura sans doute déjà investi des frais assez considérables. Il appartient au demandeur d'effectuer le choix qu'il considère comme le plus approprié à son cas. En principe le juge n'a pas à se substituer à lui.

Il y a des cas toutefois où bien qu'un juge ait apparemment compétence en vertu de la Convention, on doit lui permettre de décliner cette compétence lorsque le litige a des liens étroits substantiels avec un Etat non contractant.

Une personne est domiciliée en Allemagne ou en France – les deux Etats étant parties à la Convention de Bruxelles. Si un litige porte sur la propriété d'un immeuble situé en Italie ou sur la validité d'un brevet d'invention ou d'une marque déposée en Espagne, le juge français ou allemand du domicile du défendeur, s'il était sollicité, devrait décliner sa compétence car l'article 16 de la Convention de Bruxelles et de Lugano donne *compétence exclusive* aux tribunaux du lieu de situation de l'immeuble ou de tenue du registre de la propriété intellectuelle[12].

Cela parce que les Etats contractants ont estimé que le juge de la situation de l'immeuble ou du registre était mieux préparé à juger d'un problème de propriété réelle ou intellectuelle, la tenue des registres fonciers ou cadastraux ou des registres de brevets ou de marques ne pouvant être modifiés que par une injonction émanant d'une autorité publique ou judiciaire locale. Si le défendeur est toujours domicilié en France ou en Allemagne et que le litige porte sur un immeuble situé en Inde ou sur un brevet enregistré en Chine – ces Etats n'étant pas liés par la Convention de Bruxelles – on pourrait admettre que le juge français ou allemand puisse décliner sa compétence, car il serait tout aussi mal placé que dans l'exemple précédent pour juger de la propriété de l'immeuble ou de la validité du brevet. Pour parvenir à cette fin certains pays pourront utiliser la technique du *forum non conveniens* alors que d'autres pourront invoquer l'effet réflexe des compétences exclusives au profit des tribunaux des Etats non contractants.

Ce qui vient d'être dit de la compétence exclusive vaut tout aussi bien pour le cas où une exception de litispendance est invoquée lorsque le tribunal d'un Etat non contractant est également saisi du litige. Les uns utiliseront le *forum non conveniens* pour faire jouer l'exception, d'autres pourront invoquer l'effet réflexe d'une institution de procédures reconnue par la Convention. On notera que les Conventions de Bruxelles et de Lugano ne se prononcent pas sur les problèmes évoqués, ce qui est regretté en doctrine, car la situation reste équivoque. Il serait bon que ces problèmes soient donc évoqués lors de la Commission spéciale et on pourrait même se demander si une nouvelle convention ne devrait pas adopter une disposition expresse.

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[12] L'article 16 dispose:

«Sont seuls compétents, sans considération de domicile:

1) a) en matière de droits réels immobiliers et de baux d'immeubles, les tribunaux de l'Etat contractant où l'immeuble est situé;

....

4) en matière d'inscription ou de validité des brevets, marques, dessins et modèles, et autres droits analogues donnant lieu à dépôt ou à un enregistrement, les juridictions de l'Etat contractant sur le territoire duquel le dépôt ou l'enregistrement a été demandé, a été effectué ou est réputé avoir été effectué aux termes d'une convention internationale;

....».

The Brussels and Lugano Conventions also did not speak to the treatment of choice of court clauses in favour of the courts of non-Contracting States. Such an agreement is not by itself void. It will have the effect of derogation or prorogation accepted by the general law of the Contracting States, and on this basis the mechanism of *forum non conveniens* may naturally be utilized.

What has just been said with regard to choice of court clauses in favour of the court of a non-Contracting State, is essentially true also for arbitration clauses which exclude the jurisdiction of the courts of all States.[13] The States bound by the New York Convention must apply Article II (3) of this Convention which, in principle, obligates the courts to decline the exercise of jurisdiction in favour of arbitration. For the States which are not Parties to the New York Convention it is their general law – thus in certain cases the mechanism of *forum non conveniens* – which will establish the extent to which the courts may or must decline to exercise jurisdiction, for it is to be supposed that the convention which will be drawn up, as is the case with the Brussels and Lugano Conventions, will eliminate from its scope of application the subject of arbitration. (See *Conclusions of the Special Commission of June 1994*, No 7.)

V Limits of the mechanism of *forum non conveniens* within the framework of a treaty

Up to the present we have seen that the provisions of the convention to be drawn up either could eliminate, by rendering it useless, the mechanism of *forum non conveniens* (elimination of the exorbitant bases for jurisdiction, strict exception for *lis pendens*, respect of choice of court clauses) or could easily be accommodated to this mechanism (freedom to decide on application of the exception for related causes of action, respect for exclusive jurisdiction or a *lis pendens* exception in favour of the court of a non-Contracting State, etc.).

There are utilizations of the mechanism of *forum non conveniens* which might seem to be contrary to the spirit of an international convention. It has been pointed out in the legal writings that, in certain cases, *forum non conveniens* had been used to prevent foreigners from being able to have free access to national courts and there cause defendants residing or established in the country of the forum which is being petitioned to be condemned to pay damages, while there was no hesitation in opening the national jurisdictions by means of the mechanisms of *forum conveniens* or *long-arm statutes* to the complaints presented against foreigners by plaintiffs residing or established in the country of the forum. Within a treaty framework, it may be thought that such discrimination is difficult to accept. At the moment when the convention offers a basis for jurisdiction to the plaintiff, the plaintiff should be able to utilize it whatever might be its domicile, nationality or residence.

Moreover, one may think that certain arguments utilized on the level of taking of evidence abroad in order to justify declining the exercise of jurisdiction under the doctrine of *forum non conveniens* appear hardly admissible in a treaty framework. It was thought, for example, that the court of the defendant's domicile which receives a complaint from a foreigner in respect of facts which took place abroad, might decline its jurisdiction for the reason that the foreign State had not ratified the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* and that it would thus be difficult to gather the proof in question, which would make it better to have the litigation proceed abroad. The pretext, quite simply drawn from non-ratification of a convention which facilitates the taking of evidence, is difficult to accept. In any case, the problem of taking of evidence abroad has always existed well before the Hague Conventions were drawn up, and it seems excessive to suggest that, without the 1970 Convention, the problem of proof would be insoluble.

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[13] See Fawcett, *op. cit.*, pp. 58-62.

Les Conventions de Bruxelles et de Lugano ne se prononcent pas non plus sur le sort d'un accord d'élection de for en faveur de tribunaux d'Etats non contractants. Un tel accord n'est pas, par-là même, nul. Il aura l'effet de dérogation ou de prorogation accepté par le droit commun des Etats contractants et à ce titre le mécanisme du *forum non conveniens* pourra être naturellement utilisé.

Ce qui vient d'être dit à propos de l'accord d'élection de for en faveur du tribunal d'un Etat non contractant vaut pour l'essentiel en ce qui concerne l'effet d'une clause d'arbitrage qui exclut par elle-même la compétence de tous tribunaux étatiques[13]. Les Etats liés par la Convention de New York devront appliquer l'article II (3) de cette Convention qui oblige en principe les tribunaux à décliner leur compétence au profit de l'arbitrage. Pour les Etats qui ne seraient pas parties à la Convention de New York c'est leur droit commun – donc dans certains cas le mécanisme du *forum non conveniens* – qui établira dans quelle mesure les tribunaux peuvent ou doivent décliner leur compétence, car l'on suppose que la convention envisagée, tout comme les Conventions de Bruxelles et de Lugano, éliminera de son champ d'application la matière de l'arbitrage. (Voir *Conclusions de la Commission spéciale de juin 1994*, No 7)

V Limites du mécanisme du *forum non conveniens* dans le cadre conventionnel

Jusqu'à présent on a vu que les dispositions de la convention envisagée pouvaient soit éliminer, en le rendant inutile, le mécanisme du *forum non conveniens* (élimination des compétences exorbitantes, exception stricte de litispendance, respect des accords d'élection de for), soit pouvaient s'accommoder aisément du mécanisme (liberté d'appréciation de l'exception de connexité, respect d'une compétence exclusive ou d'une exception de litispendance en faveur d'un tribunal d'un Etat non contractant, etc.).

Il est des utilisations du mécanisme du *forum non conveniens* qui pourront sembler contraires à l'esprit d'une convention internationale. On a relevé en doctrine que dans certains cas le *forum non conveniens* avait été utilisé pour empêcher que des étrangers ne puissent saisir aisément les tribunaux nationaux et y faire condamner des défendeurs résidant ou établis dans le pays du for sollicité, alors qu'on n'hésitait pas à ouvrir les juridictions nationales, au moyen des mécanismes du *forum conveniens* ou de *long arm statute* aux demandes présentées contre des étrangers par des demandeurs résidant ou établis dans le pays du for. Dans un cadre conventionnel on peut penser qu'une telle discrimination est très difficilement admissible. Du moment que la convention offre un chef de compétence au demandeur, celui-ci doit pouvoir l'utiliser quels que soient son domicile, sa nationalité, sa résidence.

De même on peut penser que certains arguments utilisés sur le plan de l'obtention des preuves à l'étranger pour justifier un déclinatoire de compétences fondé sur le *forum non conveniens* paraissent peu admissibles dans un cadre conventionnel. Il a été jugé, par exemple, que le tribunal du domicile du défendeur sollicité par un étranger, à propos de faits qui se sont passés à l'étranger, pouvait décliner sa compétence au motif que l'Etat étranger n'avait pas ratifié la *Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale* et qu'il serait ainsi difficile de recueillir lesdites preuves et qu'il valait donc mieux faire le procès à l'étranger. Le prétexte tiré, tout simplement, d'une non ratification d'une convention facilitant l'obtention des preuves est difficilement admissible. De toute façon le problème de l'obtention des preuves à l'étranger a toujours existé bien avant l'élaboration des Conventions de La Haye et il semble excessif d'invoquer que, sans la Convention de 1970, les problèmes de preuves seraient insolubles.

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[13] Voir Fawcett, *op.cit.*, p. 58-62.

The bases for jurisdiction offered by a double international convention ought to be considered as having sufficiently reasonable links with the litigation so that the issues can be joined. It is possible that in certain circumstances the establishment of proof will be particularly difficult, and this is a risk to be taken by the plaintiff who must produce the proof. If the plaintiff does not succeed in establishing the facts, he will be non-suited. The judge exercising jurisdiction does not, in principle, have to substitute his will for that of the plaintiff in order to protect the latter in some way in spite of himself.

It seems that one may conclude that, outside of the cases previously studied in which declining of jurisdiction may be accepted either by the mechanism of *forum non conveniens* or the direct or reflex effect of the initiation of legal proceedings, a court of a Contracting State which is considered to have jurisdiction by the convention, except in very exceptional cases to be defined, may not decline to exercise his jurisdiction under the pretext that the courts of another Contracting State would be better placed to decide on the issues in the lawsuit.

VI Criteria for the possible application of the mechanism of *forum non conveniens* in certain exceptional cases

In this respect it is interesting to note that in his important course on "The principle of proximity in contemporaneous private international law"[14] Professor Lagarde, after having examined the practice of the courts of the English-speaking countries in applying the theory of *forum non conveniens*, proposed a "clause creating an exception to the rules of judicial jurisdiction" from which the non-treaty law of the States of the European continent may draw its inspiration. According to this clause "a tribunal which has jurisdiction might exceptionally declare itself not to have jurisdiction if it were established, on one hand, that this court was not very appropriate to handle the litigation because of its distance from the defendant and the difficulty for this court to gain access to evidence and the elements of the lawsuit and, on the other hand, that another court which is more appropriate and closer, offering the plaintiff equivalent guarantees as to its impartiality and as to procedural justice, might recognize itself as having jurisdiction if it were seised by the plaintiff. Finally, such a clause creating an exception would be however excluded where the court is one which is regularly chosen by the parties to the litigation".[15]

In order that such a clause may apply, it does not suffice therefore to weigh the advantages and disadvantages of the proceeding for each of the parties, but it will be necessary to refer to objective factors. This will eliminate the floating applications of the theory, as one finds them sometimes in the United States where the theory is sometimes utilized more as an element of assessment in the balancing of the interest of the parties than as a condition under which jurisdiction will be declined.[16] In addition, it will be noted that, according to the clause proposed, jurisdiction should be declined only if the existence of a foreign court which has jurisdiction is guaranteed. Thus the hypothesis is eliminated which is also found in the American case law of declining jurisdiction where this would lead to a denial of justice.

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[14] See footnote 4, *supra*.

[15] *Ibidem.*, p. 150 (translation by the Permanent Bureau).

[16] It is in particular the recent case law of the House of Lords (*Spiliada* case 1986) which "objectivized" the theory of *forum non conveniens*; see Fawcett, *op. cit.*, pp. 11-12; but see also the document submitted by Australia (Annex A).

Les chefs de compétence proposés par une convention internationale double doivent être considérés comme ayant des liens suffisamment raisonnables avec le litige pour que l'on puisse en débattre. Il est possible que dans certaines circonstances l'établissement des preuves soit particulièrement difficile, c'est là un risque à prendre par le demandeur qui a la charge de la preuve. S'il n'arrive pas à établir les faits il sera débouté. Le juge saisi n'a pas, en principe, à substituer sa volonté à celle du demandeur pour le protéger en quelque sorte malgré lui.

Il semble que l'on puisse conclure qu'hormis les cas étudiés précédemment où un déclinatoire de compétence peut être admis soit par le mécanisme du *forum non conveniens* ou l'effet direct ou réflexe d'institutions de procédures, le juge d'un Etat contractant considéré comme compétent par la convention ne peut pas, sauf cas très exceptionnel à définir, décliner sa compétence sous prétexte que les tribunaux d'un autre Etat contractant seraient mieux placés pour juger de l'affaire.

VI Critères pour l'application éventuelle du mécanisme du *forum non conveniens* dans certains cas exceptionnels

A cet égard il est intéressant de noter que, dans son Cours important sur «Le principe de proximité dans le droit international privé contemporain»[14] le Professeur Lagarde après avoir examiné la pratique des tribunaux anglo-saxons en appliquant la théorie du *forum non conveniens*, a proposé une «clause d'exception aux règles de compétence juridictionnelle» dont pourrait s'inspirer le droit (non conventionnel) des Etats du continent européen. Selon cette clause «*un tribunal compétent pourrait exceptionnellement se déclarer incompétent s'il était établi, d'une part, que ce tribunal était peu approprié pour connaître du litige en raison de l'éloignement du défendeur et de la difficulté pour ce tribunal d'accéder aux preuves et aux éléments du cas, d'autre part, qu'un autre tribunal plus approprié et plus rapproché, offrant au demandeur des garanties équivalentes quant à son impartialité et à la justice procédurale, saisi par le demandeur et se reconnaître compétent. Enfin, une telle clause d'exception serait cependant exclue lorsque le tribunal saisi serait un tribunal élu régulièrement par les parties au litige*»[15].

