

# INTERNATIONAL LAW ASSOCIATION

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### COMMITTEE ON INTERNATIONAL CIVIL AND COMMERCIAL LITIGATION

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*Alternate:* Professor Frederich K  
Juenger

### **THIRD INTERIM REPORT : DECLINING & REFERRING JURISDICTION IN INTERNATIONAL LITIGATION**

#### **I FORUM SHOPPING & FORUM ALLOCATION**

1. In an ever shrinking world, in which trade and commerce flow across all national boundaries, it is no surprise that the number of cross-border disputes continues to rise. Civil litigation has itself become to some extent a commodity which prospective claimants shop for amongst the potentially available national legal systems. In this environment, the scope for conflict between the courts of different countries is much increased. Yet there has been no consensus as to the appropriate solutions to the problem of forum shopping and conflicts between courts. Indeed, remedies developed in some states have engendered as

much controversy as the underlying problems, revealing in the process deep-seated differences in conception as to the proper extent to which courts should intervene to reduce the incidence of forum shopping and of concurrent jurisdiction.

2. This Report summarises the research of the International Civil and Commercial Litigation Committee into the legal techniques available for the declining of jurisdiction as a response to the problems of forum shopping and of concurrent jurisdiction. It explains the proposals advanced by the Committee for the progressive reform of the law in this area through the Leuven/London Principles on Declining and Referring Jurisdiction in International Litigation.

3. The structure of the Report is as follows:

I Forum Shopping and Forum Allocation

- (a) Myths and Misconceptions concerning Forum Shopping
- (b) Common Techniques for Allocation of Jurisdiction
  - (i) Jurisdiction Clauses
  - (ii) Lis Pendens and Related Actions
  - (iii) Forum Non Conveniens
  - (iv) Anti-Suit Injunctions
- (c) The Search for New Solutions
  - (i) Cross-Vesting Legislation in Australia
  - (ii) Canadian Uniform Court Jurisdiction and Proceedings Transfer Act
  - (iii) The Hague Convention on the Protection of Children

II The Committee's Research

- (a) Work Programme
- (b) Methodology

III The Leuven/London Principles

- (a) Status and Overall Approach
  - (b) Preamble
  - (c) Scope and Purpose
  - (d) Preliminary Matters
  - (e) Jurisdiction Clauses
  - (f) Lis Pendens
  - (g) Related Actions
  - (h) Other Grounds for Referral
  - (i) Referral: Procedure in the Originating Court
  - (j) Procedure in the Alternative Court
  - (k) Consequences of Referral
  - (l) Injunctions in Relation to Foreign Proceedings
- Annexure: Text of Leuven/London Principles in English and French.

4. Some of the issues which the Committee had to consider are vividly illustrated by the recent case of *Airbus Industrie v Patel*,<sup>1</sup> in which the courts of

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<sup>1</sup> [1999] 1 AC 119 (England, HL)

India, Texas and England became embroiled. The facts are instructive on a number of levels. On 14 February 1990, an Indian Airlines flight took off from Bombay on a domestic flight to Bangalore. The aircraft was an Airbus A320, manufactured in Toulouse, France. There was a full complement of passengers. Almost all of them were Indian. But there were also two British families and three Americans. During its final approach to land in Bangalore, the aircraft struck the ground short of the runway. Ninety-two persons died. No-one escaped uninjured. An Indian Board of Enquiry found that the principal cause of the accident was pilot error. But it also found that the Bangalore airport company was at fault in failing to have adequate safety procedures in place. In India, litigation against the airline and the airport company resulted in a total award for all claimants of US\$75,000 (after costs). The English claimants then brought an action in Texas against a number of parties who may have had some connection to the aircraft or its operation. One such party was the manufacturer, Airbus. Airbus applied successfully to the Indian court for an injunction to restrain the English claimants from suing it anywhere other than India. But the injunction had no effect because the English claimants were outside India, and thus not amenable to the process of the Indian court. Airbus therefore came to England and sought an injunction in the home courts of the English claimants to stop them from continuing the Texas action against it. In the Court of Appeal,<sup>2</sup> Airbus succeeded. But the House of Lords thought otherwise. Lord Goff held that the English court had to have a “sufficient interest” in the matter in order to justify the indirect interference with the foreign court which an anti-suit injunction entails.<sup>3</sup>

5. The case illustrates some of the recurring issues in forum shopping and its regulation: wide divergencies between what different legal systems regard as appropriate levels of recovery in civil actions and as appropriate claims to jurisdiction (which can facilitate forum shopping), and controversy about where and how the remedies for it are to be sought. Any principled investigation of these issues must start by debunking some commonly held myths about forum shopping.<sup>4</sup>

### ***Myths and Misconceptions concerning Forum Shopping***

6. The first such myth is that forum shopping is necessarily pernicious and that the role of any modern system for the allocation of jurisdiction is to eradicate it. The truth is that all systems of civil jurisdiction afford the parties a wide degree of choice as to where to sue in cross-border cases of any complexity. In so doing, the rules reflect the simple reality that the fact patterns presented in transnational cases typically connect the case to more than one country. Those who search for the goal of the one right forum for every case are likely to find their grail elusive.

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<sup>2</sup> [1997] 2 Lloyd's Rep 8

<sup>3</sup> *Supra* note 1, at pages 134-140

7. Forum shopping is not just about exploiting the anarchy of different national jurisdictional rules. It is equally possible within the context of a treaty-based regime, such as the Brussels<sup>5</sup> and Lugano<sup>6</sup> Conventions. A commonly discussed example is the ability of a prospective defendant to pre-empt a forum otherwise available to a claimant by commencing a negative declaratory suit first in an alternative forum of his choice. He may then invoke the *lis pendens* provision of Article 21 so as to prevent the claimant from suing elsewhere.<sup>7</sup>

8. The second myth is that forum shopping is something that occurs elsewhere, but not at home. Much attention has been focussed on a small number of jurisdictions, where a combination of very favourable conditions for claimants and very wide rules of jurisdiction has attracted many claims with an apparently tenuous connection to the forum. Cases involving fora of this kind (Texas being perhaps the most notable example)<sup>8</sup> dominate discussions of forum shopping, in part because they have been the subject of high-profile attempts to invoke the powers of the courts of other countries to restrain perceived excesses.

