

CHALLENGES TO *FORUM NON CONVENIENS*

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I. INTRODUCTION

Forum non conveniens is an imperfect doctrine, developed and existing mostly in common law jurisdictions, and subject to easy criticism. At the same time, it has survived largely because it serves a legitimate purpose for which no superior substitute has been presented. Its resilience has been demonstrated despite numerous challenges. It is likely to continue to survive and evolve in most states around the world in which it exists. Interestingly, the United Kingdom (including Scotland,

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which is credited with having given birth to the doctrine¹) is perhaps the state in which the doctrine is most at risk.²

The doctrine of *forum non conveniens* is not the only doctrine for regulating forum shopping. Its principal competitor in legal systems is the doctrine of *lis alibi pendens*³—the approach to the regulation of forum shopping that exists in most civil law jurisdictions—which requires that the court first seised with a case shall have priority over all other courts. Courts later seised with the case shall decline jurisdiction in favor of the court first seised.

The future of *forum non conveniens* may depend largely on whether, in the search for the best approach to the possibility of parallel litigation (*i.e.*, to forum shopping), we see the competition between *forum non conveniens* and *lis alibi pendens* as a healthy competition in the market place of legal systems, or as a conflict that must be resolved by the triumph of one approach over the other, or by some compromise that harmonizes the two approaches. This broader global context for the doctrine of *forum non conveniens* should be considered when dealing with the nuance of the doctrine in its case-by-case development in the United States.

In the discussion below, I consider recent challenges to the doctrine of *forum non conveniens* as well as how both the competing doctrine of *lis alibi pendens* and the greater global context affect those challenges. I begin with a brief discussion of the common law doctrine of *forum non conveniens*, as well as an introduction to *lis alibi pendens*, the civil law alternative doctrine. I then consider recent external and internal challenges to the doctrine of *forum non conveniens* in the context of this comparison. Finally, I provide some concluding comments on

1. See RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 7–10 (2007) (describing the development of the doctrine in Scotland).

2. See, *e.g.*, Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1445, ¶ 46 (“[T]he Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.”). See also *infra* Part IV.A.1.

3. The matter at hand (*lis*) between the parties (*alibi*) is pending (*pendens*). See *infra* Part III.

where the evolutionary development of the doctrine might go in the future.

II. THE *FORUM NON CONVENIENS* DOCTRINE

Forum non conveniens is a doctrine applied mostly in common law judicial systems.⁴ It allows courts that have jurisdiction over a case to stay or dismiss the case upon a determination that the case may more appropriately be heard in another court. The trial court is given substantial discretion in determining whether a more appropriate forum exists, and, if so, whether to stay or dismiss in favor of that other court.⁵ Most often, the exercise of *forum non conveniens* is considered to allow a court to decline to exercise jurisdiction because the interests of justice are best served if the trial takes place in another court. While Scottish courts are credited with first developing and applying the concepts underlying this doctrine,⁶ courts in other countries have joined in its evolution, “resulting in familiarity with the doctrine throughout the common law world.”⁷

In the United States, the law on *forum non conveniens* has been developed largely through three major Supreme Court decisions: *Piper Aircraft Co. v. Reyno*,⁸ *Gulf Oil Corp. v. Gilbert*,⁹ and *Koster v. Lumbermens Mutual Casualty Co.*¹⁰ These cases generally have been followed in both federal and state courts, and

4. For a review of the *forum non conveniens* doctrine in the United Kingdom, United States, Canada, and Australia, see BRAND & JABLONSKI, *supra* note 1.

5. In the United States, even if a court has both subject matter and personal jurisdiction over the parties, it may dismiss a case on grounds of *forum non conveniens* when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would “establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience,” or when the “chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.” *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947). *See also* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (holding that a lower court did not abuse its discretion in the decision to invoke *forum non conveniens* when the events precipitating the lawsuit occurred in another state).

6. BRAND & JABLONSKI, *supra* note 1.

7. *Id.* at 1.

8. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

9. *Gilbert*, 330 U.S. at 501.

10. *Koster*, 330 U.S. at 518.

have in some instances been tracked by state legislation.¹¹ Courts begin by determining whether the suggested foreign forum is an adequate alternative forum.¹² If the alternative forum is deemed adequate, the court will next consider a combination of private and public interest factors to determine whether the alternative forum is more appropriate to hear the case than the forum chosen by the plaintiff. The Supreme Court listed the private and public interest factors as follows in *Gilbert*:

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

Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of

11. See, e.g., LA. CODE CIV. PROC. ANN. art. 123 (2005) (allowing dismissal in circumstances similar to the federal standard enunciated in *Piper, Gilbert, and Koster*).

12. *Gilbert*, 330 U.S. at 506-08.

the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.¹³

The Supreme Court reiterated the importance of these private and public interest factors in *Piper*, noting:

[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. . . . [T]he presumption applies with less force when the plaintiff or real parties in interest are foreign.¹⁴

A *forum non conveniens* dismissal may be granted even though the foreign forum will apply a law that is less favorable to the plaintiff.¹⁵ Nonetheless, a difference in substantive law is one factor a court may consider in the *forum non conveniens*

13. *Id.* at 508–09.

14. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

15. *Id.* at 247. In the *Piper Aircraft* case, the Supreme Court held that dismissal on *forum non conveniens* grounds was appropriate in a wrongful death action originally brought in a California court on behalf of the estates of citizens and residents of Scotland killed in an airplane crash in Scotland. The case was removed to federal court in California, then transferred to the Middle District of Pennsylvania because it was, in part, against a Pennsylvania plane manufacturer and an Ohio propeller manufacturer. The Supreme Court held that “dismissal on *forum non conveniens* grounds may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery.” *Id.* at 250. In effect, the Court rejected the use of U.S. courts by foreign plaintiffs in order to gain the advantage of more favorable law on products liability and more favorable jury verdicts. Similarly, the Second Circuit upheld the dismissal of a case on *forum non conveniens* grounds even though the suit was brought against a New York corporation in a New York court. *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127 (2d Cir. 1987). In *Transunion Corp. v. Pepsico*, most of the facts in the case involved a dispute about a bottling contract in the Philippines. The plaintiff was a Philippine national, and the defendant's operations concerned in the dispute were all in the Philippines. The case demonstrates the equal applicability of the *forum non conveniens* doctrine to contract, as well as tort, cases.

analysis.¹⁶ In the United States, *forum non conveniens* is often seen as a defense against forum shopping. Justice Scalia's majority opinion in *American Dredging Co. v Miller* described *forum non conveniens* as addressing both court administration and private litigant problems by discouraging plaintiffs from forum shopping.¹⁷

While the doctrine generally allows a court to decline to exercise jurisdiction that otherwise exists, the Supreme Court has held that a court may dismiss a case on *forum non conveniens* grounds even before finding the existence of jurisdiction, "when considerations of convenience, fairness, and judicial economy so warrant."¹⁸ While a court may place conditions on a *forum non conveniens* dismissal, some courts will refuse to require a defendant to agree in advance to the enforceability of a judgment from the alternative foreign court.¹⁹

III. THE COMPETING APPROACH TO PROBLEMS OF PARALLEL LITIGATION: *LIS ALIBI PENDENS*²⁰

The doctrine of *forum non conveniens* is, in part, a response to the possibility of parallel litigation. Most common law legal systems allow parallel litigation, and thus create a race to judgment, with one forum then being more-or-less obliged to recognize and enforce the judgment first rendered and thereby

16. *Piper Aircraft Co.*, 454 U.S. at 254.

17. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994).

18. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 423 (2007).

19. See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987) (finding it appropriate for the district court to condition the dismissal on the defendant's submission to the jurisdiction of the courts of India and waiver of any statute of limitations defenses, but rejecting the conditions that the defendant agree in advance to the enforceability of any resulting Indian judgment and accept discovery in India according to the Federal Rules of Civil Procedure).

20. Portions of this section are developed from previous writings of the author. Ronald A. Brand, *Balancing Sovereignty and Party Autonomy in Private International Law*, in LIBER MEMORIALIS PETAR ŠARĀEVĪĀ: UNIVERSALISM, TRADITION AND THE INDIVIDUAL 35 (Johan Erauw et al. eds., 2006); Ronald A. Brand, *External Effects of Internal Developments For Private International Law in Europe: The External Effects of Internal Developments*, in LIBER FAUSTO POCAR: NEW INSTRUMENTS OF PRIVATE INTERNATIONAL LAW 163 (Gabriella Venturini & Stefania Bariatti eds. 2009); Ronald A. Brand, *The European Magnet and the U.S. Centrifuge: Ten Selected Private International Law Developments of 2008*, 15 ILSA J. INT'L & COMP. L. 367 (2009).

terminate all other litigation. Courts may employ *forum non conveniens* to exit this race to judgment. Most civil law jurisdictions seek to prevent parallel litigation, largely through the doctrine of *lis alibi pendens*.²¹

Civil law jurisdictions tend to give as little discretion to judges as possible. Thus, the idea that, under a doctrine such as *forum non conveniens*, a court could exercise discretion to stay or dismiss a case in favor of a foreign court is inconsistent with the basic understanding of a judge's role. Moreover, such an action is seen by some as inconsistent with every person's (and every plaintiff's) right of access to the courts.

The *lis pendens* approach is codified in the structure of the jurisdictional rules of the Brussels I Regulation in the European Union,²² which approaches parallel litigation with a simple and predictable rule. Article 27 states:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.²³

Through case law, this has become one of the preeminent rules of the Brussels I Regulation, trumping even Article 23,

21. For a more detailed discussion of the doctrine of *forum non conveniens* in other common law systems, and of the doctrine of *lis alibi pendens* in civil law systems, see BRAND & JABLONSKI, *supra* note 1.

22. Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC) [hereinafter Brussels I Regulation]. The Brussels I Regulation was further amended in December 2012. Regulation (EU) 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), 2012 O.J. (L 351) 1 (EU) [hereinafter Recast Regulation]. Under Article 81, the Recast Regulation "shall apply from 10 January 2015, with the exception of Articles 75 and 76, which shall apply from 10 January 2014." *Id.* art. 81.

23. Brussels I Regulation, *supra* note 22, art. 27.

which otherwise allows parties to choose the court in which their disputes will be decided.²⁴

While *forum non conveniens* has its problems, the *lis pendens* alternative is far from perfect. A comparison of the two doctrines highlights the differences between the general common law quest for equity/fairness and the civil law quest for efficiency. The doctrine of *forum non conveniens*, developed in common law jurisdictions, favors equitable analysis over efficient rules, and it gives courts discretion in determining the most appropriate forum for a single dispute.²⁵ By contrast, the civil law *lis alibi pendens* approach provides a predictable rule, more efficiently applied.²⁶ Neither approach to parallel litigation is wholly satisfactory. The *lis pendens* approach favors effi-

24. See *infra* Part IV.A.1. The basic rule of Article 23 is found in its first paragraph:

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

Brussels I Regulation, *supra* note 22, art. 23.

25. See, e.g., BRAND & JABLONSKI, *supra* note 1 (discussing the development and scope of *forum non conveniens* in common law countries).

26. The Brussels I Regulation states this concept as follows:

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

Brussels I Regulation, *supra* note 22, art. 27.

Because the jurisdictional rules of the European Commission's proposed recasting of the Brussels I Regulations would also have applied to defendants domiciled outside the EU, the draft text of Article 34(1) at that time contained the following additional language to modify the *lis pendens* rule in situations where the other court is located outside the EU:

1. Notwithstanding the rules in Articles 3 to 7, if proceedings in relation to the same cause of action and between the same parties are pending before the courts of a third State at a time when a court in a Member State is seised, that court may stay its proceedings if:
 - (a) the court of the third State was seised first in time;
 - (b) it may be expected that the court in the third State will, within a reasonable time, render a judgment that will be capable of recognition and, where applicable, enforcement in that Member State; and

ciency and predictability (values focused on societal interests) over equity and fairness (values focused on individual interests). The result is a race to the courthouse that can interrupt (and perhaps prevent) rational negotiated resolution of disputes before tensions are raised by formal legal proceedings. The common law approach (*forum non conveniens*) requires that courts be given discretion (something disfavored in civil law systems), and brings with it significant uncertainty.

IV. CHALLENGES TO *FORUM NON CONVENIENS*

Recent developments have presented challenges to the *forum non conveniens* doctrine on a number of fronts. This includes cases in Europe that have resulted in the jurisprudential dominance of *lis pendens* over *forum non conveniens*, instability resulting from differing tests applied in states that use *forum non conveniens*, statutes in Latin America designed to curtail the effect of *forum non conveniens* dismissals in the United States, and “boomerang litigation” in which defendants who prevail on *forum non conveniens* motions are faced with large judgments from litigation in the alternative forum.

A. *External Challenges*

1. *The European Challenge*

In the *Gasser* and *Owusu* cases, the European Court of Justice provided a clear contrast between the European civil law *lis pendens* approach and the common law *forum non conveniens* approach to forum shopping and parallel litigation.²⁷ In *Gasser*, an Italian buyer brought suit in Italy against an Austrian seller. The Austrian seller then brought suit in Austria for payment on outstanding invoices, which had clauses stating that disputes would be settled only in Austrian courts. The Austrian seller argued that the prorogation (choice of court) rule found in Article 17 of the Brussels Convention supported ex-

(c) the court is satisfied that it is necessary for the proper administration of justice to do so.

Commission Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), at 38, COM (2010) 748 final (Dec. 14, 2010) [hereinafter Commission Proposal].

27. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1445; Case C-116/02, *Erich Gasser GmbH v. MISAT Srl.*, 2003 E.C.R. I-14721.

clusive jurisdiction in Austrian courts. The Italian buyer responded that the Article 21 *lis pendens* rule required deference to the court first seised. The Austrian seller also argued that, even if the choice of court clause were for some reason invalid, jurisdiction over the Austrian seller could exist only in Austria under Article 2 (domicile of the defendant) or Article 5(1) (place of performance of the contract). Thus, the seller argued that the Italian action was brought only to frustrate proper adjudication, and that the Italian court was likely to take years simply to decide the issue of jurisdiction. The European Court of Justice held that the *lis pendens* rule of Article 21 trumps the choice of court rule of Article 17, and that the Austrian case must be dismissed in favor of litigation in Italy.

The *Owusu* decision continued this rigid interpretation of jurisdictional principles under the Brussels jurisdictional regime. Mr. Owusu, a British national domiciled in the United Kingdom, brought suit in the United Kingdom, claiming damages resulting from injuries incurred while vacationing in Jamaica. The defendants were an individual domiciled in the United Kingdom from whom a vacation home had been rented and several Jamaican companies allegedly responsible for not giving notice of the hazardous conditions that led to Mr. Owusu's swimming accident.

The *Owusu* defendants sought a *forum non conveniens* dismissal, arguing that Jamaica was the more appropriate forum.²⁸ The case was sent to the European Court of Justice for a ruling on whether the Brussels Convention prohibited relief on the *forum non conveniens* motion when the alternative forum was not a Brussels Convention Contracting State. The Court held that the Brussels Convention "precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State."

While the Court justified its decision in *Owusu*, on the basis of the need for "the predictability of the rules of jurisdiction laid down by the Brussels Convention,"²⁹ its result was a

28. *Owusu* [2005] E.C.R. I-1445, ¶ 15.

29. *Id.* ¶ 46.

rigid adherence to the civil law preference for a doctrine of *lis pendens* over the common law preference for a doctrine of *forum non conveniens*. This was consistent with the *Gasser* decision, which elevates *lis pendens* over the parties' choice of court and allows defensive litigation through requests for negative declaratory judgments. Both cases result in a preference for a rush to the courthouse in order to preempt litigation in the natural forum and to allow a party other than the natural plaintiff to gain an advantage by bringing the case in a defensive fashion.

The civil law race to the courthouse arguably has the benefit of predictability, but it sacrifices the opportunity for reasoned efforts to resolve disputes before the natural escalation of tensions brought about by formal litigation. It necessarily assumes that the first forum seised will always be the most appropriate forum, and thereby prevents any judicial discretion designed to place the case in the most appropriate forum.

The *Gasser/Owusu* problem has been addressed by the new Brussels I Recast Regulation, which amends the Brussels I Regulation.³⁰ The reasons for the changes are addressed in the Report delivered on September 25, 2012 and approved by the European Parliament on November 20, 2012.³¹ The matters currently dealt with in Article 27³² are covered in new Article 31 of the Recast Regulation, which reads as follows:

Article 31

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

30. Recast Regulation, *supra* note 22.

31. Report on the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), (Oct. 15, 2012), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0320&language=EN>; Andrew Dickinson, *European Parliament Votes to Recast the Brussels I Regulation*, CONFLICTOFLAWS.NET (Nov. 21, 2012), http://conflictoflaws.net/2012/european-parliament-votes-to-recast-the-brussels-i-regulation/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+conflictoflaws%2FRSS+%28Conflict+of+Laws+.net%29.

32. Brussels I Regulation, *supra* note 22, art. 27.

2. Without prejudice to Article 26 [consent by appearance], where a court of a Member State on which an agreement as referred to in Article 25 [honoring choice of court agreements] confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.³³

Paragraph (2) of this provision seems to address the *Gasser* problem by giving a party's choice of court greater weight in comparison to the *lis pendens* rule. This is consistent with the rules the EU itself agreed to in the negotiation of the 2005 Hague Convention on Choice of Court Agreements.³⁴ This change does not, however, address the *Owusu* problem of the more direct relationship between the doctrines of *forum non conveniens* and *lis alibi pendens*. It rather appears to leave intact the strong preference for the civil law doctrine of *lis pendens* and its resulting dominance over the common law U.K. doctrine of *forum non conveniens* whenever the defendant is from

33. Recast Regulation, *supra* note 22, art. 31.

34. Hague Convention on Choice of Court Agreements art. 5(2), June 30, 2005, 44 I.L.M. 1294, available at <http://www.hcch.net/upload/conventions/txt37en.pdf>:

Article 5

Jurisdiction of the chosen court

(1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

(2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State. . . .

any European Union Member State, including the United Kingdom.

The *Gasser* and *Owusu* cases demonstrate the limitations on the doctrine of *forum non conveniens* that have been imposed by the Brussels Regime. Those limitations demonstrate the clear rejection of the doctrine of *forum non conveniens* in the courts of EU Member States, regardless of whether the Member State has a tradition of following the *forum non conveniens* doctrine over a *lis alibi pendens* analysis, and regardless of whether the court to which deference would be given under a *forum non conveniens* analysis is within or outside of the European Union.

This European challenge to the *forum non conveniens* doctrine portends a significant diminution of the doctrine in the United Kingdom. The civil law *lis pendens* approach to parallel litigation now embodied in the Brussels I Regulation has clearly won out over the common law *forum non conveniens* approach within the European Union.

2. *The Nonconformity Challenge*

A doctrine is weakest when it is not unified. Distinctions within both the common law world of *forum non conveniens* and within the United States doctrine challenge the doctrine by providing nonconformity in its application. The following list demonstrates some of the differences in the doctrine's application across common law jurisdictions in which it is applied:³⁵

- 1) In England and Canada, the doctrine is applicable to basic jurisdictional analysis.³⁶

35. For further elaboration on these differences, see BRAND & JABLONSKI, *supra* note 1, at 101–19.

36. In England, CPR 6.20 of the Civil Procedure Rules of the Supreme Court (formerly Order 11, Rule 1(1), of the Rules of the Supreme Court) allows discretion in permitting service of a writ out of the jurisdiction. R. CIV. PRO. 6.20 (Eng.). Through this system, service of process is fundamental to jurisdiction over a foreign defendant, and the exercise of discretion can bring in the *forum non conveniens* analysis. In Canada, the tie between *forum non conveniens* and initial jurisdictional determinations is made clear in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.