Pour que pareille clause puisse s'appliquer il ne suffit donc pas de peser les avantages et inconvénients de la procédure pour chacune des parties, mais il faudra se référer à des facteurs objectifs. Ceci éliminera les applications flottantes de la théorie, comme on les retrouve parfois notamment aux Etats-Unis où elle est parfois utilisée plus comme un élément d'appréciation dans la balance des intérêts des parties que comme une condition déclinatoire de compétence[16]. En outre, on notera que selon la clause proposée le dessaisissement devrait uniquement être prononcé si l'existence d'un autre tribunal étranger compétent est garantie. Ainsi est écartée l'hypothèse qu'on retrouve également dans la jurisprudence américaine d'un déclinatoire de compétence conduisant à un déni de justice.

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[14] Voir, *supra*, note 4.

[15] *Ibidem* p. 150.

[16] C'est notamment la jurisprudence récente du *House of Lords* (affaire *Spiliada* (1986) qui a "objectivé" la théorie du *forum non conveniens*, voir Fawcett, *op.cit.*, p. 11-12; mais voir aussi le document soumis par l'Australie (Annexe A).

It is important to emphasize that this clause creating an exception was proposed by the author for the *general law* of the States of the European continent, therefore to be used outside of the treaty frameworks such as those of the Brussels and Lugano Conventions. The closer that the convention which is to be drafted comes to the system of these Conventions, the less it will offer a place for such a clause. But if the idea of a mechanism such as that mentioned under item 32 of the Conclusions of June 1994 were to be retained, Professor Lagarde's proposal might be taken as a point of departure for a treaty formula. In this respect several more detailed questions would have to be taken up, for example:

– should there be taken into account among the objective factors justifying the application of the clause not only private interests (which ones?), but also considerations of public interest (costs of the proceedings for the public treasury, difficulty for the judge to apply a foreign law)?[17]

– should there be established, in the convention, and if so how, a procedure for determining whether the other court (1) is in fact more appropriate to handle the case, (2) offers equivalent guarantees to the plaintiff (to the parties), (3) confirms its own jurisdiction and, then, (4) has been in fact seised and has recognized that it has jurisdiction?[18]

– may the first court condition its dismissal on the defendant agreeing not to raise certain objections before the second court (*e.g.* jurisdiction)?

– should there be limits, in the convention, on the possibility to appeal from a decision on *forum non conveniens* in order to reduce the length and the costs of the proceedings?

VII Limits of the mechanism of *forum non conveniens* where the alternative forum is located in a non-Contracting State

But how about the case where the court of a Contracting State thinks that the courts of a *non-Contracting State* are the ones which are better placed to decide on the issues? The case was illustrated in particular in the United Kingdom, where the English jurisdiction at the statutory headquarters of an incorporated company declared that it had no jurisdiction for the reason that the courts of Argentina, where such company's real and administrative headquarters were situated, were better placed to decide on the litigation.[19] In the framework of a double convention of the Brussels/Lugano type, such a solution is even less acceptable than declining jurisdiction in favour of the courts of a Contracting State.

Indeed if, as in the particular case before the courts in England, the defendant has its domicile or its headquarters within the meaning of the Convention in a Contracting State, the exorbitant bases for jurisdiction known in the other Contracting States may not be utilized against this defendant. For this reason, if the company incorporated in England has property in the Netherlands, the plaintiff domiciled in the Netherlands cannot use the *forum actoris* or the *forum arresti* of the Netherlands in order to establish its claim and obtain payment from local property. It must normally go before the court of the domicile of the defendant or another court (place of enforcement of the obligation, place where the harmful event occurred, etc.). If it files its complaint with the court considered fundamentally as

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[17] See for a detailed discussion the documents submitted by the United Kingdom and the United States (Annexes D and C).

[18] See also the document submitted by Canada (Annex B).

[19] Re *Harrods (Buenos Aires) Ltd* [1991] 4 All ER 348; [1992] *Cf.* 72. The procedure for a preliminary judgment before the European Court of Justice was stopped following a settlement between the parties. (Case C-314/92 *Ladenimor SA* v. *Intercomfianz SA*.) See on the entirety of the question H. Gaudemet-Tallon, *Le* "forum non conveniens", *une menace pour la Convention de Bruxelles? (à propos de trois arrêts anglais récents)*, *Rev. crit. dr. internat. privé* 1991, p. 491.

Il importe de souligner que cette clause d'exception a été proposée par l'auteur pour le *droit commun* des Etats du continent européen, donc en dehors des cadres conventionnels tels que les Conventions de Bruxelles et de Lugano. Plus la convention en projet se rapprocherait du système de ces conventions, moins offrirait-elle de place à une telle clause. Mais si l'idée d'un mécanisme comme celui évoqué au point 32 des Conclusions de juin 1994 était retenue, la proposition de M. Lagarde pourrait être prise comme point de départ d'une formule conventionnelle. A cet égard plusieurs questions plus détaillées devraient être abordées, par exemple:

– convient-il de tenir compte parmi les facteurs objectifs justifiant l'application de la clause non seulement des intérêts privés (lesquels?), mais aussi des considérations d'intérêt public (coûts de la procédure pour le trésor public, difficulté pour le juge d'appliquer une loi étrangère)?[17]

– convient-il d'établir, dans la convention, et dans l'affirmative comment, une procédure pour déterminer si l'autre tribunal 1) est effectivement plus approprié pour prendre connaissance de l'affaire, 2) offre des garanties équivalentes au demandeur (aux parties), 3) se reconnaît compétent et, ensuite, 4) a été effectivement saisi et s'est reconnu compétent?[18]

– le tribunal saisi en premier lieu peut-il conditionner son dessaisissement en ce sens que le défendeur doive accepter de ne pas lever certains moyens de défense devant l'autre tribunal (*e.g.* l'incompétence de celui-ci?)

– convient-il de limiter, dans la convention, les possibilités de faire appel d'une décision sur *forum non conveniens* afin de réduire la longueur et les frais de la procédure?

VII Limites du mécanisme du *forum non conveniens* lorsque le for alternatif se trouve dans un Etat non contractant

Qu'en est-il lorsque le tribunal d'un Etat contractant estime que ce sont les tribunaux d'un *Etat non contractant* qui sont mieux placés pour juger de l'affaire? Le cas a été illustré notamment aux Royaume-Uni où l'on a vu la juridiction anglaise du siège statutaire d'une société se déclarer incompétent au motif que le tribunal argentin du siège réel et administratif de ladite société était mieux placé pour juger du litige[19]. Dans le cadre d'une convention double du type Bruxelles/Lugano une telle solution est encore moins admissible qu'un déclinatoire en faveur des tribunaux d'un Etat contractant.

En effet, si, comme dans le cas d'espèce jugé en Angleterre, le défendeur a bien son domicile ou son siège au sens de la Convention dans un Etat contractant, les compétences exorbitantes connues dans les autres Etats contractants ne peuvent être utilisées contre ce défendeur. C'est ainsi que si la société incorporée en Angleterre a des biens aux Pays-Bas, le demandeur domicilié aux Pays-Bas ne peut utiliser le *forum actoris* ou le *forum arresti* néerlandais pour faire valoir sa créance et se payer sur les biens locaux. Il doit normalement saisir le tribunal du domicile du défendeur ou un autre tribunal (lieu d'exécution de l'obligation, lieu du fait dommageable, etc.). S'il cite au tribunal, considéré comme fondamentalement compétent, du

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[17] Pour plus de détails voir les documents soumis par le Royaume-Uni et les Etats-Unis (Annexes D et C).

[18] Voir aussi le document soumis par le Canada (Annexe B).

[19] *Re Harrods (Buenos Aires) Ltd* [1991] 4 All ER 348; [1992] *Cf.* 72. La procédure de jugement préliminaire devant la Cour européenne de Justice a été arrêtée suite à un arrangement entre les parties. (affaire C-314/92 Ladenimor SA c. Intercomfianz SA). Voir sur l'ensemble de la question H. Gaudemet-Tallon, Le «*forum non conveniens*», une menace pour la Convention de Bruxelles? (à propos de trois arrêts anglais récents), *Rev.crit. dr.internat.privé* 1991, p. 491.

having jurisdiction of the domicile of the defendant and this court declines to exercise its jurisdiction, thinking that it is for the court of a third State to judge, the plaintiff obliged to initiate a lawsuit in a third State is not at all sure of being able to have this decision enforced in the place where the property to be seised is located. In the Dutch case, it is even *certain* that the Argentine judgment cannot be enforced in the Netherlands, since the Netherlands does not grant enforcement in the absence of a treaty. The property situated in the Netherlands may therefore become untouchable and the situation is blocked. In summary, if there is a basis for jurisdiction recognized by an international convention in favour of the court of a Contracting State, the plaintiff should not be deprived of the benefit of recognition by operation of law and the enforcement of the judgment in all the other Contracting States by being sent away to proceed in a non-Contracting State before a court whose judgment will certainly not have the same effect.

VIII Sanction of foreign forum shopping

It appears from the reports to the XIVth Congress of the International Academy of Comparative Law and from the General Report of J.J. Fawcett[20] that the States which have adopted the doctrine of *forum non conveniens* have also utilized this method to deal with the problem of abusive *forum shopping* abroad. In this hypothesis, what is involved is to persuade the court at the forum not to decline the exercise of its jurisdiction as in the preceding hypotheses, but rather to enjoin a party against instituting legal proceedings abroad, for the foreign court would be in the particular case considered as being inappropriate to decide the matters at issue. Thus, if an action has been instituted in a forum, this forum may wish to prohibit one of the parties from instituting the same action abroad in order to avoid a risk of concurrent litigation and conflicting decisions. The court of the forum seised with a principal action may wish to prohibit the parties from litigating abroad a related question in order to avoid any possible incompatibility of decisions or simply because it appears to it to be "convenient" that the accessory related cause of action be submitted to the court which will decide upon the principal action. In the countries which do not know the method of *forum non conveniens*, these excesses, if they exist, are sanctioned subsequently by the non-recognition of the foreign judgment. But the method of *forum non conveniens* is intended to intervene *a priori* at the very stage of the direct assumption of jurisdiction.

It seems difficult to envisage that such a method might be utilized within the framework of a double convention drawing its inspiration from the Brussels and Lugano Conventions. As has been said, in the spirit of the convention all of the bases for assuming jurisdiction offered to the plaintiff are considered as being good and as having reasonable connections with the litigation. The result is that it should normally be presumed that no abusive *forum shopping* may exist where the plaintiff makes a choice between the different options which are offered to it. Certainly, conflicting decisions ought to be avoided, but the problem will then be dealt with in the convention itself by an exception for *lis pendens* or for related actions. In short, it seems that the use of injunctions for the purpose of prohibiting a party from bringing an action before a court considered to have jurisdiction under the convention would be contrary to the spirit of an international treaty. This question was not discussed at the first Special Commission meeting and this problem undoubtedly deserves to be addressed and clarified during the coming discussions.

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[20] *Op. cit.*, pp. 62-67.

domicile du défendeur et que ce tribunal décline sa compétence, estimant que c'est à un tribunal d'un Etat tiers de juger, le demandeur obligé de faire un procès dans un Etat tiers n'est pas du tout sûr de pouvoir faire exécuter la décision au lieu où se trouvent les biens à saisir. Dans le cas d'espèce néerlandais, il est même *certain* que le jugement argentin ne pourra pas être exécuté aux Pays-Bas puisque l'on n'accorde pas l'exequatur en dehors de traité. Les biens situés aux Pays-Bas risquent donc de devenir intouchables et la situation est bloquée. En résumé, s'il existe un chef de compétence reconnu par une convention internationale au profit d'un tribunal d'un Etat contractant, on ne devrait pas pouvoir priver le demandeur du bénéfice de la reconnaissance de plein droit et de l'exécution du jugement dans tous les autres Etats contractants en le renvoyant à se pourvoir dans un Etat non contractant devant un tribunal dont le jugement n'aura certainement pas le même effet.

VIII Sanction du *forum shopping* à l'étranger

Il ressort des rapports au XIV[e] Congrès de l'Académie internationale de droit comparé et du Rapport général de J.J. Fawcett[20] que les Etats qui ont adopté la doctrine du *forum non conveniens* ont aussi utilisé cette méthode pour régler le problème de l'abus de *forum shopping* à l'étranger. Dans cette hypothèse il s'agit de persuader le tribunal du for, non pas de décliner sa compétence comme dans les hypothèses précédentes, mais d'enjoindre à une partie de ne pas intenter un procès à l'étranger car le tribunal étranger serait, dans le cas d'espèce, considéré comme inapproprié pour juger du litige. Ainsi, si une action a été intentée dans un for, ce for peut vouloir interdire à l'une des parties d'intenter la même action à l'étranger pour éviter un risque de litispendance et de conflit de décision. Le tribunal du for saisi d'une action principale peut vouloir interdire aux parties de débattre à l'étranger d'une question connexe pour éviter éventuellement une incompatibilité de décision ou tout simplement parce qu'il lui paraît «convénient» que l'action connexe accessoire soit soumise au tribunal qui juge de l'action principale. Dans les pays qui ne connaissent pas la méthode du *forum non conveniens* ces excès, s'ils existent, sont sanctionnés *a posteriori* par la non-reconnaissance du jugement étranger. Mais la méthode du *forum non conveniens* veut intervenir *a priori* au stade même de la compétence directe.

Il paraît difficile d'envisager qu'une telle méthode puisse être utilisée dans le cadre d'une convention double s'inspirant des Conventions de Bruxelles ou de Lugano. Ainsi qu'on l'a dit, dans l'esprit de la convention, tous les chefs de compétence offerts au demandeur sont considérés comme bons et ayant des liens raisonnables avec le litige. Il en résulte qu'on doit normalement présumer qu'il ne peut exister d'abus de *forum shopping* lorsque le demandeur fait un choix entre les différentes options qui lui sont offertes. Certes, il convient d'éviter les conflits de décisions mais le problème sera alors réglé dans la convention même par une exception de litispendance ou de connexité. Bref, il semble que l'usage d'injonctions tendant à interdire à une partie de saisir un tribunal considéré comme compétent par la convention serait contraire à l'esprit d'un traité international. La question n'a pas été discutée lors de la Commission spéciale et ce problème mérite sans doute d'être abordé et éclairci lors des prochains débats.

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[20] *Op.cit.* p. 62-67.