9. Yet the process of choosing the most advantageous forum for a particular suit is a universal one. To take an example: although the Brussels and Lugano Conventions provide a set of rigid rules for the allocation of jurisdiction, the rules still leave parties with a wide latitude for choice. In at least some respects this system facilitates forum shopping. The rules confer on a claimant the choice between general and special jurisdictions. They allow for the aggregation of claims against numerous defendants in the courts of one of them, even if the particular defendant has no connection with that state. Further the Conventions have not prevented cases of abuse, especially where the domestic rules of civil procedure in the relevant state do not ensure that a determination on jurisdiction can be made at the outset of proceedings before a litigant is required to plead to the merits.<sup>9</sup>

10. The third fallacy in the forum shopping debate is that this is an issue which is relevant only in the largest cases; that rules developed for a Bhopal or

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<sup>4</sup> On forum shopping generally see the articles by Committee members in Goldsmith (ed) *International Dispute Resolution: The Regulation of Forum Selection* (1996): Kessedjian 'Judicial Regulation of Improper Forum Selections', 273, and Juenger 'Judicial Control of Improper Forum Selection: Some Random Remarks and a Comment on How Not to Do It', 311. See also Juenger 'Forum Shopping, Domestic and International' (1989) 63 Tul LR 553, and Siehr "Forum Shopping" im internationalen Rechtsverkehr' (1984) 25 Z RV 124

<sup>5</sup> Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, hereafter 'the Brussels Convention'

<sup>6</sup> Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988, hereafter 'the Lugano Convention'

<sup>7</sup> *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861 (ECJ); *The Tatry* [1994] ECR I-5439 (ECJ)

<sup>8</sup> See, e.g. the note by Weintraub 'The United States as a Magnet Forum and What, If Anything, to Do About It' in Goldsmith, op cit note 4, 213

<sup>9</sup> See, e.g. the evidence on the position in Greek law which was before the English Court of Appeal in *Continental Bank NA v Aeakos SA* [1994] 1 WLR 588, 598

a Chernobyl have little relevance to the common run of cases. Yet it is worth recalling that one of the leading modern English authorities, *Castanho v Brown & Root*,<sup>10</sup> concerned a non-fatal accident suffered by a single Portuguese sailor on board a boat docked at Great Yarmouth harbour in Norfolk. It became an international case only when the sailor was encouraged to discontinue his English action in favour of potentially higher recoveries in the United States.

11. The fourth fallacy is that disputes about forum are just a procedural side-show of little relevance to a resolution of the merits. But, as the facts of *Airbus v Patel* show starkly, the remedies available in different countries may well utterly change the nature of the dispute – affecting the equation of whether it is worth fighting at all.

12. The fifth fallacy is the notion that forum shopping may be cured by harmonised choice of law rules. Sometimes substantive legal differences drive party choice (especially where there is the prospect of strict liability or of the avoidance of a limitation period). But, most often, party selection is dictated by the procedural characteristics of the forum concerned (costs rules, jury trial, provision for discovery etc) or simply by the relative advantage of playing at home rather than abroad.

13. These points do suggest that no simplistic view can be taken about the phenomenon of forum shopping or its panacea. But they should not lead to the conclusion that the law has no function in the proper allocation of jurisdiction between courts. On the contrary, both national legal systems and international conventions have developed a variety of techniques for the allocation of jurisdiction and the regulation of competing jurisdictions.

### ***Common Techniques for Allocation of Jurisdiction***

#### *Jurisdiction Clauses*

14. Perhaps the most widely recognised technique in declining jurisdiction is the enforcement of jurisdiction agreements.<sup>11</sup> This is a principle which has wide acceptance amongst different legal systems. But, even so, it has been given effect in a number of different ways. In most common law jurisdictions, there is a power to decline jurisdiction pursuant to a jurisdiction clause, but it is discretionary. The court is not compelled to decline jurisdiction in the face of an exclusive jurisdiction clause in favour of another forum. It may still decide to hear the case. By contrast, in many civil law countries, there is no discretion. The matter is seen as one which has the effect of either denying the court jurisdiction in the first place, or requiring the court to decline to exercise it by virtue of the agreement.

15. As Patrick Kinsch reminded the Committee,<sup>12</sup> the origin of the differ-

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<sup>10</sup> [1981] AC 557 (HL)

<sup>11</sup> See Fawcett 'General Report' in Fawcett (ed) *Declining Jurisdiction in Private International Law* (1995) 1, 47-58 (hereafter 'Fawcett')

<sup>12</sup> Kinsch 'Jurisdiction Clauses and Forum Non Conveniens Considerations', Committee Working Paper

ence in approach was that the common law courts had been hostile to jurisdiction clauses, characterising them as a means by private agreement of ousting the jurisdiction of the judicial organs of the state. The more gradual approximation achieved in common law countries of the approach of the courts to jurisdiction and arbitration clauses, and the modern trend towards upholding jurisdiction clauses, has thus developed against a policy background which was traditionally inimical to such clauses. The modern position in English law is relatively well settled to be that the courts have a discretion as to whether to enforce a jurisdiction clause, but it is a discretion which will only be exercised against enforcement of a clause where there is “strong cause”. But the position in the United States continues to be much more diverse, with courts in some states retaining much wider powers to refuse to enforce such clauses.<sup>13</sup> By contrast, the civil law approach favours the upholding of party choice in jurisdiction clauses as an overriding objective. This is reflected in the mandatory language of Article 17 of the Brussels and Lugano Conventions. That said, practice in the operation of Article 17 continues to illustrate the formality with which civil law systems approach the determination of whether a valid jurisdiction clause has been entered into.<sup>14</sup>

#### *Lis Pendens and Related Actions*

16. The second major set of techniques for allocation jurisdiction amongst competing fora has been developed to deal with the problem of *lis pendens* or parallel litigation.<sup>15</sup> As Fawcett has shown, *lis pendens* is really a description of a problem, that of parallel litigation, rather than a statement of any approach towards the problem’s solution. He has pointed out that there are at least four possible solutions to the problem of parallel litigation:<sup>16</sup>

- (a) the forum could decline jurisdiction over its pending proceedings;
- (b) the forum could seek to restrain the foreign proceedings;
- (c) both sets of proceedings could be allowed to continue, leaving the allocation of priority between judgments to be determined by the rules of *res judicata* and the recognition and enforcement of foreign judgments;
- (d) mechanisms could be adopted to encourage the parties to opt for trial in the most appropriate forum.