2) While other countries consider only private interest factors in applying the doctrine, U.S. courts consider both public and private interest factors.³⁷

3) Australia has rejected what Professor von Mehren has called the “convenience-suitability approach” now applied in the United Kingdom, United States, and Canada, in favor of an “abuse-of-process approach” to *forum non conveniens*, which rejects the “appropriate forum” test approach and continues the requirement previously applied in other jurisdictions that the defendant demonstrate that the forum chosen by the plaintiff results in vexation or oppression.³⁸

4) Australia considers the plaintiff’s juridical advantage that may result from its chosen forum as particularly important, noting that “a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise.”³⁹

Within the United States, there is further non-uniformity, with many states having their own versions of the doctrine.⁴⁰ The Washington State Supreme Court has specifically rejected

37. *E.g.*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947). U.K. courts have specifically stated that “public interest considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the court has to make” in a *forum non conveniens* analysis. *Lubbe v. Cape Plc.*, [2000] UHKL 41, [2000] 1 W.L.R. 1545, 1561, 1566 (Lord Bingham of Cornhill, Lord Hope of Craighead) (appeal taken from Eng.).

38. *Oceanic Sun Line Special Shipping Co. v. Fay* (1988) 165 C.L.R. 197, 209 (Austl.); Arthur Taylor von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems*, 295 RECUEIL DES COURS, ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 9, 326 (2002). The Australian High Court’s retention of the “clearly inappropriate forum test” in *Voth v. Manildra Flour Mills Proprietary Ltd.* was accompanied, however, with an explanation that the words “oppressive” and “vexatious” are to be liberally construed. *Voth v. Manildra Flour Mills Proprietary Ltd.* (1990) 171 C.L.R. 538, 555 (Austl.). For a comparison of the Australian approach with that of other common law countries, see BRAND & JABLONSKI, *supra* note 1.

39. *Voth*, 171 C.L.R. at 554.

40. For discussions of state *forum non conveniens* law, see John W. Joyce, Comment, *Forum Non Conveniens in Louisiana*, 60 LA. L. REV. 293 (1999) and Karolyn King, Note, *Open “Borders”—Closed Courts: The Impact of Stangvik v. Shiley, Inc.*, 28 U.S.F. L. REV. 1113 (1994).

any claim that a foreign plaintiff's choice of forum is presumptively inconvenient,⁴¹ and New York decisions have been read to eliminate the first prong of the federal analysis—proof of an alternative, appropriate forum.⁴² In *Radeljak v. Daimler-Chrysler Corp.*, the Michigan Supreme Court provided a list of private and public interest factors that differs from that established by the U.S. Supreme Court in *Gilbert*,⁴³ and overruled earlier Michigan common law which required that the private and public interest factors be considered only if the defendant first proved that the local court is a “seriously inconvenient” forum.⁴⁴ Thus, the law of the various states tends to both move away from, and back to, the federal standard.

3. *Two Latin American Challenges*

As with the civil law legal systems of continental Europe represented in the Brussels regime discussed above,⁴⁵ a similar distaste for the results of a discretionary *forum non conveniens* doctrine has been seen in the civil law legal systems of Latin America. The result has been an evolutionary approach that has first challenged the doctrine directly by refusing cases dismissed on *forum non conveniens* grounds in U.S. courts, and then, more recently, accepting the cases and responding with large judgments.

a. *The First Latin American Challenge: Seeking to Prevent Forum Non Conveniens Dismissals*⁴⁶

One of the more interesting developments regarding the *forum non conveniens* doctrine has been the effort in Latin America to frustrate the application of the doctrine in the United States by enacting laws designed to make courts unavailable for cases that have been filed outside the legislating country and then dismissed on the basis of *forum non conveniens*. Two basic rules of Latin American civil procedure, like

41. *Myers v. Boeing Co.*, 794 P.2d 1272, 1281 (Wash. 1990). See also King, *supra* note 40, at 1127–28 (discussing *Myers*).

42. Joyce, *supra* note 40, at 310.

43. *Radeljak v. DaimlerChrysler Corp.*, 719 N.W.2d 40, 43 (Mich. 2006).

44. *Id.* at 48–49.

45. See *infra* Part IV.A.1.

46. Portions of this section build on and incorporate the author's prior writings in BRAND & JABLONSKI, *supra* note 1.

those in the continental European systems from which they developed,⁴⁷ provide the basis for this concern with the application of the *forum non conveniens* doctrine in the United States. First, it is a basic rule of jurisdiction in Latin America that a person (legal or natural) may be sued at his place of domicile or residence.⁴⁸ Second, like the *lis pendens* rule in Europe, once a plaintiff has chosen a court that has jurisdiction on this ground, that court generally does not have discretion to refuse to hear the case, and all other courts are considered to have lost jurisdiction over the case.⁴⁹ This legal tradition obviously comes into conflict with the U.S. *forum non conveniens* doctrine which allows courts to reject the plaintiff's choice of forum and dismiss a case over which it has both personal and subject-matter jurisdiction.

It is not difficult to see how these differences in legal systems lead to serious conflict in specific litigation. In many cases, it is not *forum non conveniens* itself that is found offensive so much as the fact that its operation denies plaintiffs access to U.S. courts and their liberal discovery rules; proximity to the assets of U.S. corporate defendants; perceived higher damage awards; punitive damages; jury trials; favorable products liabil-

47. See *infra* Part IV.A.1.

48. Many Latin American nations, including Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, and Peru, have adopted the Bustamante Code, Código de Derecho Internacional Privado [Convention on Private International Law], Feb. 20, 1928, 86 L.N.T.S. 111 [hereinafter Bustamante Code], art. 323 of which provides that "the following courts shall have jurisdiction to try personal actions: 1) The court of the place of performance of an obligation, and 2) The court of the domicile of the defendants, and subsidiarily, the court of their place of residence." BUSTAMANTE CODE 43 (Julio Romaniach, Jr. trans., Lawrence Publ'g Co. 1996) (1928). See also Henry Saint Dahl, Forum Non Conveniens, *Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 26 n.25 (2003-04) (discussing art. 323 of the Bustamante Code). Those jurisdictions that have not adopted the Bustamante Code have procedural codes that also reflect this civil law rule. See Dante Figueroa, *Are There Ways Out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?*, BUS. L. REV. (Am. U.), Spring 2005, at 42, 44 ("The basis for jurisdiction in Latin America is found in the written law, most commonly in the codes of civil procedure, or in the Bustamante Code in those countries where this convention has been ratified.").

49. See Figueroa, *supra* note 48, at 44-45 (discussing forum choice in Latin America).

ity laws; the contingent fee system; and the lack of a loser-pays rule for attorney fees. Nonetheless, the doctrine of *forum non conveniens* serves as a gate-keeper to these benefits.