ANNEXES

ANNEXE A - Document soumis par l'Australie

ANNEXE B - Document soumis par le Canada

ANNEXE C - Document soumis par les Etats-Unis d'Amérique

ANNEXE D - Document soumis par le Royaume-Uni

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ANNEX A - Document submitted by Australia

ANNEX B - Document submitted by Canada

ANNEX C - Document submitted by the United States of America

ANNEX D - Document submitted by the United Kingdom

ANNEX A

AUSTRALIAN PRACTICE - NOTE FROM THE AUSTRALIAN DELEGATION

IN RELATION TO *FORUM NON CONVENIENS*

Domestic Practice

Domestic jurisdiction in Australia is rather complicated. It must be remembered that in Australia, as in other common law countries, jurisdiction depends on lawful service of the originating process upon the defendant, either personally within the jurisdiction or by statutory authority under rules of court modelled on the English RSC Order 11.

Jurisdiction of federal courts is Australia-wide. The jurisdiction of State courts is at common law confined to the territory of the State. However, under the *Service and Execution of Process Act* 1992 a writ issued out of any State court can be served upon a defendant anywhere within Australia or its external territories. Since there are no connections required with the State of issue, provision must be made for the declining or transferring of jurisdiction in cases where the plaintiff has issued process in an inappropriate forum.

For these purposes a dictinction must be drawn between process issued out of a Supreme Court and process issued out of an inferior court. In the former case provision is made for the transfer of proceedings under section 5 (2) of the *Jurisdiction of Courts (Cross-vesting) Acts* 1987, a co-operative federal-state scheme whereby State and federal superior courts can exercise one another's jurisdiction and transfer pending matters to each other. The provisions of section 5 (2) are rather complex and are set out and discussed in Nygh, *Conflict of Laws*, 6th ed. at 88 to 93. In the case of proceedings instituted in an inappropriate inferior court, provision is made in section 20 of the *Service and Execution of Process Act* 1992 for the staying of such an action on the ground that another court is the appropriate court to determine the matter in dispute. Section 20 (4) sets out a number of factors to be considered. They are found and discussed at pp. 45 and 46 of Nygh, *op.cit.*

It may be noted that the procedures have different consequences. In the case of a superior court action, the matter is transferred with the result that the action changes venue but need not be recommenced. In the case of an inferior court action, the cause is stayed permanently which for practical purposes means it is discontinued and the plaintiff must start again in the appropriate court. Although the jurisprudence is somewhat confusing, and at times conflicting, it may be fair to say that in general courts are reluctant to deny jurisdiction to a plaintiff if as a result that plaintiff would be deprived of a real advantage.

International Practice

There are no statutory provisions in relation to international litigation. The Australian practice in declining jurisdiction differs from that in the United States and England. The High Court of Australia rejected the Spiliada test of looking for the "more appropriate forum" in *Oceanic Sun Line Special Shipping Co. Inc. v. Fay* (1988) 165 CLR 197. Instead, it developed the "clearly inappropriate forum" test in *Voth v. Manildra Flour Mills Pty Ltd.* (1990) 171 CLR 538. Basically, that test requires the court only to satisfy itself that the forum chosen by the plaintiff is not "clearly inappropriate" *i.e.* imposes a burden on the defendant that is substantially out of proportion to any benefit to be gained by the plaintiff in that forum. The fact that the forum chosen by the plaintiff is not the "natural forum" *e.g.* because the cause of action arose elsewhere or the defendant resides elsewhere is not sufficient to decline jurisdiction. Nor is the fact that there is another forum which is more appropriate for the trial of the action. For further details and explanation, see Nygh, *op. cit.*, at 102-108. Although the High Court in *Voth v. Manildra Flour Mills Pty Ltd.* did decline jurisdiction by applying the above test, other courts applying the *Voth* principle have been extremely reluctant to decline jurisdiction.

PRATIQUE AUSTRALIENNE - COMMUNICATION DE LA DÉLÉGATION AUSTRALIENNE

A PROPOS DU *FORUM NON CONVENIENS*

Pratique intérieure

En Australie, la compétence judiciaire est quelque peu compliquée. On se souviendra qu'en Australie, comme dans d'autres pays de *common law*, la compétence judiciaire est subordonnée à la signification légale de la citation à comparaître au défendeur, soit personnellement dans le territoire de l'Etat du for, soit par autorité statutaire en vertu de règlements judiciaires modelés sur l'*Order 11* des *Rules of the Supreme Court* d'Angleterre.

La compétence judiciaire des cours fédérales s'applique à l'Australie dans son ensemble. La compétence judiciaire des cours d'un Etat fédéré est en *common law* limitée au territoire de cet Etat. Cependant, aux termes de la *Loi de 1992 sur la signification et l'exécution des actes de procédure,*[1] une citation à comparaître émanant d'une cour d'un Etat fédéré peut être signifiée à un défendeur n'importe où en Australie ou dans ses territoires extérieurs. Comme aucune connexité n'est requise avec l'Etat de la cour duquel la citation émane, des dispositions doivent être prises relativement au refus de juridiction ou au transfert de procédure au cas où le demandeur aurait choisi un forum inapproprié.

A ces fins, une distinction s'impose entre un acte de procédure émanant d'une Cour suprême et celui émanant d'une cour inférieure. Dans le premier cas, le transfert de procédure est prévu au paragraphe 5 (2) *des Lois de 1987 sur la compétence des cours (investissement réciproque),*[2] un concordat coopératif fédéral-Etat autorisant chacune des cours supérieures fédérales et des cours supérieures des Etats fédérés à exercer la compétence judiciaire de chacune des autres, et autorisant ces cours à se transférer des affaires en instance. Les dispositions du paragraphe 5 (2) sont quelque peu complexes et sont discutées dans Nygh, *Conflict of Laws*, 6ème éd., 88-93. Dans le cas d'une action intentée dans une cour inférieure inappropriée, le paragraphe 20 de la *Loi de 1992 sur la signification et l'exécution des actes de procédure*[3] prévoit la suspension d'une telle action sous le prétexte qu'une autre cour est la cour appropriée pour juger le litige. Le paragraphe 20 (4) cite un certain nombre de facteurs à considérer. Ils sont discutés aux pages 45 et 46 de Nygh, *op cit.*

Il est à noter que les procédures entraînent des conséquences différentes. Dans le cas d'une instance introduite dans une cour supérieure, l'affaire est transférée, par conséquent l'instance change de cour mais ne doit pas nécessairement recommencer. Dans le cas d'une instance introduite dans une cour inférieure, la cause est suspendue à titre définitif, ce qui signifie dans la pratique qu'elle est abandonnée et que le demandeur doit recommencer dans une cour appropriée. Bien que la jurisprudence prête quelque peu à confusion et soit parfois contradictoire, on peut affirmer qu'en général les cours sont peu disposées à refuser la juridiction à un demandeur si celui-ci était par conséquent privé d'un avantage réel.

Pratique internationale

Il n'existe pas de dispositions statutaires relatives au litige international. La pratique australienne en ce qui concerne le refus de juridiction diffère de celle des Etats-Unis et de l'Angleterre. Dans l'affaire *Oceanic Sun Line Special Shipping Co. Inc. c. Fay* (1988) 165 CLR 197, la Haute Cour d'Australie rejeta le test *Spiliada* qui consiste à chercher le «forum plus approprié». Par contre, elle développa le test «forum clairement inapproprié» dans l'affaire *Voth c. Manildra Flour Mills Pty Ltd.* (1990) 171 CLR 538. Fondamentalement, ce test exige seulement que la cour soit satisfaite que le forum choisi par le demandeur n'est pas «clairement inapproprié», autrement dit que ce choix de forum n'impose pas au défendeur un fardeau qui est substantiellement disproportionné à l'avantage que le demandeur sera susceptible d'obtenir dans ce forum. Le fait que le forum choisi par le demandeur n'est pas le «forum naturel» parce que la cause de l'action est survenue ailleurs, par exemple, ou que le défendeur réside ailleurs, ne suffit pas pour refuser la compétence judiciaire, ni le fait qu'il existe un autre forum plus approprié pour le jugement de l'action. Se référer à Nygh, *op. cit.*, 102-108 pour obtenir des détails et des explications complémentaires. Bien que la Haute Cour, dans l'affaire *Voth c. Manildra Flour Mills Pty Ltd.*, ait effectivement refusé la compétence judiciaire en appliquant le test susvisé, d'autres cours appliquant le principe de *Voth* ont été très peu disposées à refuser la compétence judiciaire.

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[1] *Service and Execution of Process Act* 1992.

[2] *Jurisdiction of Courts (Cross-vesting) Acts* 1987.

[3] *Service and Execution of Process Act* 1992.

ANNEX B

INFORMATION NOTE ON THE USE OF *FORUM NON CONVENIENS* IN CANADA

presented by the Canadian delegation

BACKGROUND

In Canada, the doctrine of *forum non conveniens* is now well recognized as part of the law, both in the common law provinces and in the civil law province of Québec.

The most recent leading authority in Anglo-Canadian common law is that of the Supreme Court of Canada in *Amchem Products Inc.* v. *B.C. (W.C.B.)*, [1993] 1 S.C.R. 897. In Québec, the rule was codified in Article 3135 of the new Civil Code that was promulgated on January 1, 1994.

In both legal systems, a number of cases have applied the doctrine of *forum non conveniens* between Canadian provinces as well as in actions involving foreign States.

The Uniform Law Conference of Canada (ULCC) has also proposed in its 1994 Uniform Court Jurisdiction and Transfer of Proceedings Act that proceedings be transferred to other courts in Canada or abroad under certain conditions. To date, no Canadian province has adopted the Uniform Act.

DISCUSSION

The *Amchem* decision has articulated a new test for identifying the proper forum, moving from the traditional English law (oppression to the defendant and injustice to the plaintiff). In the opinion of Justice Sopinka (at pp. 919-921), the test before applying the rule on *forum non conveniens* includes the following elements:

- the determination of any juridical advantages to the plaintiff or the defendant;
- the qualification of the parties' connection to the jurisdiction as real and substantial; and
- the existence of a more appropriate jurisdiction based on the relevant factors.

Justice Sopinka also discussed (at p. 921) the issue in relation to service outside the province (*ex juris*). In his view, the question remains the same whether the defendant is served in the jurisdiction or outside. "Whether the burden of proof should be on the plaintiff in *ex juris* cases will depend on the rule that permits service out of the jurisdiction. If it requires that service out of the jurisdiction be justified by the plaintiff, ..., then the rule must govern ... While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff."

ANNEXE B

NOTE D'INFORMATION SUR LE RECOURS À LA RÈGLE DU *FORUM NON CONVENIENS* AU CANADA

présentée par la délégation canadienne

CONTEXTE

Au Canada, il est bien établi aujourd'hui que la théorie du *forum non conveniens* fait partie du droit canadien tant dans les provinces de *common law* que dans le droit civil de la province de Québec.

C'est l'arrêt de la Cour suprême du Canada dans l'affaire *Amchem Products Inc.* c. *Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, qui constitue la plus récente autorité en droit anglo-canadien à cet égard. Au Québec, la règle a été codifiée à l'article 3135 du nouveau Code civil, qui a été promulgué le 1er janvier 1994.

Dans les deux systèmes de droit, la jurisprudence a appliqué la théorie du *forum non conveniens* entre les provinces canadiennes et, aussi, dans des instances où étaient en cause des Etats étrangers.

La Conférence sur l'harmonisation des lois au Canada (CHLC) a également proposé, dans sa Loi uniforme sur la compétence des tribunaux et le transfert d'instances de 1994, un transfert de la compétence matérielle à d'autres tribunaux, au Canada ou à l'étranger, à certaines conditions. A ce jour, la Loi uniforme n'a été adoptée dans aucune province canadienne.

DISCUSSION

L'arrêt *Amchem* a dégagé un nouveau critère d'établissement du for approprié qui s'écarte du droit anglais traditionnel (l'oppression de la partie défenderesse et l'injustice pour la partie demanderesse). D'après le juge Sopinka (aux pp. 919 à 921), il faut tenir compte des points suivants avant d'appliquer la règle du *forum non conveniens*:

- la détermination des avantages juridiques pour la partie demanderesse ou la partie défenderesse;
- un facteur de rattachement des parties au ressort pouvant être qualifié de réel et d'important;
- l'existence d'un ressort plus approprié en vertu des facteurs pertinents.

Le juge Sopinka a aussi analysé (à la p. 921) la question par rapport à la signification effectuée à l'extérieur de la province (*ex juris*). A son avis, la question demeure la même, qu'il y ait signification à la partie défenderesse dans ou hors de la province: «La question de savoir si le demandeur a la charge de la preuve dans les affaires de signification *ex juris* dépend de la règle qui permet la signification à l'extérieur du ressort. Si elle exige que le demandeur justifie la signification à l'extérieur du ressort... alors la règle dicte la solution... Bien que la norme de preuve reste celle qui est applicable en matière civile, tout comme les tribunaux anglais, j'estime qu'il faut établir *clairement* qu'un autre tribunal est plus approprié pour que soit écarté celui qu'a choisi le demandeur».

The *Amchem* test has been codified in Article 11 of the above-mentioned ULCC Uniform Act. In addition to a restatement of the principles enunciated by the Supreme Court, the Uniform Act also contains a list of factors relevant to the exercise of the court's discretion when examining the question of *forum non conveniens*. Part 3 of the Uniform Act provides for a detailed procedure for the transfer of proceedings on the basis of a court's order requesting another court to accept the transfer if the court making the order is satisfied that "the receiving court has subject matter competence in the proceeding and ... is a more appropriate forum..." (article 14).

In Québec, Article 3135 of the *Civil Code*, the text of which is attached, provides in very general terms the circumstances in which *forum non conveniens* may be invoked as follows:

- although the Québec authority has jurisdiction, the situation is exceptional; and
- the authorities of another country are in a better position to decide.

It should be noted that the reverse doctrine of *forum conveniens*, which has also been codified in Article 3136, may apply on certain conditions as follows:

- the dispute has a sufficient connection with Québec; and
- proceedings cannot possibly be instituted outside Québec or their institution cannot be reasonably required.

In both the common and civil law systems in Canada, case law has developed and refined the interpretation of the doctrine of *forum non conveniens*. However, some uncertainty remains on the exact limits of its application. Procedural questions have also arisen.

For instance, does the appearance of the defendant before a foreign court to challenge its jurisdiction constitute attornment? On this point, the decision of the British Columbia Court of Appeal in *Mid-Ohio Imported Car Co.* v. *Tri-K Investments Ltd.*, [1996] 2 W.W.R. 144, stated that a defendant may dispute an order for service *ex juris* upon him and challenge jurisdiction without being considered to attorn to the foreign court's jurisdiction. To go beyond this would run afoul of the strict rule at common law. This approach was based on the law of British Columbia and not the law of the court of origin which was not considered.