17. Nygh points out that rules dealing with *lis pendens* may serve two purposes:

- (a) to avoid multiplicity of litigation; and
- (b) to avoid inconsistent judgments.

18. However, in this field, as with jurisdiction clauses, there is no apparent consistency of approach amongst different national legal systems. In Anglo-

<sup>13</sup> See Born *International Civil Litigation in United States Courts* (3 edn, 1996) 373-7

<sup>14</sup> See Collins (ed) *Dacey and Morris on the Conflict of Laws* (13 edn, 2000) 436 and the authorities there cited

<sup>15</sup> Nygh ‘Lis Pendens’, Committee Working Paper, and Fawcett 27-43

<sup>16</sup> Fawcett, 28

Commonwealth law, the existence of parallel proceedings abroad is just one factor to be considered in the exercise of the court's wider discretion as to whether to decline jurisdiction (and may also be a ground for the grant of an anti-suit injunction to restrain the foreign proceedings). In the United States, *lis pendens* is rarely identified as a factor worthy of the relinquishment of the US jurisdiction, but may sometimes be a basis for the grant of an anti-suit injunction. US courts do not generally seem to regard the existence of parallel litigation as a matter for concern, preferring instead to leave the effects of such litigation to be determined at the recognition of judgment stage. By contrast, many civil law countries have adopted a strict rule requiring the court to decline jurisdiction where another court is already first seized of the same matter between the same parties. This rule is reflected in Article 21 of the Brussels and Lugano Conventions. The operation of the rule has given rise to issues of great complexity and difficulty in determining whether the proceedings in the respective countries are in fact concerned with the same cause or matter. Even the issue of when a court is first seized for the purpose of the operation of the rule has been controversial, since it has exposed the diversity of solutions adopted within national rules of civil procedure for the institution of actions.

19. *Lis pendens* may be seen as part of a wider issue of related actions in international litigation. But, as Baumgartner has shown,<sup>17</sup> it is perhaps unfortunate that the issues raised by related actions have always been overshadowed by consideration of the much stricter rules which may be necessary where the competing proceedings are on all fours with each other. The point is an important one, because the development of rules to deal with related actions serves a distinct policy objective not so far met expressly by any of the techniques mentioned so far, namely, that of consolidation of international litigation. Baumgartner notes that many civil law countries in fact have provisions for the stay of proceedings in favour of the courts entertaining related actions within their domestic legal systems, but have apparently been reluctant to extend that approach to international cases. Even practice under Article 22 of the Brussels Convention (which enables a discretionary stay) has been limited. Common law jurisdictions do not have separate rules for dealing with related actions. However, a judicial policy of favouring a forum in which all claims arising out of the same transaction or occurrence can be determined can be seen in both US and Anglo-Commonwealth jurisprudence concerning the exercise of the court's discretion to stay its proceedings or to restrain a party from pursuit of proceedings in a foreign country.

#### *Forum Non Conveniens*

20. A third technique, which has been adopted by the courts of some countries to resolve problems in the allocation of jurisdiction, has been to decline jurisdiction in favour of another forum which is clearly more appropriate to try

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<sup>17</sup> Baumgartner 'Related Actions', Committee Working Paper

the case.<sup>18</sup> The policies behind the existence of such a rule may be identified as:

- (a) an ability to moderate jurisdictional rules which may otherwise wreak injustice by conferring jurisdiction on a court on the basis of a single, perhaps fortuitous, connection with the forum;
- (b) the discouraging of excessive forum shopping whereby plaintiffs seek to obtain the advantages of litigation in a favourable forum which otherwise has very little connection with the case; and
- (c) the allocation of the case to the forum which is objectively the most appropriate to try it.

21. Although the doctrine of *forum non conveniens* is now generally regarded as a common law institution, in fact its origins are to be found in Scots law (a civilian system).<sup>19</sup> Moreover, although the doctrine's reception into English law has now been completed, principally through the eloquent judgments of Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd*<sup>20</sup> and *RTZ v Connolly*,<sup>21</sup> its acceptance in other common law countries has been less uniform. As Nygh has pointed out, the High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd*,<sup>22</sup> has moved in precisely the opposite direction to that of the House of Lords by holding that "the plaintiff who has regularly invoked the jurisdiction of the court has a prima facie right to insist upon its exercise".<sup>23</sup>

22. In civil law countries, there is no general recognition of the doctrine of *forum non conveniens*. Thus, in the debates on the accession of the United Kingdom to the Brussels Convention, there was strong opposition from civil law states to the introduction of any element of the doctrine into the Convention's scheme.<sup>24</sup> However, as research conducted under the auspices of the International Academy of Comparative Law (with Professor James Fawcett as general reporter) has illuminatingly shown, a number of civil law countries do recognise a limited power to decline jurisdiction where the case has an insufficient connection with the forum or where its pursuit would constitute an abuse.

### *Anti-Suit Injunctions*

23. A fourth technique which has been adopted in order to determine the allocation of jurisdiction is that of the anti-suit injunction.<sup>25</sup> This is a remedy which

<sup>18</sup> Juenger 'Forum Non Conveniens Dismissals and Stays', Committee Working Paper, Fawcett 10-27

<sup>19</sup> *Sim v Robinow* (1892) 19 R 665 per Lord Kinnear; and see the discussion by Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 474-5

<sup>20</sup> *Idem*

<sup>21</sup> [1998] AC 854

<sup>22</sup> (1990) 171 CLR 538

<sup>23</sup> *Idem*

<sup>24</sup> Schlosser Report on the Accession of Denmark, Ireland and the United Kingdom to the Brussels Convention OJ C59, 5.3. 79, p 77, paras 76-81

<sup>25</sup> Carter 'Anti-Suit Injunctions in Private International Law' (Europa Institut at Universität des Saarlandes, 1997) Nr 368

has been mainly developed in common law jurisdictions. This technique does not involve the forum court deciding to decline its own jurisdiction. Rather it involves the court seeking to protect its own jurisdiction by restraining one of the parties before it from pursuit of litigation abroad. The grant by common law courts of an injunction represents in form an order directed only to the person of the defendant restraining him from pursuit of the foreign litigation. However, the courts have recognised that there is in reality an indirect interference with the foreign court's exercise of its own jurisdiction. The leading Anglo-Commonwealth case, *SNI Aerospatiale v Lee Kui Jak*,<sup>26</sup> emphasises that what needs to be shown, as a general rule, is that England is the natural forum for trial and that it would be oppressive or vexatious to continue the proceedings abroad. In *Airbus Industrie* (discussed above) the House of Lords decided that the English court should not act as a global policeman in granting such injunctions and should only act where the English court had a sufficient interest in the matter. Nevertheless, as Carter has shown, there is no sign that the use of anti-suit injunctions is on the wane. On the contrary, the continued expansion in the volume and scope of international litigation has spawned many more cases of perceived forum shopping abuse, to which the common law courts have reacted by granting injunctions. Indeed a recent English Court of Appeal judgment even suggested that (at least in cases where the injunction was sought to enforce a jurisdiction or arbitration clause) "the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution".<sup>27</sup>