Commentators report that very few cases dismissed on *forum non conveniens* grounds are pursued further in the alternative Latin American court.⁵⁰ Some cases are settled out of court for far less than similar cases in the United States.⁵¹ Others are never resolved at all.⁵² Such results have spurred a deeper criticism: that application of the *forum non conveniens* doctrine is used to protect U.S. corporations from liability for harm caused in Latin America.⁵³

These concerns were highlighted in the 1995 case *Delgado v. Shell Oil Co.*, a products liability action brought by citizens of twelve countries, including nine in Latin America, against U.S. chemical manufacturers for injuries allegedly caused by exposure to hazardous chemicals while working on farms in 23 countries.⁵⁴ The Federal District Court for the Southern District of Texas dismissed the case after determining that alternative fora were available in the plaintiffs' home countries, where the injuries had occurred, and that the application of private and public interest factors weighed in favor of litigation in those fora. At the end of its decision, the court stated:

Notwithstanding the dismissals that may result from this Memorandum and Order, in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction of any action commenced by a plaintiff in these actions in his home country or the country in which he was injured, that plaintiff may return to this court and, upon proper motion, the court will resume jurisdic-

50. *Id.* at 45.

51. Winston Anderson, *Forum Non Conveniens Checkmated? – The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 184 n.7 (2001). In one case, *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995), "anecdotal evidence" suggests that plaintiffs coming from the Caribbean settled their claims for approximately \$2,000 each, while the average award made to American victims of the same product was approximately \$500,000 each. Anderson, *supra*, at 184 n.7.

52. Figueroa, *supra* note 48, at 45.

53. *E.g., id.*

54. *Delgado*, 890 F. Supp. at 1324.

tion over the action as if the case had never been dismissed for f.n.c.⁵⁵

Many of the attempts by the *Delgado* plaintiffs to refile their cases in the alternative fora in Latin America were unsuccessful because of basic civil law objections to a court declining to exercise jurisdiction once seised of a case.⁵⁶ The most significant response to the *Delgado* case was legislation designed to remove the “alternative forum” necessary to the *forum non conveniens* analysis. A non-official organization calling itself the

55. *Id.* at 1375.

56. One case was dismissed in Costa Rica, with the court noting that it had no jurisdiction: “A procedural decision, issued by a Court of the United States of America, cannot determine the territorial jurisdiction within this country, to adjudicate the present case, since that would violate National Sovereignty.” *Forum Non Conveniens, Costa Rica*, INTER-AM. BAR ASS’N, http://www.iaba.org/LLinks_forum_non_Costa_Rica.htm (last visited Feb. 5, 2013) (internal citations omitted). Similarly, a court in Nicaragua reasoned:

The fact that the Nicaraguan plaintiffs in this case have filed the same lawsuit, requesting the same damages, before the Honorable Federal Court in Texas, amounts to a jurisdictional submission. . . . According to Art. 255 of the Code of Civil Procedure, once jurisdiction attaches it cannot be modified. . . . Finally, [. . .] our procedural system does not recognize, and therefore it does not accept nor does it admit, the imposition of the Forum Non Conveniens Theory by foreign courts.

Forum Non Conveniens, Nicaragua, INTER-AM. BAR ASS’N, http://www.iaba.org/LLinks_forum_non_Nicaragua.htm (last visited Feb. 5, 2013) (internal citations omitted).

Latin American governments have also issued opinions stating that they would not recognize or respect the doctrine of *forum non conveniens*. For example, an Official Opinion issued by the Attorney General of Guatemala stated:

Guatemala does not recognize the Forum Non Conveniens theory. . . . The jurisdictional standards in our system are mandatory and do not lend themselves to being manipulated by any tribunal whether domestic or foreign. Once the plaintiffs have exercised the right to bring suit in the domicile of the defendants, whether in this country or abroad, it is illegal for a Guatemalan judge to disturb this choice of tribunal. . . . We trust that, in the same way that a Guatemalan court would not dare to require an American judge to violate American law, the American Judiciary Power would also abstain from requesting that the Guatemalan Judiciary Power violate Guatemalan law.

Forum Non Conveniens, Guatemala, INTER-AM. BAR ASS’N, http://www.iaba.org/LLinks_forum_non_Guatemala.htm (last visited Feb. 5, 2013) (internal citations omitted).

“Latin American Parliament” or “PARLATINO” created a Model Law on International Jurisdiction and Applicable Law to Tort Liability, containing two articles:

Art. 1. National and international jurisdiction. The petition that is validly filed, according to both legal systems, in the defendant’s domiciliary court, extinguishes national jurisdiction. The latter is only reborn if the plaintiff desists of his foreign petition and files a new petition in the country, in a completely free and spontaneous way.

Art. 2. International tort liability. Damages. In cases of international tort liability, the national court may, at the plaintiff’s request, apply to damages and to the pecuniary sanctions related to such damages, the relevant standards and amounts of the pertinent foreign law.⁵⁷

Similar statutes favoring litigation in the court of the defendant’s domicile (consistent with article 323 of the Bustamante Code),⁵⁸ and preventing reference to another court, even if the court at the defendant’s domicile considers that other court the more appropriate forum, were enacted in a number of Latin American countries.⁵⁹

These statutes did not always have their intended effect. In each of *Polanco v. H.B. Fuller Co.* and *Aguinda v. Texaco, Inc.*,

57. The English text of the Model Law is available through the Inter-American Bar Association. *Forum Non Conveniens, PARLATINO, INTER-AM. BAR ASS’N*, http://www.iaba.org/LLinks_forum_non_Parlatino.htm (last visited Feb. 5, 2013) (internal citations omitted).

58. See *supra* note 48, and accompanying text.

59. For example, on May 14, 1997, Guatemala adopted the Law for the Defense of Procedural Rights of Nationals and Residents, which provides that: “The personal action that a plaintiff validly establishes abroad before a judge having jurisdiction, forecloses national jurisdiction, which is not revived unless a new lawsuit is filed in the country, brought spontaneously and freely by the plaintiff.” *Forum Non Conveniens*, Guatemala, *supra* note 56. Ecuador adopted a similar statute, but it was declared unconstitutional. Dahl, *supra* note 48, at 48. Panama’s Judicial Code provides that “[l]awsuits filed in the country as a consequence of a *forum non conveniens* judgment from a foreign court, do not generate national jurisdiction. Accordingly they must be rejected *sua sponte* for lack of jurisdiction because of constitutional reasons or due to the rules of preemptive jurisdiction.” JUDICIAL CODE [JUD. C.] art. 1421-J (Pan.), available at <http://www.interamericanbarfoundation.org/PanamaEnglishtranpulldown14.html>.

after expressing skepticism about interpretations of the foreign law, the court dismissed the case on *forum non conveniens* grounds subject to the condition that the plaintiffs could resume their case in the United States if the highest courts of the alternative forum refused to hear it.⁶⁰ Other plaintiffs have had greater success in persuading U.S. courts that the alternative fora in their home countries are unavailable when statutes provide a *lis pendens* rule that effectively blocks the foreign court from taking jurisdiction of a case first filed in the United States. In *Canales Martinez v. Dow Chemical Co.*, the Federal District Court for the Eastern District of Louisiana concluded that there was no available alternative forum in Costa Rica after a close examination of Costa Rican procedural law.⁶¹ The Federal District Court for the Southern District of Indiana reached a similar result in *In re Bridgestone/Firestone, Inc.*, determining that a Venezuelan court could not exercise jurisdiction over a case that had been dismissed on *forum non conveniens* grounds.⁶² In spite of the plaintiffs' success in the *Bridgestone/Firestone* case, at least two subsequent courts faced with products liability claims by Venezuelan plaintiffs have followed the *Delgado* approach, granting *forum non conveniens* dismissals subject to the condition that the courts in Venezuela accept jurisdiction.⁶³

The ambivalent attitudes of U.S. courts toward the Latin American statutes resulted in the effort being less than a complete success in challenging the doctrine of *forum non conveniens*. Those statutes do, however, serve to highlight the differences in basic civil law and common law attitudes towards questions of jurisdiction and access to courts.

60. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 546–47 (S.D.N.Y. 2001); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512 (D. Minn. 1996).

61. *Canales Martinez v. Dow Chemical Co.*, 219 F. Supp. 2d 719, 734 (E.D. La. 2002).

62. *In re Bridgestone/Firestone, Inc.*, Tires Products Liability Litigation, 190 F. Supp. 2d 1125, 1132–33 (S.D. Ind. 2002).

63. *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672 (S.D. Tex. 2004); *Rivas v. Ford Motor Co.*, No. 8:02 CV-676-T-17 EAJ, 2004 WL 1247018 (M.D. Fla. 2004).

b. *The Second Latin American Challenge: Boomerang Litigation*⁶⁴

More recently, another Latin American approach has arisen toward dismissals in U.S. courts of cases brought by Latin American plaintiffs. This approach is best illustrated by the extensive litigation against Chevron Corporation resulting from its merger with Texaco. Ecuadorian residents sued Texaco, seeking damages for oil contamination in the Amazon region.⁶⁵ The suit was dismissed on *forum non conveniens* grounds, on the basis that the Ecuadorian courts offered a more appropriate forum.⁶⁶ Suit was then brought in Ecuador against Chevron (the new, merged company), resulting in a judgment against Chevron in the amount of \$27.3 billion.⁶⁷ Chevron then responded by filing preemptive actions to prevent recognition of the resulting judgment.⁶⁸

Professors Christopher A. Whytock and Cassandra Burke Robertson argue that such “boomerang litigation” requires that the tests applicable in judging the adequacy of foreign courts in both *forum non conveniens* and the recognition of foreign judgments should be harmonized, and that “[c]ases should only be dismissed from U.S. courts when the alternative forum is adequate both to hear the case and to allow enforcement of the resulting judgment in the United States.”⁶⁹ Their argument has an intuitive appeal, suggesting that whenever it is appropriate to defer to another court to decide a case it is also appropriate to accept the results of that litigation. Doing

64. Portions of this section rely heavily on the author’s prior work in Ronald A. Brand, *Access-to-Justice Analysis on a Due Process Platform: Response to Christopher A. Whytock & Cassandra Burke Robertson*, *Forum Non Conveniens and The Enforcement of Foreign Judgments*, 111 *Colum. L. Rev.* 1444 (2011), 112 *COLUM. L. REV. Sidebar* 76 (2012), http://www.columbialawreview.org/assets/sidebar/volume/112/76_Brand.pdf.

65. *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 626–27 (S.D.N.Y. 1996).

66. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001), *aff’d*, 303 F.3d 470 (2d Cir. 2002).

67. Lucien J. Dhooge, *Aguinda v. ChevronTexaco: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 19 *J. TRANSNAT’L L. & POL’Y* 1, 14, 37 (2009). This award was later reduced to approximately \$18 billion. Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and The Enforcement of Foreign Judgments*, 111 *COLUM. L. REV.* 1444, 1448 (2011).

68. For a detailed discussion of the cases, see Whytock & Robertson, *supra* note 67.

69. *Id.* at 1520.

otherwise, they claim, creates a “transnational access to justice gap” that must be removed.

While jurisdiction and the recognition of foreign judgments are related matters, the relationship that is important is the relationship between the jurisdictional basis relied upon by the foreign court from which the judgment originates and the interests of the state in which recognition of the judgment is sought. The problem with an analysis that ties declining jurisdiction under the doctrine of *forum non conveniens* to the analysis required for the recognition of foreign judgments is that it conflates the wrong combination of jurisdiction and recognition rules. *Forum non conveniens* allows jurisdiction to be declined in order to find the most suitable forum in which to hear a dispute. Judgment recognition law reviews the jurisdictional basis applied in the court that grants the judgment and considers whether those foreign proceedings respected the judgment debtor’s basic rights as determined by the law of the state asked to recognize the judgment.

Thus, if we are properly to consider the intersection of the doctrine of *forum non conveniens* and the law applicable to foreign judgment recognition, we must take into account more than just our own legal system. We must also consider the legal systems in other countries whose courts may receive the cases dismissed on the basis of *forum non conveniens* and generate the judgments for which recognition may be requested. Most importantly, when the court declining jurisdiction based on *forum non conveniens* is a common law court, and the court issuing the resulting judgment is a civil law court, the overlap of differing legal systems makes harmonization of the *forum non conveniens* and recognition of judgments tests particularly inappropriate. Understanding this overlap problem requires an examination of the fundamentally different approaches to the question of judicial jurisdiction.

Because *forum non conveniens* is one approach to the problem of parallel litigation that exists when the courts of more than one state have jurisdiction to decide a matter, we must consider not only the doctrine applied in declining jurisdiction but also the doctrines upon which basic questions of jurisdiction are based. In the United States, judicial jurisdiction

has, since *Pennoyer v. Neff* in 1877,⁷⁰ been a constitutional matter based on the defendant's right to "due process of law" in any question involving life, liberty, or property (*i.e.*, any question that arises in litigation). Questions of jurisdiction are resolved by looking at the due process rights of the defendant, using an analysis that requires a three-way nexus among the court, the defendant, and the claim. In civil law countries, questions of jurisdiction are not so much questions of the defendant's rights as they are questions of what court is "competent" to hear a case. Thus, for example, the rules of special jurisdiction found in the Brussels I Regulation of the European Union rely on a two-way nexus between the court and the claim.⁷¹ By omitting a separate analysis of the interests of the defendant in each case, the resulting bases of jurisdiction theoretically (and in real cases) allow European courts to exercise jurisdiction in ways that United States courts would hold to violate the defendant's right to due process.⁷²

The contrast between conceptions of jurisdiction in the United States and the European Union illustrates the basic jurisdictional distinction between the United States and most of the rest of the world. While the United States focuses on the "due process rights of the defendant," other systems focus on "access to justice"—the plaintiff's right to have his or her day in court.⁷³ The former is a clear defendant-protection approach, and the latter is a clear plaintiff-protection approach.