Another procedural question has to do with a stay of proceedings when *forum non conveniens* is invoked. Although a stay of proceedings would be granted pending the introduction of proceedings in the foreign forum, it has not been fully resolved whether or not a stay would be granted in the face of other proceedings already commenced or about to be commenced in the other court.

CONCLUSION

The theory of *forum non conveniens* is now well accepted in Canada and the state of the law appears to be settled on this point. However, the legal community has expressed fears concerning resultant concurrent proceedings and forum shopping that may prove to be disadvantageous to Canadian parties to international litigation. It has also identified a need to provide for clearer rules in order to secure fairness and predictability in international proceedings.

Le critère de l'arrêt *Amchem* a été codifié à l'article 11 de la Loi uniforme précité de la CHLC. Outre qu'y sont réitérés les principes dégagés par la Cour suprême, elle énumère une série de facteurs pertinents au regard de l'exercice du pouvoir discrétionnaire du tribunal saisi de l'exception de *forum non conveniens*. La Partie 3 de la Loi uniforme institue une procédure élaborée de transfert de l'instance en vertu d'une ordonnance judiciaire invitant un autre tribunal à accepter le transfert si le for qui la rend est convaincu que «le tribunal d'accueil a la compétence *ratione materiae* pour entendre l'instance et ... constitue un ressort plus approprié ...» (article 14).

Au Québec, l'article 3135 du Code civil, dont copie est jointe en annexe, prévoit, en des termes très généraux, dans quelles circonstances la règle du *forum non conveniens* peut être invoquée:

- bien qu'une autorité du Québec soit compétente pour connaître d'un litige, la situation est exceptionnelle; et

- les autorités d'un autre Etat sont mieux à même de trancher le litige.

Il est à noter que le principe inverse, celui du *forum conveniens*, qui a aussi été codifié à l'article 3136, peut s'appliquer dans certaines conditions:

- si le litige présente un lien suffisant avec le Québec,

- et si une action à l'étranger se révèle impossible ou si on ne peut exiger qu'elle y soit introduite.

Dans les deux systèmes de droit du Canada, de *common law* et de droit civil, la jurisprudence a développé et affiné l'interprétation de la théorie du *forum non conveniens*. Mais une certaine insécurité juridique demeure, en ce qui a trait aux limites exactes de son application. Des questions de procédure se sont également posées.

Par exemple, un acte de comparution de la partie défenderesse déposé devant le tribunal étranger pour en contester la compétence peut-il être assimilé à une soumission à sa compétence ? Sur ce point, la décision de la Cour d'appel de Colombie-Britannique dans l'affaire *Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd.*, [1996] 2 W.W.R. 144, a affirmé que la partie défenderesse peut contester l'ordonnance de signification *ex juris* à son encontre et opposer une exception déclinatoire de compétence sans pour autant être considérée comme s'étant soumise à la compétence du tribunal étranger. Aller plus loin serait contraire à la règle stricte de la *common law*. Cette approche était fondée sur la loi de la Colombie-Britannique, non pas sur la loi du for d'origine qui n'a pas été examinée.

Un autre point de procédure concerne la question du sursis d'instance lorsque la règle du *forum non conveniens* est invoquée. Bien que le sursis puisse être ordonné jusqu'à l'introduction de l'instance devant le tribunal étranger, il demeure à établir définitivement si un tel sursis peut être ordonné alors que l'instance étrangère a déjà été introduite ou est sur le point de l'être.

CONCLUSION

La théorie du *forum non conveniens* est maintenant acceptée au Canada et le droit semble avoir été fixé sur ce point. Mais, dans les milieux juridiques, l'on dit craindre des dédoublements d'instances et le «shopping de fors», qui sont susceptibles de s'avérer désavantageux pour les parties canadiennes à des litiges internationaux. Il leur est également apparu qu'il fallait des règles claires pour assurer à la fois des conditions justes et prévisibles à la conduite des litiges internationaux.

One avenue would be to establish acceptable and prohibited bases of jurisdiction that would be followed by courts in a large number of countries without judicial discretion to take or decline that jurisdiction. Another would be to allow domestic courts, on the basis of compelling and well-recognized factors, to use their discretion in deciding whether or not to take jurisdiction.

The Hague project on judgments might therefore provide an opportunity to examine various national solutions and lead to better understanding and use of *forum non conveniens* and in the process address these and related concerns.

Attachment

Une façon de faire pourrait être de déterminer les bases acceptables et prohibées de compétence à partir desquels les tribunaux de différents pays se déclareraient compétents ou non, sans qu'ils ne puissent utiliser alors leur discrétion pour exercer ou décliner leur compétence. Une autre façon serait d'autoriser les divers tribunaux nationaux à recourir à leur pouvoir discrétionnaire pour décider, en vertu de facteurs bien établis, reconnus et obligatoires, de se reconnaître ou non compétents.

Le projet de La Haye sur l'exécution des jugements peut représenter une occasion d'étudier les diverses solutions nationales et conduire à une meilleure compréhension et à un meilleur usage du principe du *forum non conveniens*, tout en permettant de revoir cette question et les préoccupations connexes.

Pièce jointe

ANNEX B

CIVIL CODE OF QUÉBEC

TITLE THREE
INTERNATIONAL JURISDICTION OF QUÉBEC AUTHORITIES

CHAPTER I
GENERAL PROVISIONS

Art. 3134. In the absence of any special provision, the Québec authorities have jurisdiction when the defendant is domiciled in Québec.

Art. 3135. Even 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.

Art. 3136. Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.

Art. 3137. On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

Art. 3138. A Québec authority may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute.

Art. 3139. Where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.

Art. 3140. In cases of emergency or serious inconvenience, Québec authorities may also take such measures as they consider necessary for the protection of the person or property of a person present in Québec.

ANNEXE B

CODE CIVIL DU QUÉBEC

TITRE TROISIÈME
DE LA COMPÉTENCE INTERNATIONALE DES AUTORITÉS DU QUÉBEC

CHAPITRE PREMIER
DISPOSITIONS GÉNÉRALES

Art. 3134. En l'absence de disposition particulière, les autorités du Québec sont compétentes lorsque le défendeur a son domicile au Québec.

Art. 3135. Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre Etat sont mieux à même de trancher le litige.

Art. 3136. Bien qu'une autorité québécoise ne soit pas compétente pour connaître d'un litige, elle peut, néanmoins, si une action à l'étranger se révèle impossible ou si on ne peut exiger qu'elle y soit introduite, entendre le litige si celui-ci présente un lien suffisant avec le Québec.

Art. 3137. L'autorité québécoise, à la demande d'une partie, peut, quand une action est introduite devant elle, surseoir à statuer si une autre action entre les mêmes parties, fondée sur les mêmes faits et ayant le même objet, est déjà pendante devant une autorité étrangère, pourvu qu'elle puisse donner lieu à une décision pouvant être reconnue au Québec, ou si une telle décision a déjà été rendue par une autorité étrangère.

Art. 3138. L'autorité québécoise peut ordonner des mesures provisoires ou conservatoires, même si elle n'est pas compétente pour connaître du fond du litige.

Art. 3139. L'autorité québécoise, compétente pour la demande principale, est aussi compétente pour la demande incidente ou reconventionnelle.

Art. 3140. En cas d'urgence ou d'inconvénients sérieux, les autorités québécoises sont compétentes pour prendre les mesures qu'elles estiment nécessaires à la protection d'une personne qui se trouve au Québec ou à la protection de ses biens s'ils y sont situés.

ANNEX C

THE DOCTRINE OF *FORUM NON CONVENIENS* IN THE UNITED STATES

I INTRODUCTION

A *Scope of the doctrine*

"The doctrine of *forum non conveniens* permits a US court to decline to exercise its judicial jurisdiction if the court would be a seriously inconvenient forum and if an adequate alternative forum exists."[1] "In all cases in which the doctrine ... 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."[2] The doctrine "can never apply if there is absence of jurisdiction or mistake of venue."[3] "The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion."[4] The Supreme Court of the United States has repeatedly reaffirmed the doctrine of *forum non conveniens* even though it has no direct federal statutory or constitutional foundation.[5]

B *History of the doctrine*

"Although the origins of the doctrine [of *forum non conveniens*] in Anglo-American law are murky, most authorities agree that ... [it] had its earliest expression ... in Scottish estate cases."[6] As the doctrine emerged, it developed two approaches: the "abuse of process" approach which permitted application of the doctrine only in cases of vexation and oppression, and the "most suitable forum" approach which was set forth in 1892 in *Sim v. Robinow*[7] as follows:

> *The plea [for staying proceedings on the ground of* forum non conveniens] *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.*[8]

The "most suitable forum" approach eventually prevailed over the "abuse of process" approach.[9]

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[1] Gary B. Born & David Westin, International Civil Litigation in United States Courts 275 (2d ed. 1994).

[2] *Gulf Oil Corp. v. Gilbert*, 330 US 501, 506-507 (1947).

[3] *Gilbert*, 330 US at 504.

[4] *Piper Aircraft Co. v. Reyno*, 454 US 235, 257 (1981).

[5] Born & Westin, *supra* note 1, at 275.

[6] *American Dredging Co. v. Miller*, 114 S.Ct. 981, 986 (1994).

[7] 1892 Sess. Cas. 665 (Scot 1st Div.).

[8] 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. J.* 455, 459-460 (1994) (quoting *Sim*, 1892 Sess. Cas. at 668).

[9] Reus, *supra* note 8, at 460 (citation omitted).

II USE OF DOCTRINE IN UNITED STATES DOMESTIC LITIGATION

Prior to the decision in *International Shoe Co. v. Washington*[10], a case which expanded the personal jurisdiction of the courts, the doctrine of *forum non conveniens* was rarely utilized.[11] The doctrine of *forum non conveniens* appears to have developed in the United States "in response to the enlargement of jurisdictional limits after *International Shoe*,"[12] which engendered forum shopping thereby creating a need for the courts to limit a plaintiff's choice of forum.[13]

In 1946, in *Gulf Oil Corp. v. Gilbert*, the Supreme Court was presented with the issue of whether a United States District Court, with jurisdiction based on diversity, had inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*. In *Gilbert*, the plaintiff, a Virginia resident, brought an action in the Southern District of New York against the defendant, a Pennsylvania corporation qualified to do business in both Virginia and New York. The defendant invoked the doctrine of *forum non conveniens* claiming that the appropriate forum was Virginia because it was the place where the plaintiff lived, where the defendant did business, where all events in the litigation took place, where most of the witnesses resided, and where both the state and federal courts were available to plaintiff and were able to obtain jurisdiction over the defendant. The Court conceded that under the venue statutes the plaintiff was permitted to commence his action in the Southern District of New York and that the court was empowered to entertain the action.[14] What remained to be decided was whether the Court must entertain the action.[15]

The Court began its analysis by stating that it had "repeatedly recognized the existence of the power [of a court] to decline jurisdiction in exceptional circumstances."[16] In support of this statement the Court quoted the following passage from a prior decision:

> *Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.*[17]

The Court stated that "[t]he 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."[18] However, the Court recognized that because the venue statutes were drafted with sufficient generality to give a plaintiff a choice of forums, a plaintiff may

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[10] 326 US 310 (1945).

[11] Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. R. 781, 802 (1985). See also, *Miller*, 114 S. Ct. at 986 (prior to *Gilbert*, although the doctrine had its most frequent expression in admiralty cases, it was also utilized by state courts, both at law and in equity, to address the problem of plaintiffs' misusing venue to the inconvenience of the defendant).

[12] Stein, *supra* note 11, at 802.

[13] Stein, *supra* note 11, at 805.

[14] *Gilbert*, 330 US at 504 (citation omitted).

[15] *Gilbert*, 330 US at 504.

[16] *Id.*

[17] *Gilbert*, 330 US at 504 (quoting *Canada Malting Co., Ltd. v. Paterson Steamships, Ltd.*, 285 US 413, 422-423 (1932)).

[18] *Gilbert*, 330 US at 507.

select a forum not simply to seek justice but "perhaps [seeking] justice blended with some harassment."[19] The Court acknowledged that a plaintiff may be tempted to adopt a trial "strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."[20]

The Court noted that "wisely" no previous court had attempted to catalogue those circumstances which would justify the granting or denial of a motion to dismiss on grounds of *forum non conveniens*.[21] Rather, the Court determined that the circumstances under which such a motion would be granted or denied had been and should continue to be left primarily to the discretion of the court resorted to by the plaintiff, *i.e.*, the court hearing the motion.[22] Nevertheless, the Court did set forth a list of both "private" and "public" interest factors which it considered to be relevant to a *forum non conveniens* analysis.

The private interest considerations are those of the litigants which include "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."[23] Additional considerations would be the enforceability of a judgment if one were obtained and the advantages and obstacles to a fair trial.[24] The purpose served by consideration of the private interest factors is to prevent a plaintiff, by choice of an inconvenient forum, from vexing, harassing, or oppressing "the defendant by inflicting on him unnecessary expense or trouble unrelated to the plaintiff's own right to pursue his remedy."[25] Ultimately, the Court concluded that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[26]

Regarding the public interest factors, a court may consider administrative difficulties, *i.e.*, docket congestion.[27] In addition, jury duty should not be imposed on community members where the litigation has no relation to the community.[28] This factor was supported by the contention that "[t]here is a local interest in having localized controversies decided at

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[19] *Id.*

[20] *Id.*

[21] *Gilbert*, 330 US at 508.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* (citation omitted).

[26] *Gilbert*, 330 US at 507. But see *Piper*, 454 US at 255 (the presumption applies with less force when the plaintiff is foreign).

Stein sets forth the following as a possible explanation for the presumption that a plaintiff's choice of forum should rarely be disturbed:

> *In an era in which conceptions of a court's personal jurisdiction were narrow – limited to immediate presence of the defendant's person or property – a rule that gave deference to the plaintiff's "choice" of forum was a modest bequest. The choice was in reality a burden of traveling to the defendant's home forum. When the scope of personal jurisdiction was subsequently expanded so that a defendant became subject to suit in numerous jurisdictions, a rule that once operated at a practical level to the disadvantage of plaintiffs eventually gave them enormous control over both choice of forum and choice of law.*

Stein, *supra* note 11, at 816-817 (citations omitted).

[27] *Gilbert*, 330 US at 508.