### *The Search for New Solutions*

24. The Committee observed that there was considerable scope for controversy surrounding all of the solutions to these problems of forum shopping and forum allocation. The use by the English courts of anti-suit injunctions within the framework of the Brussels Convention had led to very strong objections both in the *doctrine*,<sup>28</sup> and also in jurisprudence,<sup>29</sup> where courts in continental countries had taken the view that the issue of such injunctions was an unjustified incursion on their right to control their own proceedings. Even amongst common law countries, the use of such injunctions had on occasions led to conflicts between courts. That was perhaps most celebratedly exemplified by the reaction of Judge Greene of the US District Court for the District of Columbia to the issue by the English Court of injunctions to restrain continuance of the anti-trust proceedings brought by *Laker* against a number of European airlines in the mid-1980s.<sup>30</sup>

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<sup>26</sup> [1987] AC 871

<sup>27</sup> *The Angelic Grace* [1995] 1 Lloyd's Rep 87

<sup>28</sup> See, e.g. van Houtte 'May Court Judgments that Disregard Arbitration Clauses and Awards be Entered under the Brussels and Lugano Conventions?' (1997) 13 Arb Intl 85

<sup>29</sup> *Re The Enforcement of an English Anti-Suit Injunction* [1997] IL Pr 320 (Oberlandesgericht Düsseldorf, Germany)

<sup>30</sup> *Laker Airways Ltd v Pan American World Airways* 559 F Supp 1124 (DDC 1983), on which see

25. The development of the doctrine of *forum non conveniens* has also excited great controversy, even in countries where it applies. Debate continues to rage over whether the ends of justice were really served by the decision of the US court in the *Bhopal* litigation to decline jurisdiction in Massachusetts, requiring the claimants to take up their claim against Union Carbide in India.<sup>31</sup> When the House of Lords in England decided that a tort claim against an English company in relation to events taking place in Namibia should not be stayed on *forum non conveniens* grounds because the claim could only be pursued in England given the availability there of legal aid,<sup>32</sup> the Lord Chancellor's Department invited consultation on the question of whether the Government should intervene to introduce legislation to reverse the result.<sup>33</sup> The existence in the Brussels Convention of a relatively rigid rule on *lis pendens* has also encountered considerable difficulty and complexity in practice,<sup>34</sup> and doctrinal controversy, given the apparently arbitrary way in which it is capable of operating.<sup>35</sup>

26. Against this background of diversity and controversy, the Committee considered what common ground might be found. It adopted as its general parameter the notion that it was centrally concerned with *declining jurisdiction*, a phrase coined by Fawcett,<sup>36</sup> which refers to a situation where a court which has jurisdiction refuses to exercise it. That is to be distinguished from the elaboration of rules which confer original jurisdiction and the situation where the rules on jurisdiction are not satisfied and the court therefore dismisses the action on the basis that it has no jurisdiction.

27. The isolation and examination of approaches to declining jurisdiction is of course to some extent artificial. It is commonly, and no doubt correctly, said that the need for rules of declining jurisdiction will be directly affected by the width of a given state's rules of original jurisdiction. If the rules of original jurisdiction are relatively narrow, then there will be correspondingly less incidence of conflict between jurisdictions and less need for the self denying ordinance of rules of declining jurisdiction. Further, the extent to which rules of declining jurisdiction are perceived to be warranted depends upon the policy which private international law is to promote in this area. If it is one of minimal

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Collins 'Provisional and Protective Measures in International Litigation' in Collins *Essays in International Litigation and the Conflict of Laws* (1994) 1, 107-117, and Vollmer 'US Federal Court Use of the Anti-Suit Injunction to Control International Forum Selection' in Goldsmith, op cit note 4, 237

<sup>31</sup> *Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984, In re* 634 F Supp 842; 809 F 2d 195 (2d Cir), cert den 484 US 871 (1987) (US). See this Committee's earlier research published as McLachlan and Nygh (eds) *Transnational Tort Litigation : Jurisdictional Principles* (1996)

<sup>32</sup> Op cit note 21

<sup>33</sup> Letter from Lord Chancellor's Department dated September 1998

<sup>34</sup> See, e.g. *The Tatry* [1994] ECR-I5439

<sup>35</sup> See Nygh 'Lis Alibi Pendens', Committee Working Paper

<sup>36</sup> Op cit note 11, 2

intervention, then it may be sufficient to leave the problems of parallel litigation (and even perceived excessive claims to jurisdiction by foreign courts) to be resolved through the process of the recognition and enforcement of foreign judgments. That is still a strong element in the national legal systems of a number of states.

28. The further fundamental point concerns the perceived role of discretion in the exercise of jurisdiction. To the civil law mind, particularly in the Germanic law systems, the existence of discretion in the exercise of jurisdiction is seen as inimical to the fundamental policy that citizens should not be shut out from the courts when seeking redress. In contrast, the common law mind tends to see discretion as a civilised means of reducing the injustices which may otherwise arise from an overly strict application of jurisdictional rules.

29. There is no doubt that the techniques adopted by the Brussels Convention in this area have had a considerable influence on the shape of international solutions for declining jurisdiction. The Convention's relatively simple rules in relation to prorogation of jurisdiction (Article 17), *lis pendens* (Article 21) and related actions (Article 22) have survived, albeit with some amendments, into the Lugano Convention and are now applied in a large number of Western European states, including common law countries. Nevertheless, those rules have not proved free from doubt in their operation. The perceived rigidity of Article 21 has in particular been the subject of continuing controversy. The Convention has not operated as a complete curb upon forum shopping. Moreover, the Convention provides rules for determination of the declining jurisdiction issue. But it provides no mechanism which might moderate the *consequences* of declining jurisdiction, even between Convention states for international judicial assistance. The Convention leaves the courts of each state to consider and resolve issues of declining jurisdiction on the material placed before them without the possibility of communication with other courts or the existence of any procedure to transfer litigation from one court to another.