70. *Pennoyer v. Neff*, 95 U.S. 714 (1878). "Rightly or wrongly, *Pennoyer v. Neff*, linked American jurisdictional law with the Fourteenth Amendment's Due Process Clause, and however questionable that linkage may be, it has become part of American conventional wisdom." Friedrich K. Juenger, Book Review, *Constitutionalizing German Jurisdictional Law*, 44 AM. J. COMP. L. 521 (1996) (reviewing THOMAS PFEIFFER, *INTERNATIONALE ZUSTÄNDIGKEIT UND PROZESSUALE GERECHTIGKEIT* (1995)) (internal citations omitted).

71. Brussels I Regulation, *supra* note 22. See particularly Article 5 for special jurisdiction rules based on a claim-court connection. *Id.* art 5.

72. See, e.g., Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 696-701 (1999) (comparing the jurisdiction rules of several European countries with jurisdiction rules in the United States).

73. See, e.g., Commission Proposal, *supra* note 26, at 3 (listed among the "[g]rounds for and objectives of the proposal": "Access to justice in the EU is overall unsatisfactory in disputes involving defendants from outside the EU.").

Use of the civil law “access-to-justice” terminology to harmonize the United States *forum non conveniens* and judgment recognition tests risks transplanting one system of analyzing judicial jurisdiction into another without acknowledging the fundamental difference in approach. The U.S. system of jurisdiction is defendant-friendly precisely because our Supreme Court has made jurisdiction a constitutional issue based on the due process “rights” of the defendant.⁷⁴ Any analysis of rules that affect that exercise of jurisdiction in U.S. courts must begin (and end) with that reality. While a plaintiff’s “access-to-justice” interest is important, it is the defendant’s right to due process that is explicitly enshrined in our Constitution as that Constitution has been interpreted to apply to jurisdictional analysis.

Finally, any argument to make U.S. judgment recognition rules more liberal than they already are faces real problems of international balance. U.S. courts traditionally have been much more liberal in recognizing foreign judgments than the courts in other legal systems have been, particularly courts in civil law countries that require near re-litigation of the case if no treaty creating reciprocal rights of recognition exists.⁷⁵ Because the United States still has no such treaty with any other country, this is a significant matter.

If we were to apply *forum non conveniens* standards of deference to foreign courts at the stage of recognition and enforcement of judgments, this would effectively result in the type of unilateral concession that hampered the U.S. delegation at the Hague Conference on Private International Law when efforts were made to negotiate a global convention on jurisdiction and the recognition and enforcement of judgments in the

74. This aspect of U.S. jurisprudence was extended further in the most recent Supreme Court decisions on jurisdiction. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (discussing the limits of a tribunal’s power to proceed against a defendant); *J. McIntyre Mach. Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (“By contrast, those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.”).

75. See, e.g., *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (discussing comity and holding that an English judgment should not be disturbed despite its attainment through procedural maneuvers that may not have been feasible in American courts); RONALD A. BRAND, *ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD* (1992).

1990's.⁷⁶ Only a few other common law legal systems grant *forum non conveniens* deference to foreign courts at the jurisdictional stage of litigation, and even fewer grant such deference to foreign courts on the question of the recognition of judgments. While it may seem coherent in a vacuum that assumes legal perfection to unify rules on deference to foreign courts at both the jurisdiction and judgments recognition stages, it simply is not consistent with reality, and would create free-rider problems that would likely hamper the United States in any future negotiation of conventions related to issues of jurisdiction and the recognition of judgments. Simply acknowledging that U.S. courts are more likely than their foreign counterparts to defer to foreign courts at the jurisdiction stage does not, in itself, justify making U.S. courts more likely than their foreign counterparts to defer to foreign courts when receiving the results of foreign litigation.

This new challenge of “boomerang litigation” is likely to remain. It will undoubtedly shape both litigation strategy and judicial thinking. Wherever that takes the development of the doctrine of *forum non conveniens*, it should not result in simplistic harmonization of the law of *forum non conveniens* and the recognition of foreign judgments.

B. *The Internal Challenge: Recognition Jurisdiction for Arbitral Awards and Foreign Judgments*

A recent internal challenge to the *forum non conveniens* doctrine in the United States began with the Second Circuit decision in *Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine*.⁷⁷ When the award creditor attempted to confirm an arbitration award rendered in Ukraine against a Ukrainian company, the motion was denied on the grounds that the case would be better decided in the courts of Ukraine.

76. For an analysis of U.S. negotiating efforts, see Ronald A. Brand, *The 1999 Hague Preliminary Draft Convention Text on Jurisdiction and Judgments: A View From the United States*, in *THE HAGUE PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND JUDGMENTS: PROCEEDINGS OF THE ROUND TABLE HELD AT MILAN UNIVERSITY ON 15 NOVEMBER 2003* at 3 (Fausto Pocar & Constanza Honorati eds., 2005).

77. *Monegasque de Reassurances S.A.M. v. NAK Naftogaz (Monde Re)*, 158 F. Supp. 2d 377 (S.D.N.Y. 2001), *aff'd*, 311 F.3d 488 (2d Cir. 2002) (holding that the function of the court is not to pass “value judgments” on the sufficiency of the justice system in other nations).

In part, this was a result of the parallel attempt to seek recognition of the judgment against the Ukrainian government, a principal shareholder in the Ukrainian company, but not a party to the original arbitration. Nonetheless, the case was followed in the Second Circuit's later decision in *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. The Republic of Peru et al.*, when a Brazilian company sought enforcement of a Peruvian arbitral award against a Peruvian governmental agency.⁷⁸ The *Figueiredo Ferraz* court held that both the Panama⁷⁹ and New York⁸⁰ Conventions allow consideration of *forum non conveniens* in enforcement actions because it is a doctrine of procedure and the bases for non-recognition of arbitral awards in both conventions are all substantive in nature.⁸¹

The *Monde Re* and *Figueiredo Ferraz* cases have implications beyond just the recognition of arbitration agreements.⁸² If courts would follow the same approach in actions to recognize foreign judgments, the impact on future U.S. ratification and implementation of the 2005 Hague Convention on Choice of Court Agreements could be affected. Article 5 provides the basic rule for recognition of exclusive choice of court agreements under the Convention, and then includes an obligation *not* to decline jurisdiction when a request for recognition of an agreement is asserted:

Article 5

Jurisdiction of the chosen court

(1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the

78. *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. The Republic of Peru*, 665 F.3d 384, 389 (2d Cir. 2011).

79. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245 [hereinafter Panama Convention].

80. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

81. *Figueiredo Ferraz*, 665 F.3d at 392–93. For further discussion of the result of these two cases, see Alan Scott Rau, *The Errors of Comity: Forum Non Conveniens Returns to the Second Circuit*, 23 AM. REV. INT'L ARB. 1 (2012).

82. See Peter Trooboff, *Ensuring Jurisdiction Over Treaty Party's Judgments: In Drafting Legislation To Implement Hague Convention, State Department Weighs Excluding Forum Non Conveniens*, NAT'L L. J., Oct. 1, 2012, at 1 (discussing how *Figueiredo Ferraz* may impact implementing legislation).

agreement applies, unless the agreement is null and void under the law of that State.