[28] *Gilbert*, 330 US at 508-509.

home."[29] It is also appropriate in diversity cases to have the case decided in the "forum that is at home with the state laws that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in laws foreign to itself."[30]

It is important to note that both the plaintiff and the defendant in *Gilbert* were US citizens; the litigation was domestic. The defendant argued that the more appropriate forum, as a matter of convenience, was another jurisdiction in the US, not a foreign forum. One year after the adoption of the doctrine of *forum non conveniens* by the Supreme Court in *Gilbert*, the US Congress enacted the federal venue transfer statute which 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."[31] A transfer under this statute appears to require an analysis similar to that of the doctrine of *forum non conveniens*.[32] However, such a transfer does not affect the applicable law, including the applicable choice of law, which remain that of the transferor state.[33] Note, however, that this statute applies only to transfers between different federal courts and not to dismissal in favor of a foreign forum. Consequently, although the *forum non conveniens* doctrine was originally a domestic doctrine to be utilized by the courts to limit a plaintiff's ability to forum shop within the United States, the federal doctrine continues to apply "only in cases where the alternative forum is abroad."[34]

III USE OF DOCTRINE OF *FORUM NON CONVENIENS* IN INTERNATIONAL LITIGATION

It is important to note that in 1947, the year during which *Gilbert* was decided, the possibility of a forum selected by a plaintiff being seriously inconvenient to the defendant was much more relevant than it is today. As one commentator has stated, in 1947 "[w]e had no commercial jet travel, no personal or office computers, no photocopy technology, no fax machines. ... It is hard to grasp how much technology has changed our lives since then."[35] With the advent of technology, the purpose served by the doctrine of *forum non conveniens* appears to have changed. It no longer appears to be restricted to those instances where the plaintiff's forum choice was so egregiously inappropriate as to appear motivated by a desire to vex and harass the defendant...."[36]

As communications and transportation technology have facilitated international activity, there has been an increase in the number of international disputes. Consequently, the number of cases filed by foreign plaintiffs has increased. As stated by Lord Denning in that oft-quoted passage, "[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."[37] There are numerous reasons why American courts are more attractive to foreign plaintiffs: (1) strict liability remains primarily an American innovation; (2) a tort plaintiff may choose, at least potentially, from among at least 50 jurisdictions if he decides to file suit in the United States; (3) jury trials are almost always available in the United States, while they are never

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[29] *Gilbert*, 330 US at 509.

[30] *Id.*

[31] 28 U.S.C. §1404(a).

[32] Born & Westin, *supra* note 1, at 277 (citation omitted).

[33] See *Van Dusen v. Barrack*, 376 US 621 (1964).

[34] *Miller*, 114 S.Ct. at 986 n.2.

[35] David W. Robertson, The Federal Doctrine of Forum Non Conveniens: An Object Lesson in Uncontrolled Discretion, 29 *Tex. Int'l. L.J.* 353, 367 (1994).

[36] *Id.*

[37] *Smith Kline & French Lab. Ltd v. Bloch*, [1983] 1 W.L.R. 730, 733 (C.A. 1982).

provided in civil law jurisdictions (even in the United Kingdom most civil actions are not tried before a jury); (4) unlike most foreign jurisdictions, American courts allow contingent attorney's fees, and do not tax losing parties with their opponents' attorney's fees; and (5) discovery is more extensive in American than in foreign courts.[38]

The leading case regarding application of the doctrine of *forum non conveniens* in the international context is *Piper Aircraft Co. v. Reyno* wherein the Supreme Court not only reaffirmed the doctrine of *forum non conveniens*, but arguably expanded it. The facts in *Piper* were as follows. In 1976, a small commercial aircraft crashed in the Scottish highlands killing the pilot and all five passengers. The decedents were all Scottish subjects and residents. The wrongful death actions filed against both Piper Aircraft Company, the Pennsylvania manufacturer of the aircraft, and Hartzell Propeller, Inc., the Ohio manufacturer of the propeller, were eventually transferred to the Middle District of Pennsylvania. Gaynell Reyno, the administratrix of the estates of the five passengers, admitted that the action against Piper and Hartzell was filed in the US because of its laws regarding liability, capacity to sue and damages more favorable to her position than were those in Scotland. Both Piper and Hartzell moved to dismiss the action on the ground of *forum non conveniens*. Relying on the balancing test of private/public interest factors set forth in *Gilbert*, the District Court granted the motions.

The District Court observed that an alternate forum existed in Scotland and that Piper and Hartzell had agreed to submit to the jurisdiction of Scottish courts and to waive any available statute of limitations defense.[39] In addition, the District Court noted that although a plaintiff's choice of forum ordinarily deserves substantial deference:

> "Reyno is a representative of foreign citizens and residents seeking a forum in the US because of the more liberal rules concerning products liability law" and that "the courts have been less solicitous when the plaintiff is not an American citizen or resident and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States."[40]

The District Court concluded that both the private and public interest factors strongly pointed towards dismissal.[41]

Reyno argued that dismissal would be unfair because Scottish law was less favorable. The District Court rejected this argument stating that "the possibility that dismissal might lead to an unfavorable change in law did not deserve significant weight; any deficiency in the foreign law was a "matter to be dealt with in the foreign forum".[42] On appeal, the US Court of Appeals for the Third Circuit reversed, holding, *inter alia*, that "dismissal is never appropriate where the law of the alternative forum is less favorable to plaintiff."[43]

The Supreme Court affirmed the dismissal of the District Court and held:

> *[P]laintiffs may not 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*

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[38] *Piper*, 454 US at 252 n. 18.

[39] *Piper*, 454 US at 242.

[40] *Piper*, 454 US at 242 (quoting *Reyno v. Piper Aircraft Co.*, 479 F.Supp 727, 731 (M.D. Pa. 1979)).

[41] *Piper*, 454 US at 242-244.

[42] *Piper*, 454 US at 244 (quoting *Reyno*, 479 F.Supp. at 758).

[43] *Piper*, 454 US at 244.

> *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.*[44]

Referencing *Gilbert*, the Court reiterated that the central focus of the *forum non conveniens* inquiry is convenience.[45] Thus, *Gilbert* "implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in law."[46] The Court also confirmed the *Gilbert* Court's use of the private/public interest factors in the *forum non conveniens* analysis:

> *Under* Gilbert, *dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. If substantial weight were given to the possibility of an unfavorable change in law, however, dismissal might be barred even where trial in the chosen forum was plainly inconvenient.*[47]

The Court also stated that its earlier decisions emphasized the need to retain flexibility in the *forum non conveniens* doctrine.[48] If substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless.[49] The court stated that the American courts were already extremely attractive to foreign plaintiffs.[50] Barring dismissal solely because of an unfavorable change in law would make the American courts even more attractive, thereby increasing the flow of litigation into the US and further congesting the courts.[51]

However, "if 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....".[52] In *Piper*, the Court held that even though Scottish law did not

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[44] *Gilbert*, 454 US at 247.

[45] *Piper*, 454 US at 249.

[46] *Id.* (citation omitted).

[47] *Piper*, 454 US at 249 (footnote omitted).

[48] *Piper*, 454 US at 249. See *Williams v. Green Bay & Western R. Co.*, 326 US 549, 557 (1946) (setting forth a rigid rule to govern discretion would rob the doctrine of its flexibility.)

[49] *Piper*, 454 US at 250.

[50] *Piper*, 454 US at 252.

[51] *Id.*

[52] *Piper*, 454 US at 254.

provide for strict liability, and the potential damages award could be lower under Scottish law, the decedents would not be deprived of any remedy nor treated unfairly.[53]

In addition, the Court confirmed the District Court's assertion that, although there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, the presumption applies with less force when the plaintiff is foreign.[54] The distinction between resident or citizen plaintiffs, and foreign plaintiffs was justified as follows:

> *[A] plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. 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.*[55]

IV CONCLUSION

The Supreme Court's decisions in both *Gilbert* and *Piper* describe a doctrine of *forum non conveniens* that "entails a discretionary balancing of [private and public interest] factors and prescribes an extremely deferential standard of review."[56] Such factors are utilized by and have been expanded upon by the lower courts. The "abuse of discretion" standard of review results in very few reversals of a trial court's *forum non conveniens* decision.

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[53] *Piper*, 454 US at 255. A determination that there is effectively no remedy available in the alternate forum would permit the district court to conclude "that dismissal would not be in the interest of justice." *Id.* Note that consideration of the availability of a remedy in the alternate forum is not a question of "convenience" but rather the "appropriateness", in the interest of justice, of a dismissal. Therefore, although the Court stressed "convenience" throughout its decision, a court is not limited to a "convenience" inquiry; it may also consider the appropriateness of a dismissal under the circumstances of the individual case.
In addition to granting dismissals even though the substantive law applicable in the alternative forum is less favorable to the plaintiff, the lower courts have granted dismissals in cases where the alternative forum did not provide for trial by jury, or contingent-fee arrangements. See, *e.g.*, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195, 202, *cert. denied*, 484 US 871 (1987). Even though a court dismisses an action, such a dismissal may be made subject to conditions such as the defendant's agreeing to submit to the jurisdiction of the alternative forum and to waive the statute of limitations as a defense to such jurisdiction. See *Bhopal*, 809 F.2d at 203; *Cf.*, *Piper*, 454 US at 242 (defendants unilaterally agreed to submit to the jurisdiction of the alternative forum and to waive any statute of limitations defense that might have been available).

[54] *Piper*, 454 US at 255.

[55] *Piper*, 454 US at 255-56 (citations omitted).

[56] Stein, *supra* note 11, at 831.

NOTE FROM THE DELEGATION OF THE UNITED KINGDOM

FORUM NON CONVENIENS *

Introduction

This paper examines the recent case law on forum non conveniens in England but first of all explores its origins in Scotland. It is arguably one of the Scottish legal system's most successful exports.[1] It was originally referred to in Scotland as forum non competens but in the latter half of the nineteenth century the modern wording was adopted as it better reflected the true nature of the plea.[2] It is today a plea of general application in Scotland and England except where its application is inconsistent with the Brussels and Lugano Conventions.[3]

Scottish Background

The meaning of the plea has not always been free from doubt. Some authority supports a very restricted scope for forum non conveniens whereby the Scottish courts would sist the proceedings only if an "unfair disadvantage"[4] or a "real unfairness"[5] would result for the defender if the action were held there. Another narrow interpretation of the plea is that it only applies

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* This paper was prepared by Mr Paul R. Beaumont, Professor of European Union and Private International Law, Faculty of Law, University of Aberdeen. Earlier versions of the author's work on forum non conveniens were published as part of a general treatment of the rules for declining to exercise jurisdiction in the United Kingdom as the UK National Report to the XIVth International Congress of Comparative Law in Athens in 1994 in *United Kingdom Law in the Mid-1990s*, ed by Bridge, Banakas, Gardner, and Carey Miller (1994), 549-575 and in *Declining Jurisdiction in Private International Law*, ed by Fawcett (1995), 207-33.

[1] See eg its adoption in the United States discussed in R. Braucher, "The Inconvenient Federal Forum" (1947) 60 Harv. L. Rev. 908, 909 and its adoption in England discussed in this paper. On forum non conveniens generally see Barma and Elvin, "Forum non Conveniens: Where do we go from Here?" (1985) 101 LQR 48; Slater, "Forum Non Conveniens: A View from the Shop Floor" (1988) LQR 554; Fawcett, "Trial in England or Abroad: The Underlying Policy Considerations" (1989) 9 OJLS 205; North & Fawcett, *Cheshire & North's Private International Law* (1992, 12th ed), 220-34; *Dicey & Morris The Conflict of Laws* (1993, 12th ed) ed by Collins, 395-419; Anton with Beaumont, *Private International Law* (1990, 2nd ed), 212-8.

[2] See eg Lord Deas in *Longworth* v *Hope* (1865) 3 M. 1049, 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 in the other?". For the first comprehensive analysis of the Scottish plea of forum non conveniens, see Anton, *Private International Law* (1967), 148-54.

[3] See s.49 of the Civil Jurisdiction and Judgments Act 1982. The breadth of the plea's application is illutrated by its use in the context of an application for judicial review in *Sokha* v *Secretary of State for the Home Department*, 1992 SLT 1049. Forum non conveniens is applicable to internal UK conflicts coming within the scope of Schedule 4 to the Civil Jurisdiction and Judgments Act 1982, which is modelled on the Brussels Convention, see Drake J in *Cumming v Scotish Daily Record and Sunday Mail Ltd, The Times*, June 8, 1995 reversing his own decision in *Foxen v Scotsman Publications Ltd, The Times*, February 17, 1994 (noted by Collins (1995) 111 LQR 541 and Beaumont (1995) 63 SLG 111). Forum non conveniens may not apply in the context of litigation which is governed by an international convention, eg the Court of Appeal has recently decided that it does not apply to matters within the scope of the Warsaw Convention, see *Milor SRL and Others v British Airways plc, The Times*, February 19, 1996. In relation to cases where forum non conveniens is a competent plea it may be possible to argue that only certain issues should be tried in another jurisdiction and not the whole case, see *Ashford Hotels Ltd v Higgins and others, The Independent*, August 14, 1995; judgment of the Court of Appeal on July 21, 1995 (LEXIS Transcript), in which Evans LJ said: "There is no reason in principle why part rather than the whole of a claim should not be stayed in favour of proceedings abroad."

[4] See the dicta of Lord Deas in *Longworth* v *Hope*, n.2 above, at 1057 and the approach of Lord Kissen in *Balshaw* v *Balshaw*, 1967 SC 63 at 73..

[5] Lord Shaw of Dunfermline in *Societe du Gaz de Paris* v *La Societe anonyme de navigation "Les Armateurs Francais"*, 1926 SC (HL) 13 at 20.

when it is in the "interests of all the parties" that the case should be tried in a forum other than Scotland.[6] Given that the pursuer has chosen to litigate in Scotland this is never likely to be the case and such an approach effectively gives the court no discretion to decline to exercise jurisdiction.[7] At the other end of the spectrum one can find some backing for the proposition that the aim of the plea is to find the "best and most suitable forum for trying the case" which gives no weight to the forum chosen by the pursuer.[8]

The most persuasive authorities, however, advocate an "ends of justice" test or an "appropriateness" test. The former can be traced to a dictum by Lord President McNeill saying that the plea applied in;

"cases in which the Court may consider it more proper for the ends of justice that the parties should seek their remedy in another forum."[9]

The idea of seeking the forum which is most likely to secure the ends of justice was combined with seeking the best interests of all the parties;[10] but the latter aim was discredited by Lord Sumner in the leading Scottish case on forum non conveniens.[11] In that case the "conveniens" element of the plea was interpreted as "appropriate" by Lord Chancellor Cave and Lord Dunedin.[12] The temptation to stir all the elements together into a composite definition can be seen in Lord Jauncey's view that the plea applies where:

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[6] See the dictum of Lord Justice Clerk Inglis in *Clements* v *Macaulay* (1866) 4 M. 583 at 592 and the statement by the learned judge at 593 that "In cases in which jurisdiction is competently founded a court has no discretion whether it shall exercise its jurisdiction or not". Lord Inglis subsequently significantly softened this position, when Lord President in *Martin* v *Stopford Blair's Executors* (1879) 7 R. 329 at 331, saying of forum non conveniens "the plea really means that of two courts having jurisdiction to try a question it is more expedient to try it in one than in the other." Nonetheless his no discretion approach was quoted approvingly by Lord Kinnear in *Sim* v *Robinow* (1892) 19 R. 665 at 668; Lord Shaw of Dunfermline in *Societe du Gaz*, n.5 above at 19; and by Lord Avonside in *Stenhouse London Ltd* v *Allwright*, 1971 SLT (Notes) 84 at 85.