30. In developing a concept of the referral of jurisdiction, the Committee was influenced by three ground breaking precedents: the Australian Jurisdiction of Courts (Cross Vesting) Act; the Canadian Uniform Court Jurisdiction and Proceedings Transfer Act 1994; and the provisions of Articles 8 and 9 of the Hague Convention on the Protection of Children.

#### *Cross Vesting Legislation in Australia*

31. The Australian cross vesting legislation was explained to the Committee by Dr Gavan Griffith QC (its Australian member, and formerly Solicitor-General of Australia).<sup>37</sup> It is domestic in scope only, in that it attempts to resolve issues of jurisdiction arising within the Australian federation. But it neverthe-

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<sup>37</sup> Jurisdiction of Courts (Cross-Vesting) Acts 1987; Griffith 'Transfer of Proceedings between Courts – The Australian Scheme for Cross Vesting of Jurisdiction between Domestic Courts', Committee Working Paper

less represents a radical attempt to move beyond a system of separate, and potentially competing, jurisdictions to a system in which the solution is found in terms of transfer of venue rather than allocation of jurisdiction. By virtue of the cross vesting legislation (enacted co-operatively by the Commonwealth and each of the states of Australia) each state confers the civil jurisdiction of its Supreme Court on the Supreme Court of each of the other states. Provision is then made by each jurisdiction for a court in which proceedings are commenced to transfer those proceedings to another court as part of this scheme if that court is the more appropriate venue. The result of the Australian solution is to eliminate altogether questions of jurisdiction, or the risk that the case may fail for want of jurisdiction. The scheme substitutes complex determinations of jurisdiction with a decision on transfer of venue. The receiving court is not permitted to refuse to accept proceedings transferred to it. The Australian scheme represents a radical solution even within the context of a federation. Despite a successful challenge to the constitutional validity of the investment of federal courts with state jurisdiction, the inter-state investment of jurisdiction remains in force.<sup>38</sup> It is not suggested that it would provide a model which could necessarily be adopted wholesale into an international scheme. Nevertheless, it represents a working precedent for an organised system of transfer of cases between the courts of different territories.

#### *Canadian Uniform Court Jurisdiction and Proceedings Transfer Act*

32. The Canadian scheme takes the process one stage further by providing a series of mechanisms for the transfer of proceedings to another court whether domestic or foreign. The scheme takes the form of a model act, the adoption of which was recommended by the Uniform Law Conference of Canada in 1994, but which has not yet come into force in any of the Canadian provinces. It was presented to the Committee by Louise Lussier (one of the Committee's Canadian members, of the Canadian Ministry of Justice).<sup>39</sup> Part 3 of the Uniform Act provides mechanisms for the transfer of proceedings in cases where, based on a specified catalogue of factors, another forum is clearly more appropriate to try the action. The Act thus seeks to moderate the blunt mechanism of the *forum non conveniens* procedure of declining jurisdiction and forcing the plaintiff to recommence proceedings elsewhere, by preserving what has already been done and providing a basis for continuity of the action in the receiving jurisdiction. The Uniform Act is a particularly useful precedent, since it represents an attempt to codify the grounds for such a transfer, and to do so in a country which has both common and civil law jurisdictions.

#### *Hague Convention on the Protection of Children*

33. The third modern precedent which influenced the Committee was

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<sup>38</sup> *Re Wakin, ex parte McNally* (1999) 163 ALR 270 (HCA, Kirby dissenting)

<sup>39</sup> Lussier 'A Case for International Co-operation : Transfer of Proceedings between Courts of Different Countries' Committee Working Paper

derived from an initiative outside the field of civil and commercial matters. It is the procedures provided for in the Hague Convention on the Protection of Children.<sup>40</sup> This was drawn to the Committee's attention by Catherine Kessedjian, its French member and Deputy Secretary-General of the Hague Conference on Private International Law. Articles 8 and 9 of that Convention enables, exceptionally, the court of the contracting state otherwise having jurisdiction under the Convention, to seek to refer the case to the court of another contracting state if it considers that the second court would be better placed in a particular case to assess the best interests of the child.<sup>41</sup> Article 8 specifies the categories of connection which may justify reference of the case to the court of another state. Article 9 enables the court of such an affected foreign state to make a request to the contracting state where the child has its habitual residence that it be authorised to exercise jurisdiction.

34. This Convention gives the courts of the Contracting State where the child has its habitual residence clear priority in deciding whether to keep the case itself or to remit the case to the court of another state. It requires the courts of all other states to defer to the decision of the court of the habitual residence of the child. It also enables the authorities of the respective states to proceed to an exchange of views on the issue. The significance of this Convention as a precedent, therefore, is that it recognises that there may be cases where a court which otherwise has the primary jurisdiction should decline the exercise it. It also incorporates procedures for communication between judicial authorities and the transfer of cases between them.

35. The Committee felt that the topic of declining and referring jurisdiction might merit its consideration against a background in which these issues could no longer be seen as exceptional, but rather were part of the everyday problems facing courts in the conduct of international commercial litigation. Research by the Committee might also assist national and international law makers in elaborating potential reforms. The Committee was mindful of the fact that the Hague Conference on Private International Law had decided to appoint a Special Commission to study the subject of Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters with a view to elaborating a new international convention on that subject.<sup>42</sup> At the same time, a review of the Brussels and Lugano Conventions was being undertaken.<sup>43</sup> In both cases, the rules and mechanisms for declining jurisdiction would again

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<sup>40</sup> Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, The Hague, 1996

<sup>41</sup> Lagarde 'Explanatory Report', paras 53-60 in Hague Conference *Proceedings of the Eighteenth Session II*, 534, 558-563

<sup>42</sup> Kessedjian 'International Jurisdiction and Foreign Judgments in Civil and Commercial Matters', Hague Conference on Private International Law, Foreign Judgments Prel Doc No 7 (1997)

<sup>43</sup> General Secretariat of the Council, Working Party on Revision of the Brussels and Lugano Conventions

come under scrutiny. The Committee hoped that its independent academic research might benefit debates in those international law making fora.<sup>44</sup>

## II THE COMMITTEE'S RESEARCH

### *Work Programme*

36. The Committee began its work by acknowledging the great debt of gratitude which it owes to Professor James Fawcett and to the Committee of the International Academy of Comparative Law which researched the actual position in relation to declining jurisdiction across 18 jurisdictions in a report presented to the Fourteenth Congress of the Academy in Athens in August 1994, which was subsequently published by Clarendon Press in 1995: Fawcett *Declining Jurisdiction in Private International Law*. These reports represent an invaluable attempt to examine on a consistent basis across a wide range of common and civil law jurisdictions the solutions adopted to the issue of declining jurisdiction. From the start, therefore, the ILA Committee eschewed a national report approach. Rather, this Committee decided to focus on the key issues in declining jurisdiction in order to see whether a consensus in terms of reform for the future could be achieved.