(2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.⁸³

The corresponding provision of the Convention regarding recognition of judgments from foreign courts based on Convention jurisdiction is Article 8, which sets up the Article 9 list of substantive grounds for non-recognition, and begins with the following language:

Article 8

Recognition and enforcement

(1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.⁸⁴

While the Hague Convention makes a distinction between substance and procedure similar to that relied upon by the Second Circuit in *Monde Re* and *Figueiredo Ferraz*, that distinction is noted in the official Report *not* to apply to the Article 8 analysis. Article 14 states:

Article 14

Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.⁸⁵

The official Report, specifically referring to this provision, states that under Article 14, “[n]ational procedural law does not of course cover the grounds on which recognition or en-

83. Hague Convention, *supra* note 34, art. 5.

84. *Id.* art. 8.

85. *Id.* art. 14.

forcement may be refused.”⁸⁶ This raises the question whether U.S. implementing legislation for the Convention should respond to the Second Circuit jurisprudence in arbitral award recognition cases by explicitly stating that *forum non conveniens* is not allowed in Convention cases for recognition of foreign judgments.⁸⁷ While such a statutory rule may run counter to the approach of the Second Circuit in *Monde Re* and *Figueiredo Ferraz*, it would be consistent with the expectation of U.S. treaty partners in the negotiation of the 2005 Hague Convention and would prevent unnecessary litigation that is certain to occur if such a rule is not included.

V. THE GLOBAL COMPROMISE: THE 2001 HAGUE DRAFT CONVENTION

The 2005 Hague Convention on Choice of Court Agreements is the result of what began as a more ambitious effort. The original project envisioned a global convention on all bases of jurisdiction and the recognition and enforcement of judgments.⁸⁸ Before that effort turned to a convention on just one basis of jurisdiction (party choice), it produced a rather substantial draft convention, which was heavily debated. Because that proposed convention would have dealt with all bases of jurisdiction, it necessarily had to address the different methods of declining jurisdiction in common law and civil law legal systems. Thus, it included a compromise approach to the doctrines of *forum non conveniens* and *lis pendens*.

The 2001 interim text includes Articles 21, which deals with *lis pendens*, and 22, which deals with *forum non conveniens*, proposing compromises on issues of declining jurisdiction.⁸⁹

86. TREVOR HARTLEY & MASATO DOGAUCHI, HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS: EXPLANATORY REPORT ¶ 215 (2007).

87. Trooboff, *supra* note 82, at 2.

88. For further discussion of the purposes of the Hague Convention, see RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS 3–10 (2008).

89. Permanent Bureau, Hague Conference on Private Int'l Law, Commission II, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001: Interim Text, http://www.hcch.net/index_en.php?act=publications.details&pid=3499&dtid=35, [hereinafter Interim Text].

Article 21 begins with provisions that require (1) that a court second seised suspend proceedings in favor of the court first seised, if the court first seised has jurisdiction under one of the bases which all contracting states agree is appropriate, and (2) then require the court second seised to decline jurisdiction when the court first seised renders a judgment:

Article 21 Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction under Articles [white list] [or under a rule of national law which is consistent with these articles] and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 [, 11] or 12.
2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.⁹⁰

The court second seised, may, however, proceed with the case if the first court has not moved forward with the action within a reasonable time. This avoids the *Gasser* problem that has arisen under the Brussels I Regulation:

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.⁹¹

The draft also responds to the *Gasser* problem of negative declaratory judgments by allowing the court second seised to continue with the action in the forum where the case is brought by the natural plaintiff:

90. *Id.* art. 21 (internal citations omitted).

91. *Id.* art. 21(3).

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

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

b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.⁹²

Finally, Article 21 authorizes a type of *forum non conveniens* (further elaborated in Article 22) by which the court first seised may determine that a court second seised is “clearly more appropriate to resolve the dispute”:

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.⁹³

Article 22 then sets up a type of limited *forum non conveniens* that would be available in all courts, and not just in traditional common law jurisdictions. A suspension or dismissal on this basis would (1) not be available where the jurisdiction of the court seised is based on an exclusive choice of court agreement, (2) require that the other forum be “clearly more appropriate,”⁹⁴ (3) require the application of private (but not public) interest factors, (4) prohibit discrimination based on the nationality of the plaintiff, and (5) allow for suspension contingent on the defendant providing security “sufficient to satisfy any decision of the other court on the merits”:

Article 22 Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application

92. *Id.* art. 21(6).

93. *Id.* art. 21(7).

94. This is effectively the more stringent Australian approach discussed above. *See supra* notes 38–39 and accompanying text.

by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

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

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

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

c) applicable limitation or prescription periods;

d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

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

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

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

b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.⁹⁵

95. Interim Text, *supra* note 89, art. 22 (internal citations omitted).

These efforts in the earlier stages of the negotiations at the Hague Conference indicate the possibility of a reasonable compromise between the common law doctrine of *forum non conveniens* and the civil law doctrine of *lis pendens*. The 2001 Hague Interim Text reaches a balance that avoids the problems of the strict *lis pendens* rule of the (pre-Recast) Brussels I Regulation as interpreted by the European Court of Justice. While it may be possible to improve on the compromise, it goes a long way to bridging the differences between common law and civil law jurisdictions in rules on declining jurisdiction.

VI. CONCLUSIONS

The doctrine of *forum non conveniens* has been the subject of a number of recent challenges. In Europe, it has been largely eclipsed by the civil law approach of the European Court of Justice in its interpretation of the Brussels Convention and Brussels I Regulation. In common law legal systems, parallel development has resulted in significant differences from country to country. In the United States, *forum non conveniens* has been the subject of challenges from Latin America, both in the form of statutes designed to frustrate its application, and in the form of boomerang litigation contesting large foreign judgments rendered after *foreign non conveniens* dismissals in U.S. courts.

The development of the doctrine should not be considered without attention to *lis pendens*, its counterpart for declining jurisdiction in civil legal systems. *Lis pendens* also serves to prevent parallel litigation, but with very different results. It is unlikely that either the common law world or the civil law world will entirely capitulate to the traditional approach of the other. Given the ease with which both doctrines are criticized, such an outcome is probably not desirable.

The better approach to the development of both doctrines would be a compromise that attempts to retain the benefits of each doctrine in a manner that allows both to operate, albeit in a more limited fashion. Such a compromise was arguably reached in the 2001 Interim Text for a convention on jurisdiction and the recognition and enforcement of judgments at the Hague Conference, before that project was set aside in pursuit of the more attainable Convention on Choice

of Court Agreements. The language of Articles 21 and 22 of the Interim Text should not be forgotten as both sides seek to develop their doctrines in ways that can operate effectively on a global basis.