[7] Lord Sumner recognised the futility of trying to satisfy the interests of all the parties in *Societe du Gaz*, n.5 above at p.22.

[8] See Lord Justice Clerk Moncrieff in *Williamson* v *North Eastern Railway Co.* (1884) 11 R. 596 at 598. See also Lord Justice Clerk Alness asking the question "where can the case best be tried?" in *Sheaf Steamship Co. Ltd.* v *The Compania Transmediterranea*, 1930 SC 660 at 667.

[9] *Longworth* v *Hope,* n.2 above, at 1053.

[10] See the authorities cited in n. 6 above.

[11] See n. 7 above and Lord Guthrie in *Argyllshire Weavers Ltd.* v *A. Macaulay (Tweeds) Ltd.*, 1962 SC 388 at 403. Lord Prosser recently quoted the combined test of declining to exercise jurisdiction in favour of a competent court in another jurisdiction where it is in the "interests of all the parties and for the ends of justice" as still being a correct statement of the law, *Sokha*, n.3 above, at 1052-1053. He went on, however, to note that "It does not appear to me that the prospects of either party can be determinative of the appropriate forum, since any advantage of this kind to one party is correspondingly a disadvantage to the other."

[12] *Ibid.* 17 and 18. Lord Dunedin repeated this in *Robinson v Robinson's trustees*, 1930 SC (HL) 20 at 24 and his opinion was concurred in by Lords Warrington and Tomlin. See also the support for this idea by all three judges in

ANNEX D

"the interests of the parties can more appropriately be served and the ends of justice can more appropriately be secured in that other court."[13]

Against this background of varied interpretations of the plea of forum non conveniens in Scotland it is fortunate that the House of Lords in a series of landmark judgments in the 1970's and 80's gradually moved towards the adoption of the Scottish plea.[14] It is undoubtedly advantageous to Scotland to have the benefit of a very clear and authoritative judgment by Lord Goff in the case where the recognition of the English adoption of the Scots doctrine was consummated.[15] That judgment focuses on the two key elements of "appropriateness" and "justice" and gives a clearer framework as to their interrelation.

The *Spiliada* Case

Lord Goff gave a six point summary of the plea of forum non conveniens.[16]

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the Inner House in the *Argyllshire Weavers* case, n.11 above at 400-401, 403 and 405. The idea that even though the Scottish courts have jurisdiction it may not be "appropriate" for the court to exercise jurisdiction was suggested by Lord Ardmillan in *Longworth* v *Hope*, n.2 above, at 1059.

[13] *Credit Chimique* v *James Scott Engineering Group Ltd.*, 1979 SC 406 at 410.

[14] *The Atlantic Star* [1974] AC 436; *MacShannon* v *Rockware Glass Ltd.* [1978] AC 795; *The Abidin Daver* [1984] AC 398. In the process the English courts abandoned a very pro-plaintiff position which declined to exercise jurisdiction which was competently founded in England only if it would be "oppressive or vexatious" to the defendant, or would be an abuse of the court, and if a stay would not cause "an injustice to the plaintiff", see Scott LJ in *St Pierre* v *South American Stores* [1936] 1 KB 382 at 398. See also the earlier cases of *McHenry* v *Lewis* (1882) 22 ChD 397; *Peruvian Guano Co.* v *Bockwoldt* (1883) 23 ChD 225; *Hyman* v *Helm* (1883) 24 ChD 531 and *Thornton* v *Thornton* (1886) 11 PD 176.

[15] *Spiliada Maritime Corporation* v *Cansulex Ltd* [1987] AC 460. The reasoning of Lord Goff was helpful to the application of forum non conveniens in *Morrison* v *Panic Link Ltd*, 1993 SLT 602, in the *Sokha* case n.3 above, and in *PTKF Kontinent v VMPTO Progress* 1994 SLT 235. Also the related decision of the House of Lords adopting forum non conveniens in the context of matrimonial proceedings, *De Dampierre* v *De Dampierre* [1988] AC 92, was followed by the Inner House in *Mitchell* v *Mitchell*, 1993 SLT 123.

[16] N.15 above, at 476-478. This paper does not consider the controversial question of whether the plea of forum non conveniens is competent when a court in the United Kingdom has jurisdiction under Article 2 of the Brussels or Lugano Conventions. The English Court of Appeal considers that forum non conveniens is a competent plea in these circumstances provided the parties are not connected with another Contracting State and the alternative forum is a non-Contracting State, see *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72 and *The Po* [1991] 2 Lloyd's Rep 206. The former case was later referred to the European Court of Justice by the House of Lords, see Case C-314/92 *Ladenimor SA* v *Intercomfinanz* but then settled before the Court could give a ruling. The decision of the Court of Appeal has been extensively analysed: Briggs (1991) 107 LQR 180; Kaye (1992) JBL 47; Gaudemet-Tallon (1991) 80 Rev. crit. dr. internat. prive 491; and Duintjer Tebbens in *Law and Reality*, ed by Sumampouw *et al* (1992), 47-61. For a creative and very well researched examination of this issue see Kennett, "*Forum non Conveniens* in Europe" (1995) 54 CLJ 552. Recently, in *Sarrio SA v Kuwait Investment Authority*, judgment of October 12, 1995 (LEXIS transcript), Mance J has decided that forum non conveniens is a competent plea in circumstances where the English courts have jurisdiction on the basis of Article 4 of the Brussels Convention (ie where the defendant is not domiciled in a Contracting State and one of the national rules of jurisdiction applies) even when the alternative forum is a Contracting State. If proceedings have commenced in the other Contracting State then the court should apply Articles 21 and 22 before considering the common law plea of forum non conveniens.

(a) A stay of proceedings will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action.

(b) In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. However, once the defendant has made a prima facie case that another forum is more appropriate the burden shifts to the plaintiff to show that justice requires the case to be tried in England.

(c) If jurisdiction is founded as of right in England, rather than leave to serve the defendant out of the jurisdiction being required, then the defendant has to show that there is another forum which is clearly or distinctly more appropriate than the English forum.

(d) In determining the appropriateness of a forum the court will determine how real and substantial is its connection with the dispute. In doing so it will consider a number of connecting factors including the convenience of witnesses, the law governing the issue, and the places where the parties reside or carry on business.

(e) If there is no clearly more appropriate forum then no stay will be granted.

(f) If, however, the court decides that there is a prima facie more appropriate forum it will 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.

Lord Goff then explained the difference in the application of the plea in cases where the court exercises its discretionary power to grant leave to serve out of the jurisdiction. In these cases the burden of proof rests on the plaintiff to persuade the court to exercise its discretion to grant leave to serve the defendant outwith the jurisdiction. If the jurisdiction so exercised might be regarded in international terms as an "exorbitant jurisdiction" then the burden of proof rests on the plaintiff to show that England is clearly the appropriate forum for the trial of the action.[17]
The advantage of Lord Goff's approach is a clear separation of the consideration of "appropriateness" from "justice". Judges are directed to consider the question of whether another competent forum is more appropriate to hear the case before they consider whether any exceptional reasons of justice constrain them to hear the case in England. Although Lord Goff

[17] Lord Goff, n.15 above at 481, disliked the word "exorbitant" and preferred "extraordinary". He cautioned that not all cases where the defendant has to be served out of the jurisdiction are in any sense extraordinary, the defendant's place of residence abroad may be no more than a tax haven. However, it seems that the courts routinely require plaintiffs to prove that England is "clearly" the appropriate forum in leave to serve cases without analysing whether the jurisdiction which is called upon to be exercised in England is extraordinary or exorbitant, see *Bank of Baroda v Vysya Bank* [1994] 2 Lloyd's Rep. 87 at 96; *Trade Indemnity plc and others v Forsakringsaktiebolaget Njord (in liq)* [1995] 1 AllER 796 at 805-809; *Artlev AG v Joint Stock Company Almazy Rossii-Sakha, The Times*, May 22, 1995, judgment of March 8, 1995 (LEXIS transcript) (C.A.) (in this case the burden of proof remained on the plaintiffs even though the defendants initially conceded, wrongly, that the burden of proof rested on them); *Agrafax Public Relations Limited trading as Abacus Communications v United Scottish Society Incorporated, The Times* May 22, 1995, judgment of May 11, 1995 (LEXIS transcript) (C.A.); and *Rowland v Gulfpac Ltd; Inoco plc and others v Gulf USA Corporation and others*, judgment of July 24, 1995 (Rix J, LEXIS transcript).

did not attempt to define "justice" he gave it a relatively narrow focus by referring back to Lord Diplock's consideration of the word in *The Abidin Daver*[18] and by refusing to accept that the loss of a juridical advantage in England is a good reason to deny a stay. Lord Diplock's dictum is worth quoting:

"The possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts, or the unavailability of appropriate remedies."

The emphasis here is on the avoidance of bias, a basic level of judicial competence, and the court process not taking an unduly long time. It will be a rare case where a judge says that foreign courts do not meet these basic criteria of natural justice.[19] The question of the unavailability of appropriate remedies in the prima facie more appropriate forum would appear to give some more discretion to English courts to retain jurisdiction on grounds of justice. However, Lord Goff in the *Spiliada* said that the fact that damages in England are awarded on a higher scale, that there is a more complete procedure of discovery, and that interest can be awarded when it cannot be in the other forum are not good reasons to retain jurisdiction and repel a plea of forum non conveniens relying on the "justice" exception.[20] Lord Goff did concede that if the limitation period has expired in the more appropriate forum and the plaintiff acted reasonably in litigating in England and did not act unreasonably in failing to commence proceedings in the more appropriate forum before the limitation period expired then justice would require allowing the plaintiff to continue with the action in England or requiring the defendant to waive the time bar in the foreign jurisdiction.[21]

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[18] Lord Goff's reference is at 478 of *Spiliada* to *The Abidin Daver*, n.14 above, at 411.

[19] One such case is *The "Al Battani"* [1993] 2 Lloyd's Rep 219, where Sheen J decided that Egypt was clearly a more appropriate forum for the trial of the action than England but declined to stay the proceedings on "justice" grounds. He decided that the "financial burden of litigating in Egypt" would be "so heavy that justice requires a stay should not be granted" (224). Sheen J emphasised that there would be a five year delay in the litigation in Egypt, that no costs other than court fees could be recovered there, and that interest on damages is only awarded as from the date of the final judgment on appeal. He also mentioned the high cost of translating the contract and other documents from English into Arabic.

[20] N.15 above, at 482-483. This restrictive approach to this aspect of the "justice" exception was followed by Lord Prosser in *Sokha* v *Secretary of State for the Home Department*, n.3 above, 1054. Sokha was being detained in prison as an illegal immigrant pending a decision to deport him. He argued that it was easier to obtain a conditional release in Scotland than in England and that therefore it would be unjust for the Scottish court to decline to exercise jurisdiction on the basis of forum non conveniens. England clearly was the more appropriate forum as Sokha had no connection with Scotland and was being detained in England. Lord Prosser was satisfied that even if Sokha would be deprived of a juridical advantage if the Scottish court declined to exercise jurisdiction, substantial justice would still be done in England. On the other hand, 'justice' may not be available in a foreign forum where the pursuers do not have their case reviewed by a judicial body, see *PTKF Kontinent v VMPTO Progress*, n.15 above, at 239.

[21] N.15 above, at 483-484.

Given the relatively narrow focus of the justice exception it is critical to establish what factors the courts will consider in deciding on the relative appropriateness of different fora. In the *Spiliada* case, Lord Templeman made the observation that:

"The factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion. The authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case."[22]

With this cautionary note in mind an attempt will be made to isolate some of the factors that have been influential in forum non conveniens cases since the *Spiliada* case.

A. The Applicable Law

In several cases the applicable law has been a very significant factor in determining the appropriate forum. In the *Spiliada* case Lord Goff regarded the fact that English law was the putative governing law of the contract as being "by no means an insignificant factor".[23] The alternative forum was a Canadian one and it appeared that the judges there took a different view of the effect of the bill of lading contract and there was a dispute as to the obligations under the contract in respect of what is usually called dangerous cargo. In *Banco Atlantico SA* v *British Bank for the Middle East*,[24] the Court of Appeal overturned the decision of the judge at first instance. The judge had granted a stay of proceedings in favour of the case being heard in the United Arab Emirates. The Court of Appeal was particularly influenced by the fact that under English choice of law rules Spanish law was applicable to the case. In the United Arab Emirates the courts would apply their own law and the plaintiff would have had no prospect of succeeding, whereas the English courts would apply Spanish law. In *Charm Maritime* v *Kyriakou*,[25] the Court of Appeal was not confident that certain issues of English trust law would be handled appropriately in Greece given the lack of trust law in that country and the potential for distortion when two parties present conflicting evidence of what the foreign law is. Thus even though the plaintiff and the first defendant were Greek, the fact that English law was applicable and that the plaintiff could only sue the non-Greek second defendant in England meant that Greece was not clearly and distinctly a more appropriate forum than England.

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[22] *Ibid.* 465. Lord Templeman also issued some important words of caution about the need for forum non conveniens to be primarily decided by the trial judge, for legal argument on the matter to be kept brief and that an "appeal should be rare and the appellate court should be slow to interfere." (at 465). For an example of an appellate court taking his warning seriously and not interfering with the discretion of the trial judge see the *Artlev AG* case, n.17 above.

[23] *Ibid.* 486.

[24] [1990] 2 Lloyd's Rep. 504.

[25] [1987] 1 Lloyd's Rep. 433.

In *Du Pont* v *Agnew*,[26] the Court of Appeal was dealing with a leave to serve case where it was necessary for the plaintiff to show that England was clearly and distinctly a more appropriate forum than Illinois. Du Pont was a Delaware Corporation which had paid punitive damages to Mr Chelos as a result of having administered a drug to him in Illinois which led to his having to be amputated below the knee. Du Pont sought to recover the damages from its insurers in the English courts. The American defendants sought to have leave to serve them out of the jurisdiction set aside. Du Pont chose the English courts because under Illinois law if the senior management of the company is held to be personally at fault it cannot recover from its insurers any punitive damages that it has been required to pay. This would seem to be a clear case of forum shopping but for the fact that the Court of Appeal construed the lead insurance policy as being a Lloyd's policy governed by English law. This was the key factor in determining that England was clearly more appropriate than Illinois because the English courts would have to determine a difficult and seemingly novel question as to whether English public policy would deny indemnity to a company against which an award of punitive damages has been made and if so under what circumstances. However, this is possibly a circular argument. The Illinois courts construed the lead insurance policy as being governed by Illinois law and therefore questions of English law and public policy were, from their point of view, irrelevant to the case.