37. Following the preparation of an issues paper by the Chairman and Rapporteur in June 1996, the Committee met on six occasions to discuss declining jurisdiction:

- (1) A preliminary meeting was held in April 1997 in Copenhagen at the offices of Gorrissen Federspiel Kierkegaard, at the kind invitation of its then Danish member, Ms Rikke Dalsgaard, and the partners of that firm. The minutes were prepared by Ms Dalsgaard and Miss Nina Norregaard.
- (2) The Committee then met in January 1998 in New Delhi at the kind invitation of the Committee's Indian member, Mr PH Parekh. The Committee benefited on that occasion from a wider discussion with members of the Indian Branch, in which the Chairman of the Executive Council of the ILA, Lord Slynn, also participated.
- (3) The essential elements of the Principles were developed in November 1998 in a meeting in Leuven at the invitation of the Committee's Belgian member, Professor Hans van Houtte. The session was held at the Katholieke Universiteit Leuven, and the Committee thanks Professor van Houtte and the Law Faculty of the University for their kind hospitality. The minutes were prepared by Mr Patrick Wautelet.

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<sup>44</sup> The Committee's Principles on Declining and Referring Jurisdiction have influenced the formulation of Articles 21-2 of the draft Hague Convention. Proposals on these issues, which draw in part upon the ideas propounded in the Committee's Principles, were introduced by eight states at a drafting meeting of the Special Commission appointed by the Hague Conference on International Jurisdiction and the Effect of Foreign Judgments in Civil and Commercial Matters on 18 November 1998. This meeting followed the Leuven meeting of the Committee on 7-8 November 1998 at which the Principles were substantially drafted. A number of Committee members have served as delegates to, or officers of, the Hague Conference Special Commission

- (4) A detailed drafting session was held in Washington in April 1999 at the invitation of Mr Peter Trooboff at the offices of Covington & Burling, whose partners the Committee thanks. The minutes were prepared by Miss Martine Stuckelberg.
- (5) Final drafting points on the Principles were agreed at a meeting in Milan in October 1999 held at the kind invitation of Professor Pocar. The minutes were prepared by Miss Costanza Honorati.
- (6) This Report was tabled, amended and agreed in Kyoto in March 2000 at a meeting held at the kind invitation of Professor Akira Takakuwa.

38. The Committee began by receiving papers on a number of discrete issues within the general field:

Nygh	Lis Pendens
Kazazi	Lis Pendens before International Tribunals
Kinsch	Jurisdiction Clauses & Forum Non Conveniens Considerations
Juenger	Forum Non Conveniens Dismissals and Stays
Baumgartner	Related Actions
Carter	Anti-Suit Injunctions
Griffith	Transfer of Proceedings between Courts – The Australian Scheme for Cross Vesting of Jurisdiction between Domestic Courts
Lussier	A Case for International Co-operation : Transfer of Proceedings Between Courts of Different Countries

It also had before it reports on the Indian and Philippines perspectives from Mr Parekh and Justice Guingona, as well as several published articles by Committee members.

### ***Methodology***

39. From the outset, the Committee adopted an approach to consideration of this problem which shared many of the hallmarks of its earlier research on jurisdiction in tort,<sup>45</sup> and on provisional and protective measures in international litigation.<sup>46</sup> Four elements of this methodology should be highlighted:

- (1) The Committee sought to take a *functional* approach to the problem, i.e. it sought to start from an examination of the way in which issues of declining jurisdiction actually arise in international litigation and the practical problems which arise for litigants in the conduct of cases which span national boundaries.
- (2) It follows from that that the Committee sought as far as possible to adopt an *anational* approach. The rules, and even the categorisations of the rules, adopted within national legal systems were unlikely to provide a basis for sound comparative research or, still less, for international reform.

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<sup>45</sup> Op cit, note 31

<sup>46</sup> 'Second Interim Report : Provisional and Protective Measures in International Litigation' in International Law Association *Report of the Sixty-Seventh Conference held at Helsinki* (1996) 185-204

- (3) The Committee focussed its discussions on the scope for *international* co-operation. In so doing, it sought to take an international perspective on the potential solutions.
- (4) The Committee was also concerned to develop so far as possible *practical* measures for international co-operation – considering the mechanics for referring jurisdiction as well as the principles upon which it should operate.

40. The Committee's discussions in Copenhagen took the form of a general examination of the problems by reference to the general headings of forum shopping, jurisdiction clauses, *lis pendens*, forum non conveniens and anti-suit injunctions. The Committee agreed that there was sufficient cause for optimism that it might be possible to reach a consensus amongst Committee members. It therefore decided that, following a period of further research, the Committee should embark on an attempt to elaborate a set of Principles on declining jurisdiction. These Principles would not be in the form of a draft model law, still less a draft international convention. Rather, and following the model of the Committee's successful Helsinki Principles on Provisional and Protective Measures in International Litigation (which had been adopted by the International Law Association at its Conference in Helsinki in 1996)<sup>47</sup> the Principles should indicate in outline a general approach for the resolution of these problems. Such an approach might well assist courts and law reformers, both at a national and international level, by giving guidance as to potential solutions.

41. Even at that preliminary stage, some of the general themes which came to preoccupy the Committee, and to characterise the approach adopted in the Principles, emerged in discussion:

- The need for a prompt and early decision on all jurisdictional issues
- The need for rationalisation of parallel and related litigation
- The fact that the Committee did not necessarily have to make the simple choice between an inflexible rule-based approach and a broad discretionary one. It might well be possible to find middle ground
- The encouragement of co-operation between courts might be a way of facilitating the rendering of just decisions in this area.