There are cases where the courts have given relatively little weight to the applicable law in determining the appropriate forum. In *Re Harrods (Buenos Aires) Ltd (No.2)*,[27] the Court of Appeal acknowledged that under English choice of law rules English law was the governing law because the company was incorporated in England. Not much significance was given to this fact because the incorporation in England was an "anomalous historical survival",[28] the company had its commercial base and management in Argentina, and under Argentine law it was an Argentine company. Bingham LJ made the point that the situation was not "closely analogous with that in which parties to a contract deliberately choose to subject their bargain to the provisions of a

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[26] [1987] 2 Lloyd's Rep. 585. In *Bank of Baroda v Vysya Bank*, n.17 above, another leave to serve case, the fact that English law governed the contract was a major factor in determining that England was a clearly more appropriate forum than India, particularly because the case turned on questions of law with little scope for oral evidence (at 96-98). In *The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd v Gann and Another* [1992] 2 Lloyd's Rep. 528 at 536, Hirst J decided that the fact that English law was the applicable law (it had been agreed by the parties in a choice of law clause) was a significant factor in deciding that England was clearly and distinctly a more appropriate forum than California. Although this case involved an exclusive jurisdiction clause and was therefore governed by different principles, Hirst J made it clear (at 537) that even if it had been a normal leave to serve case in which the *Spiliada* principles governed he would have found England to be clearly the more appropriate forum.

[27] [1991] 4 AllER 348. In *The 'Varna' (No.2)* [1994] 2 Lloyd's Rep. 41 at 48-9, Clarke J did not regard the fact that under English choice-of-law rules the contract was governed by English law as a significant factor in deciding the natural forum. The plaintiffs could have sought to rely on English law in the Bulgarian proceedings but did not do so, and it had not been demonstrated that there was any difference between Bulgarian and English law in relation to the merits of the claim. In the *Trade Indemnity* case, n.17 above, Rix J did not regard the fact that the reinsurance contract was governed by English law as particularly significant because the main burden of the dispute was a "factual one with its centre in Sweden, in connection with which Swedish factual and expert witnesses will have to be called." (at 809).

[28] N.27 above, at 367.

given law."[29] In *Morrison* v *Panic Link Ltd*,[30] Lord Sutherland did not regard the English forum as clearly and distinctly more appropriate notwithstanding that in their franchise agreement the parties had given the English courts non-exclusive jurisdiction and had made English law applicable. The defender had not averred in what way the English law was different from Scots law and therefore the assumption was made that it was the same. Lord Sutherland was particularly influenced by the fact that the agreement related to the operation of a franchise in Scotland and the majority of the contractual obligations which were the subject of the action were to be performed in Scotland.

If the parties have chosen the law governing their dispute or the same law would be applicable to the case under either potential forum, this is an objective factor that should be weighed in determining which forum is the most appropriate to determine the case. Clearly if the legal issues are complex and disputable, it will be a strong factor in favour of choosing the forum that would be applying its own law. The alternative forum would have to determine what the foreign law is. If expert evidence is given in such cases it is often conflicting. In the United Kingdom and some other jurisdictions proof of foreign law is an issue of fact and the decision of the judge is not subject to appeal.

If, however, the applicable law has not been agreed by the parties and the potential fora would apply different laws, the applicable law under Scots or English choice of law rules should not be considered a significant factor in determining the appropriate forum. It is unwise to assume that the law applicable according to English or Scottish choice of law rules is the appropriate law to govern the dispute. It may be that in an extreme case the law selected by the choice of law rules of the alternative forum may be so unrelated to the case that it would be contrary to "justice" to stay the proceedings. Such matters should be considered under the justice exception and not in an analysis of appropriateness.

B. Litigation is pending elsewhere (Lis Pendens)

Lord Justice Bingham said that with regard to concurrent proceedings between the same parties on the same issues in different jurisdictions:

"The policy of the law must ... be to favour the litigation of issues only once, in the most appropriate forum."[31]

The reason why the courts disapprove of such concurrent proceedings was stated by Lord Brandon in *The Abidin Daver*:

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[29] *Ibid.*

[30] N.15 above.

[31] *Du Pont* v *Agnew* , n.26 above, at 589.

ANNEX D

"one or other of two undesirable consequences may follow: first, there may be two conflicting judgments of the two Courts concerned; or, secondly, there may be an ugly rush to get one action decided ahead of the other, in order to create a situation of res judicata, or issue estoppel in the latter."[32]

If the two actions started about the same time then priority will matter very little in determining the appropriate forum. In *Du Pont*, Lord Justice Bingham did not think that the fact that the English proceedings began a month before the Illinois proceedings should affect the outcome of the plea of forum non conveniens.[33] On the other hand if proceedings are commenced in two fora at about the same time but have reached a much more advanced stage in one rather than the other so that "they have had some impact upon the dispute between the parties"[34] then this is a factor in favour of the action being allowed to proceed in that forum. It is not, however, determinative. This was precisely the case in *Meadows* v *ICI* where the action in Ireland was much closer to coming to trial than in England but Hirst J. decided that Ireland was not clearly and distinctly the more appropriate forum because otherwise the case had no connection with Ireland, the case had a real and close connection with Guernsey and England, the convenience of witnesses favoured Guernsey and England, and, most significantly, England was the only forum in which all three parties, Meadows, ICI and ICB, were before the court in one single action.[35]

In *Cleveland Museum of Art* v *Capricorn Art*,[36] Hirst J was influenced to grant a stay of the English proceedings in favour of proceedings in Ohio by the fact that the latter proceedings had been commenced just over 18 months before the former and was ready for trial in Ohio. If a stay

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[32] N.14 above, at 423. Quoted with approval by Bingham LJ in *Du Pont*, n.26 above at 589.

[33] N.26 above at 593. In *Irish Shipping Ltd* v *Commercial Union* [1991] 2 QB 206 at 232, Sir John Megaw gave "no weight" to the fact that Belgian proceedings were instituted four months before the English proceedings. However, he was influenced by the fact that the defendants who were arguing for the case to be heard in Belgium had not acted in good faith because for a long time they had relied on a non-existent confidentiality clause in the contracts of insurance. In the absence of such lack of good faith the fact that the action in Belgium was commenced four months earlier than the English action would have had no more than "little weight" in determining where the action should be heard. In *Banque Paribas* v *Cargill International SA* [1992] 1 Lloyd's Rep 96, the fact that the Swiss proceedings were commenced about a month earlier than the English proceedings did not outweigh a variety of factors pointing to England as a clearly and distinctly more appropriate forum, including the fact that several key issues were governed by English law. The decision was affirmed by the Court of Appeal in [1992] 2 Lloyd's Rep 19 at 25. In *Excess Insurance Company Limited and Others v Allendale Mutual Insurance Company*, judgment of March 8, 1995 (Lexis transcript) the Court of Appeal decided not to grant leave to serve out of the jurisdiction as England was not clearly the appropriate forum. It was particularly influenced by the fact that proceedings had already been commenced in Rhode Island, even though they had "progressed to a limited extent", and that the courts there clearly had jurisdiction by virtue of a non-exclusive jurisdiction clause.

[34] Lord Goff in *De Dampierre* v *De Dampierre* , n.15 above, at 108, quoted with approval by Hirst J in *Meadows* v *ICI* [1989] 1 Lloyd's Rep 181 at 189.

[35] N.34 above at 189-190. Hirst J's decision was upheld by the Court of Appeal [1989] 2 Lloyd's Rep 298 at 305. This case was decided before Ireland acceded to the Brussels Convention.

[36] [1990] 2 Lloyd's Rep 166. In *The Varna (No 2)*, n.27 above, the proceedings in Bulgaria were already at an advanced stage and some of the questions had been decided. Clarke J regarded this as a particularly significant point in favour of regarding Bulgaria as the more appropriate forum and he stayed the English proceedings.

was not granted substantial costs would be wasted in the Ohio proceedings and substantial delay would occur before the English courts could resolve the dispute. In this case most of the other factors favoured Ohio; it was more convenient for witnesses and Ohio law was the proper law of the loan agreement. The principal factor favouring England was to ensure the participation of the second defendant, Rogers & Co., in the same proceedings as the other two parties. This was clearly outweighed by the several factors favouring trial in Ohio.

The English courts give much greater weight to concurrent proceedings commenced elsewhere when the English proceedings are simply an attempt to obtain a negative declaration. This is disapproved of as being an example of "forum shopping".[37] The case of *FNBB* v *UBS* illustrates the point.[38] The Court of Appeal overturned the decision of the court of first instance and granted a stay in favour of the proceedings in Geneva. The Union Bank of Switzerland (UBS) claimed $5.3 million from First National Bank of Boston (FNBB) in proceedings in Geneva and then FNBB brought proceedings against UBS in London for a declaration that it was under no such liability. In the English proceedings FNBB sued four other defendants alleging a conspiracy betwen them to extract $5.3 million from the banking system as between FNBB and UBS, the sum that UBS was claiming from FNBB in Switzerland. Mr Justice Steyn was heavily influenced by the fact that FNBB's claims against the four defendants other than UBS could only be brought in England and decided not to stay the English proceedings even though Geneva was the appropriate forum to resolve the dispute between UBS and FNBB. The Swiss courts were the appropriate forum because Swiss law governed and the case had a closer connection with Switzerland than anywhere else. The Court of Appeal made some important observations about actions for negative declarations and relied on Lord Wilberforce's dictum in *Camilla Cotton Oil Co.* v *Granadex SA*, that:

"The declaration claimed is of a negative character and as Lord Sterndale himself had said "a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made". He went on: "Hardly ever" is not the same as "never" but the words warn us that we

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[37] See *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361at 371; *Sohio Supply Co* v *Gatoil* [1989] 1 Lloyd's Rep 588 at 593; and *FNBB* v *UBS* [1990] 1 Lloyd's Rep 32 at 38, 39. Some academic support for this disapproval comes from Collins, *Essays in International Litigation and the Conflict of Laws* (1994) at 274-288, although he does indicate that seeking a negative declaration can be appropriate in certain cases (at 287), and Fentiman, "Tactical Declarations and the Brussels Convention" (1995) 54 CLJ 261. For a more neutral approach to negative declarations see Bell, "The Negative Declaration in Transnational Litigation" (1995) 111 LQR 674 and Davenport, "Forum Shopping in the Market" (1995) 111 LQR 366 at 371. Bell rightly points out that it is wrong to assume that negative declarations are per se an example of forum shopping (see 685-690) because such a declaration may be sought in the natural forum. In *Rowland v Gulfpac Ltd., etc*, n.17 above, Rix J referred to the above cases which warn against the desirability of negative declarations, "particularly in a forum shopping context", and said that the action before him was in effect a negative declaration and therefore he would only exercise jurisdiction with "great care". He was influenced by the fact that the American positive proceedings (for bankruptcy) were already being administered in Idaho and that the crucial issues were governed by American insolvency law. Therefore the plaintiffs in the English action were denied leave to serve because they had not shown that England was clearly the more appropriate forum. Hopefully Rix J's comment that negative declarations are suspect in a forum shopping context is a move away from the simplistic assumption that seeking a negative declaration is per se an act of forum shopping.

[38] N.37 above.

must apply some careful scrutiny. So I inquire whether to grant such a negative declaration would be useful."[39]

In the instant case a negative declaration against UBS would not have been useful as it would not have prevented the continuance of the Swiss proceedings and any judgment there in favour of UBS could have been enforced against FNBB in Switzerland. In relation to the importance of being able to sue the other four defendants together with UBS the Court of Appeal pointed out that if FNBB were to obtain its negative declaration against UBS then its claims against the other four defendants would fall. Those claims would have had a chance of succeeding only if it was discovered that FNBB was liable to give UBS $5.3 million. Therefore allowing a negative declaration action against UBS to proceed in England would have had no utility in relation to the action against the other four defendants unless it failed. Sir Michael Kerr concluded that:

"To allow FNBB's claim for a declaration of non-liability to proceed against UBS would be contrary to the spirit of comity between our Courts and the Swiss Courts."[40]

C. Convenience of Witnesses

The convenience of witnesses is usually a relevant factor in determining the appropriate forum to hear a case but has rarely, if ever, been determinative. Where the dispute is primarily factual rather than legal then the convenience of witnesses can be a major factor[41] but where the dispute is primarily one of law and there is little scope for oral evidence then convenience of witnesses is of negligible relevance.[42]

In *CMA* v *Capricorn Art*,[43] convenience of witnesses was one of several factors pointing towards Ohio being the more appropriate forum and the English proceedings were stayed. It seems likely that the fact that considerable time and expense had already been incurred in relation to the Ohio action and that Ohio law governed the loan agreement were of more significance than the convenience of witnesses. Jet travel reduces the level of inconvenience involved in witnesses giving evidence in a foreign forum and if travel is not possible the evidence can usually be taken on commission. Certainly in *Du Pont* v *Agnew*,[44] the Court of Appeal did not regard the fact that Illinois was more convenient for the bulk of the witnesses than London as creating a substantial

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[39] [1976] 2 Lloyd's Rep 10 at 14. The quotaton from Lord Sterndale is from a decision when he was still Lord Justice Pickford in *Guaranty Trust Company of New York* v *Hannay & Co.* [1915] 2 KB 536 at 564-565. The quotations were made by Sir Michael Kerr in *FNBB* v *UBS*, n.37 above, at 36-37.

[40] N.37 above at 38. His reasoning was concurred in by Russell LJ and Sir Stephen Brown, P.

[41] See the *Trade Indemnity* case, nn.17 and 27 above.

[42] See *Bank of Baroda v Vysya Bank*, nn.17 and 26 above, at 96.

[43] N.36 above, at 173.

[44] N.26 above, at 594. Discussed further at nn. 31 and 64.

advantage in favour of Illinois as the appropriate forum. Indeed this advantage to Illinois was outweighed by the view of the Court of Appeal that the insurance policies were governed by English law.

If the witnesses will give oral evidence in a foreign language and the bulk of the written evidence is in that language then this constitutes a more significant factor in favour of the English proceedings being stayed. In *re Harrods (Buenos Aires) Ltd (No. 2)*, Lord Justice Stocker noted that the bulk of the witnesses would give evidence in Spanish, that the documents were in Spanish and thus a lot of translation would be required. He concluded that:

"The difficulties of a trial in this country are such that it is not easy to see how such a trial is to be conducted. At the very least, it will present a formidable task for a trial judge."[45]

D. Convenience of the Parties

Often convenience of the parties is a factor which cancels itself out in that one forum is more convenient for one party and the alternative forum is more convenient for the other. However, if the defendant is sued in his home court then this is a factor against granting a stay of the proceedings. Lord Justice Bingham has said that:

"It must be rare that a corporation resists suit in its domiciliary forum. Rarely would this Court refuse jurisdiction in such a case."[46]

Where the alternative forum is the plaintiff's home base then this is a factor in favour of upholding a plea of forum non conveniens. In *Cleveland Museum of Art* v *Capricorn Art*, Hirst J decided that Ohio was a more appropriate forum than England and was significantly influenced by the fact that the Cleveland Museum of Art is situated there.[47]

The courts may be willing to look behind the nominal parties to the insurers who are financing the litigation. In the *Spiliada* case, Lord Goff took account of the fact that the shipowners' insurers, who were managed in England, financed the litigation and were dominus litis, as a

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[45] N.27 above, at 364. Bingham LJ pointed out that the fact that the bulk of the witnesses spoke Spanish was a "significant matter in an action where credibility is very much in issue" (at 367).

[46] *Banco Atlantico*, n.24 above, at 510. Lord Justice Bingham may take a different view where the company is registered in England but simply has a "ghostly legal existence" there carrying on all its business in another country, see *Re Harrods (Buenos Aires) Ltd (No.2)*, n.27 above at 367.

[47] N.36 above, at 173.

factor against granting a stay of the English proceedings even though the nominal parties had Greek, Liberian and Canadian connections.[48]

E. Real and Close Connection between the Forum and the Dispute

This factor may be linked to the convenience of the parties in that it focuses on the place where the parties' dispute is centred and this is often where one or both of the parties reside. In *Meadows* v *ICI*, Hirst J concluded that London was the place which had the most real and close connection with the dispute partly because the parties had offices in London and the bulk of the important transactions took place there.[49] Likewise in *Morrison* v *Panic Link Ltd*, Lord Sutherland was influenced by the fact that Scotland was:

"the country which has the clearest connection with the subject matter of the action".[50]

He reached this conclusion on the basis that the majority of the contractual obligations were due to be performed in Scotland because the agreement concerned the operation of a franchise there. This connection with Scotland was strengthened by the fact that the pursuer was domiciled there.

In many ways looking for the forum with which the action has "its closest and most real connection" is another way of saying one is trying to identify the "natural forum" or the "most appropriate" forum.[51] It is not really a factor in determining the "appropriate" forum but rather another way of stating the objective. It may, however, be a relevant factor in determining the appropriate forum if the focus is a narrow one on the geographical place with which the dispute is connected, eg the place of performance of the contractual obligation in question.[52]

F. Actions for Negative Declarations

The importance of this factor is considered above under B. Litigation Pending Elsewhere. If an action is pending elsewhere and the defendant in that action brings proceedings in England for a negative declaration this is usually regarded as forum shopping and the courts in the United

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[48] N.15 above, at 486. He cited in support of this approach Lord Sumner in *Societe du Gaz*, n.5 above, at 20.

[49] N.34 above, at 190.

[50] N.15 above, at 604. The decision was affirmed by an Extra Division, 1994 SLT 232.

[51] See *Bank of Baroda v Vysya Bank*, n.17 above, at 96 and the *Gann* case, n.26 above, at 537.

[52] See *Bank of Baroda v Vysya Bank*, n.17 above, at 98.

Kingdom may decline to exercise jurisdiction.[53] Similarly, if a plaintiff brings proceedings in England for a negative declaration in an attempt to preempt a positive action against them in another forum, the English courts may well refuse to grant such a declaration.[54]

A strong case can be made that the English courts are too hostile to negative declarations and that the question whether the plaintiff is seeking a negative declaration rather than a positive remedy should in itself be neutral in determining the appropriate forum.[55]

G. Third Party/Multiple Defendants

If the plaintiff is able to sue all the defendants in England, or join a third party to the action there, but this is not possible in the alternative forum, then this is a significant factor in favour of the English court retaining jurisdiction.[56] It is not, however, a conclusive factor. In the *Cleveland Museum of Art* case, the second defendants, T. Rogers & Co., could be sued together with the first defendants only in England and yet Hirst J decided to stay the English action against the first defendants, Capricorn Art, in favour of the already pending proceedings in Ohio. In this case several factors favoured Ohio and only the "Rogers" factor pointed towards England.[57]

H. Related proceedings ("*The Cambridgeshire* Factor")

In *The Spiliada* case,[58] a significant reason why the English courts declined to stay the proceedings was the existence of related litigation in England concerning *The Cambridgeshire*

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[53] See nn. 37-40 above.

[54] Nn. 37-40 above and *Midland Bank Plc.* v *Laker Airways Ltd.* [1986] QB 689. If the negative declaration is being sought in the alternative forum then this is a factor against staying the English proceedings, see *Sohio* v *Gatoil* n.37 above, 593.

[55] See the articles by Bell and Davenport, n.37 above. Bell (at 686) cites the *Gann* case, n.26 above at 537, as an example of where an English court did not assume that seeking a negative declaration in a foreign forum was necessarily wrong. However, the case is at best rather weak support for Bell's viewpoint because Hirst J's reasoning on the significance of an action for a negative declaration was brief and less than clear. For other reasons this was a case where England was clearly the appropriate forum, see n.26 above.

[56] See *Charm Maritime* v *Kyriakou,* n.25 above, at 448 and 451; and *Meadows* v *ICI,* n.34 above, at 190.

[57] N.36 above.

[58] N.15 above.

and involving the same defendants, Cansulex Ltd. Fifteen counsel were engaged in *The Cambridgeshire* case and each had 75 files. Staughton J, who was hearing both cases, in the *Spiliada* case (later supported by the House of Lords) thought it would be "wasteful in the extreme of talent, effort and money if the parties to this case were to have to start again in Canada."[59] It is wise to take into account the loss of the specialist knowledge gained by the lawyers, experts and judges in related proceedings in the same forum when deciding whether or not to stay a case.

I. Res Judicata

If a foreign judgment may be res judicata in relation to the proceedings pending in the United Kingdom then this is a factor in favour of staying the proceedings to allow the question of res judicata to be determined in the foreign forum.[60] In *Charm Maritime* v *Kyriakou*,[61] it was not clear if the Greek judgment was res judicata and to determine this question in England would involve a good deal of evidence from Greek lawyers. Therefore this was a strong factor pointing towards the case being heard in Greece. Nonetheless, the Court of Appeal gave greater weight to other factors pointing towards England, in particular the need to determine questions of trust law unfamiliar in Greece[62] and the ability to sue the second defendant, Mathias, in the English courts.[63]

J. Public Policy

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[59] *Ibid.* 471. See the comments of Lord Goff at 485-486 about the steep "learning curve" where lawyers and experts grapple with difficult scientific questions in protracted litigation. In *Bank of Baroda v Vysya Bank*, n.17 above, Mance J, in deciding that England was the appropriate forum, took into account the fact that there had been extensive English proceedings arising out of the problems affecting the underlying transaction and therefore Vysya Bank (which wanted the action litigated in India) had English lawyers who were already well briefed about the background at the time when the present action was begun (at 96-97).

[60] See *Charm Maritime* v *Kyriakou* , n.25 above, at 447 and 451.

[61] *Ibid.*

[62] *Ibid.*

[63] See nn. 25 and 56 above.

In *Du Pont* v *Agnew*[64] the Court of Appeal decided that the contract was governed by English law and that the question whether the plaintiffs could be indemnified by the insurers against the punitive damages awarded against them in Illinois was an open one to be determined by English public policy. Lord Justice Bingham seemed to be saying that when a novel question of English public policy is in issue the English courts must not decline to exercise jurisdiction:

"If English public policy is to be held to deny the right to indemnity in these circumstances, then this Court and no other must so hold. I do not regard this as a question capable of fair resolution in any foreign court, however distinguished and well instructed... The primary question, as I regard it, is the effect of this contract as a matter of English public policy, and that is a question which I do not think any foreign Judge could conscientiously resolve with any confidence that he was reaching a correct answer."[65]

K. Expense and Time

The trial judge in *Irish Shipping Ltd.* v *Commercial Union*,[66] refused to grant a stay of the English proceedings. He decided that both the English and Belgian courts were appropriate fora but:

"The advantage of this jurisdiction appears to be that it will probably lead to a resolution of the dispute more quickly than Belgian process and at less expense, because the issues on the plaintiffs' title to sue are more complex in Belgium."[67]

This view was affirmed by the Court of Appeal.

However, the fact that another forum might permit a lesser recovery of costs and that litigation may take longer than in England will only be taken into account in exceptional circumstances.[68]

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[64] Nn. 26, 31 and 44 above.

[65] *Ibid.* 594-595.

[66] [1991] 2 QB 206.

[67] *Ibid.* 246.

[68] See *Bank of Baroda v Vysya Bank*, n.17 above, at 98. The fact that the winning party can recover his own costs in England but not in California was regarded as being of significance in granting leave to serve in *Agrafax Public Relations Limited, etc*, n.17 above, because the costs of the litigation were disproportionate to the amount at stake.

The availability of legal aid in England and its non-availability in the alternative forum is not a relevant factor in determining the appropriate forum.[69]

L Lack of Arguable Defence on the Merits

If the defendant is unable to state an arguable defence on the merits then it is highly unlikely that he will be granted a stay of the proceedings.[70]

Concluding Remarks

Given the propensity for States to arrogate to themselves extensive jurisdiction in civil and commercial cases it seems highly appropriate to employ forum non conveniens as a means of declining to hear cases which would clearly be better heard in another forum. The alternative mechanism of lis pendens, employed in the Brussels and Lugano Conventions, does not concern itself with which is the more appropriate forum to hear the case but rather with which party launched its action first. An arbitrary first come first served rule may be necessary and acceptable in the context of these Conventions where the grounds of jurisdiction are clearly circumscribed and an almost automatic system of recognition and enforcement of judgments is created. Outwith such a tight knit framework its arbitrariness becomes unacceptable. The benefit of certainty is outweighed by the fact that it encourages parties to rush to be the first to

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Winning the law but not being able to recover one's own costs would be a pyrrhic victory. It is not clear whether Henry LJ was invoking this point in the context of weighing the relative appropriateness of California and England or whether he was relying on the justice exception.

[69] See *Connelly v RTZ Corporation PLC and Another, The Independent*, September 29, 1995; *The Times*, October 20, 1995 (C.A.). Judgment was given on 18 August 1995, see LEXIS transcript. The Court of Appeal was unanimous that the availability of legal aid for the plaintiff in England and its non-availability in Namibia was not a good reason to deny the plea of forum non conveniens. It was common ground between the parties that Namibia was the forum with which "the action has the most real and substantial connection" and that the plaintiff in the English action would not be able to pursue his action in Namibia due to his lack of money and the non-availability of legal aid there. Counsel for the plaintiff argued that the stay could not be granted because in these circumstances Namibia is not a forum "in which the case may be tried more suitably for the interests of all the parties and for the ends of justice". The majority of the Court of Appeal (Swinton Thomas and Neill LJJ) rejected the plaintiff's argument on the narrow ground that s.31(1) of the Legal Aid Act 1988 forbids the courts from taking into account the fact that a party to the proceedings has legal aid when applying "the principles on which the discretion of any court or tribunal is normally exercised". Thus when exercising the discretion to decide whether to uphold a plea of forum non conveniens or not the fact that a party has legal aid must be treated as neutral. The principle lying behind this statutory provision is to prevent litigants in receipt of legal aid being discriminated against or being given advantages over other litigants. Waite LJ reached the same conclusion but on rather wider grounds: (a) it would be contrary to international comity to make the levels of state assistance for litigation determinative of forum non conveniens and (b) comparisons of public assistance in different fora can be difficult and this is not appropriate when deciding the plea of forum non conveniens at an early stage of litigation and often as a matter of urgency.

[70] See *Bank of Credit & Commerce Hong Kong Ltd (in liquidation) v Sonali Bank* [1995] 1 Lloyd's Rep. 227 at 238, the unreported case cited therein (*Adria Services Y.U. v Grey Shipping Co. Ltd.*, judgment of Clarke J on July 30, 1993) and *Standard Chartered Bank v Pakistan National Shipping Corporation and Others* [1995] 2 Lloyd's Rep. 365 at 378.

initiate proceedings, including purely defensive actions for negative declarations in a forum which is so inconvenient for the other party that it is designed to deter that party from pursuing its positive remedy.[71]

The availability of the plea of forum non conveniens does increase the uncertainty about whether or not a particular court will exercise its jurisdiction. This in turn increases the risk of fruitless litigation simply trying to establish whether a court will hear the case. Nonetheless, the alternatives of always exercising even the most exorbitant of jurisdictions or of operating a lis pendens rule create too many opportunities for injustice. The lis pendens rule is certain but, unlike choice of law rules which are certain, it does not have the virtue of encouraging out-of-court settlements and thereby reducing the time and the cost of resolving legal disputes. Rather it encourages a person involved in a legal dispute to rush to a particular court in order to gain procedural and/or juridical advantages over the other party. Thus the flexibility of forum non conveniens is not gained at the expense of encouraging litigation rather the certainty of lis pendens is gained at that expense.

The recent developments in the plea of forum non conveniens, particularly its adoption by the House of Lords in the *Spiliada* case, have greatly clarified its scope and increased the certainty of its application in an individual case. One reason for that enhanced certainty is the large number of cases decided on the plea since its adoption in England. Such a volume of precedent could never be established in the much smaller jurisdiction of Scotland. It has to be acknowledged that the analysis of the various factors considered in these cases to determine the "appropriate" forum shows that different weight can be given to different factors in different circumstances. A trial judge can find some guidance from these cases but still has considerable discretion in determining the appropriate forum. It will be a very rare occasion when the plea is denied on the grounds of "justice" even though there is clearly a more appropriate forum.

Although the flexibility of the judicial application of forum non conveniens cannot be removed it may be helpful to list the points that have emerged from the case law in the United Kingdom since the *Spiliada* case, or from academic analysis, as to the determination of the "appropriate" forum.

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 which 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.

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[71] For a discussion of these issues see the works of Bell, Collins, Davenport and Fentiman, n.37 above, and Herzog, "Brussels and Lugano, Should you Race to the Courthouse or Race for a Judgment?" (1995) 43 AJCL 379, esp. at 398.

ANNEX D

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 ot 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. This factor has echoes of the interpretation of the Brussels Convention which gives a strict construction to the special jurisdictions in favour of the general jurisdiction of the defendant's domicile in Article 2.

5) The geographical place with which the dispute is closely connected, eg 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 currently a factor in favour of the latter forum. However, it is arguable that this should be a neutral forum in determining the appropriate 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 which 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 but in an extreme case can be relevant to the "justice" exception.

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 forum in order to avoid wasting time.