42. Following more wide ranging discussions in New Delhi, the Committee mapped out the general structure of the Principles at its meeting in Leuven. Immediately following the Leuven meeting, the Rapporteur prepared a draft of the Principles. Patrick Kinsch, in consultation with Catherine Kessedjian and Louise Lussier, prepared a French text. Both were circulated to members. Although a broad consensus had been reached on many issues in Leuven, there was much work to be done of a detailed nature which was undertaken at the

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<sup>47</sup> Idem. The Helsinki Principles have been considered by UNCITRAL in its work on a proposal for preparing uniform provisions on court-ordered interim measures of protection in support of arbitration, see: 'Report of the Working Group on Arbitration on the Work of its Thirty-Second Session (Vienna, 20-31 March 2000)' UN Doc A/CN.9/468, para 86

Committee's Washington meeting. That meeting finalised almost all aspects of the text. Some remaining controversial matters were resolved at a meeting of the Committee held in Milan in October 1999 at which the final text was approved by the Committee for submission to the International Law Association. The text of this report was considered by the Committee at its meeting in Kyoto on 31 March 2000. It has been amended in the light of those discussions and is now submitted to the ILA for the purpose of the London Conference in July 2000.

43. The Committee will be inviting the Association to adopt the Principles at the conclusion of the London Conference, following their formal presentation at a public meeting of the Committee on Wednesday, 26 July 2000. In recognition of the fact that the main work on the formation of the Principles was carried out at the Katholieke Universiteit Leuven on 7-8 November 1998, and that they are proposed to be adopted at the London Conference of the ILA, the Committee has entitled its Principles:

“The Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters”

### III THE LEUVEN/LONDON PRINCIPLES

#### *Status and Overall Approach*

44. The full text of the Principles, both in English and French, is annexed this Report. This section of the Report explains the thinking of the Committee which underlies the text, and is intended to be referred to in its interpretation.

45. The overall purpose of the Principles is to indicate the lines of a potential new direction in the declining and referring jurisdiction in international civil and commercial litigation. The Principles are not reflective of the current position in national legal systems. On the contrary, they involved a departure from, or development of, the approach currently adopted in any national legal system. By the same token the Principles are not intended as a prelude to an international convention. They are designed to be capable of direct application within national legal systems (though it is undoubtedly the case that procedures which the Principles propose would be capable of incorporation into an international convention and might benefit in their operation by the degree of multi-lateral assurance which an international convention can offer). The Principles are likewise not intended to be exhaustive. There are a great many issues of detail which would need to be worked out were they to be implemented within any national rules of civil procedure. In a number of cases, the Committee judged it wise to confine itself to those essential issues on which there was a clear consensus, leaving other matters to the province of national law. The Principles are nevertheless intended to be pragmatic and, while indicating a new approach, to be capable of implementation in the real world.

46. Four general points about the overall approach may be made at the outset:

(1) The Principles address a concern expressed in many quarters about the

process of declining jurisdiction, namely the prospect that it could lead to a denial of justice in which a plaintiff is left without an effective forum in which to secure relief. They do so by coupling the process of declining jurisdiction with that of *referral*. This process ensures that, in cases where a court is permitted to decline jurisdiction by these Principles, it shall always refer the matter to an alternative court, and provides a mechanism to ensure that such referral is effective.

- (2) The approach of the Principles is *rule-based*, and does not represent the exercise of an unfettered discretion. The Committee felt that, even though a number of the rules might be rather “open textured”, in the sense that they were expressed in general terms in order to provide for a wide variety of circumstances, nevertheless, it was appropriate and possible to give specific guidance to courts. In this way, the Committee has sought to address another widespread concern about declining jurisdiction expressed by some commentators, namely that it would be lead to an unacceptably arbitrary and unpredictable application of jurisdictional rules.
- (3) The Principles are predicated on an enhanced degree of *co-operation* between courts. But, as will be seen, the Committee has sought to take the notion of co-operation to a more advanced stage by specifying specific procedures for communication in order to meet due process concerns and to ensure efficiency and transparency. In this regard, the Principles go one stage further than either the Hague Convention on the Protection of Children (discussed above) or the Committee’s own Helsinki Principles on Provisional and Protective Measures (Article 15).
- (4) Nevertheless, and importantly, the Principles are *party-driven* in their operation. They require parties to a litigation to take the initiative in making an application to a court to decline and refer jurisdiction. They also impose a number of other obligations on parties in the conduct of such applications. The Principles neither require nor permit the court to act of its own motion. In the Committee’s view, one of the principal purposes behind the development of a set of Principles on Declining and Referring Jurisdiction was to ensure fairness to litigating parties. It therefore judged it reasonable to impose some responsibility on those parties to prosecute applications. The Committee also had in mind the practical consideration that in most cases it was the parties, and not either one of the relevant courts, which knew the state of proceedings in the alternative court, and were therefore in a position to keep both courts informed of the matter.

47. There is one other general introductory point on the approach taken on the Principles which should be made. It relates to language. So far as possible, the Committee sought to stand outside the terms and concepts which are recognised in one legal system, but not in all. It preferred to adopt terms which reflected the functions required by the Principles, but which were not rooted in the particularities of national systems of civil procedure. Thus, it favoured use

of terms such as declining, referring, suspension and termination. It deliberately eschewed *forum non conveniens*, stay, termination and transfer. The Committee also considered, and was satisfied, that the Principles could stand on their own text, without the need for elaborate definitions of terms. The additional benefit of this approach was that it made it more possible to prepare drafts in both of the working languages of the International Law Association : English and French.

### ***The Preamble***

48. The Committee decided that it was essential that it include a Preamble to the Principles, so that the overall policy objectives which it desired to facilitate found a voice in the document. The Preamble:

- starts from the premise that rules of primary jurisdiction overlap, and that this means that in practice litigating parties have some choice of forum in any case
- sets out the overall objectives of such a set of Principles as promoting the proper allocation of cases between courts, discouraging improper forum shopping, and reducing the unnecessary incidence of concurrent jurisdiction and the risk of irreconcilable judgments
- identifies the overall purpose of such a system as being one which promotes international civil justice – a notion which of its nature stands above the parochial concerns of national legal systems
- recognises the role of international human rights law in this context, by incorporating the notion of access to a fair hearing before an impartial tribunal without undue delay and without discrimination on grounds of nationality
- emphasises that the Principles seek to make a positive contribution by *defining* the circumstances in which the court shall decline jurisdiction
- enshrines the notion that, when a court declines jurisdiction, the fairest and most sufficient means of resolving the matter would be to refer it to an alternative available forum.

### ***Scope and Purpose***

- 1.1 *These Principles determine the extent to which a court otherwise having original jurisdiction shall decline to exercise such jurisdiction, whether by suspension or termination, and refer the matter to a court of competent jurisdiction in another state in the exceptional circumstances set out below.*
- 1.2 *These Principles do not determine the rules of original jurisdiction in civil and commercial matters. Such rules are a matter of national law subject to international law, including any applicable international conventions.*

49. These two short preliminary Principles set out first the positive then the negative aspect of the field of application of the Principles. Principle 1.1 makes it clear that the Principles link the decision to decline jurisdiction with referral

to a court of competent jurisdiction in another state. The Principle emphasises that a decision to decline will always be an exceptional matter and will occur only in the circumstances set out in the Principles. The Principles leave to national law the question whether the declining of jurisdiction is by suspension or termination (thus leaving national legal systems to decide whether a stay or dismissal is most appropriate).

50. Principle 1.2 simply states the obvious point that the Principles are not concerned with the rules of original jurisdiction. Those rules are a matter for national law. However, as the Principle observes, national law may itself be subject to international law on the point, both the customary international law rules which govern jurisdiction generally, and, more specifically, any international conventions prescribing jurisdiction in civil and commercial matters. The Committee has of course already done extensive research into original jurisdiction as applies in tort cases. But it is fundamental to the approach adopted in the Principles that it is both possible and useful to separate out the circumstances in which a court may decline jurisdiction from the underlying jurisdictional rules.

### ***Preliminary Matters***

- 2.1 *It shall be for a party to make and substantiate an application to an originating court. The originating court shall not act of its own motion.*
- 2.2 *An application shall be made at the outset of the proceedings. It shall be finally determined by the originating court on summary proceedings by separate order at the earliest opportunity and in any event before the defendant is required to plead on the merits.*
- 2.3 *If either party wishes to pursue such rights of appeal as are allowed under national law from such an order, it must do so expeditiously.*

51. Principle 2 deals with certain preliminary matters which the Committee regards as axiomatic in the practical operation of the Principles. The first has already been mentioned. It imposes the responsibility on the litigating party to make applications and dis-entitles the originating court itself from acting on its own motion.

52. Principle 2.2 enshrines a Principle which the Committee felt strongly should have wide acceptance in the handling of all jurisdictional determinations, and not simply those which relate to declining jurisdiction. Nevertheless, the formulation, in keeping the scope of the Principles, does relate only to declining jurisdiction. The purpose of the Principle is to ensure that a declining jurisdiction determination is made at the outset of the proceedings before the defendant is required to become involved in any way in the substance of the dispute. Such an approach of course imposes responsibilities on the defendant. It requires him to act at the outset of the proceedings. But it also requires originating courts to operate their procedures so that the application can be determined in accordance with three requirements:

- (a) on summary proceedings;
- (b) by separate order; and

(c) at the earliest opportunity and in any event before the defendant is required to plead on the merits.

53. The Committee introduced each of these requirements in order to ensure, so far as possible, that there was a prompt and clear determination of the issue on declining jurisdiction before the matter proceeded further. The Committee was mindful that experience in the operation of existing systems for international allocation of jurisdiction, such as the Brussels Convention, have shown that such systems could be partly frustrated by domestic systems of civil procedure which deferred the making of a decision on jurisdiction until the court had also determined the substance of the dispute. By this means, the ability to mount an effective challenge to jurisdiction could be rendered otiose. The defendant would instead become embroiled in substantive issues against his will, and end up doing precisely what he sought not to do, namely to litigate the merits in an inappropriate court.

54. The Committee gave careful consideration to the issues of burden of proof and rights of appeal. The result of its deliberations is to confine the degree of guidance given by the Principles on these issues to:

- (a) a requirement that the party making an application must *substantiate* it (Principle 2.1); and
- (b) a requirement that any party pursuing such rights of appeal as are allowed under national law must do so *expeditiously*.

55. The Committee felt, after careful consideration, that further guidance on burden of proof would require delving into the substantive law of evidence and the civil procedure rules of different countries, where it was unlikely that consensus could be found, and which would have much wider ramifications than the issue before the Committee.

56. Rights of appeal were left to national law, because in many countries these have a constitutional significance. Thus, although there were significant arguments on efficiency grounds in favour of curtailing rights of appeal on determinations of declining jurisdiction, the Committee felt that the most practical solution was simply to impose a positive obligation on the appellant to pursue any rights of appeal vouchsafed to him under national law in an expeditious fashion.

### ***Jurisdiction Clauses***

- 3.1 *If the parties have chosen the originating court as the exclusive forum for resolution of the matter, then that court shall exercise jurisdiction and shall not decline it under Principle 4.*
- 3.2 *If the parties have chosen an alternative court as the exclusive forum for the resolution of the matter, then the originating court shall either terminate its proceedings on the ground that it has no jurisdiction over the matter or as the case may be decline jurisdiction.*
- 3.3 *If the parties' choice of forum is not exclusive, the court may hear an applicant pursuant to Principle 4*

57. The Principles uphold party autonomy in choice of jurisdiction by providing that:

- (a) if there is an exclusive choice of jurisdiction in favour of the originating court then that court shall not decline jurisdiction in favour of another court; but that
- (b) if the exclusive jurisdiction clause is in favour of an alternative forum, then that choice shall be honoured by the originating court.

58. The text of Principle 3.2 reflects the divergence amongst different national legal systems as to the effect of jurisdiction clauses between whether they result in the originating court having no jurisdiction over the matter or simply require the court, having jurisdiction, to decline it.<sup>48</sup>

59. The Principle recognises additional scope for flexibility, however, where the choice of forum is not exclusive (the construction of any particular clause being a matter for the applicable law). In the case of non-exclusive jurisdiction clauses, the Principles recognise that the court may still go on to consider whether it should decline jurisdiction in accordance with the other grounds for doing so specified under Principle 4. Cases in which the originating court, designated by a non-exclusive jurisdiction clause, still decides that it is appropriate to refer the matter to an alternative court under Principle 4 will be wholly exceptional. But, where the non-exclusive jurisdiction clause designates a foreign court, the Committee felt that the originating court should be entitled to examine the question of whether it should decline jurisdiction (which, by definition, it would not be obliged to do by virtue of the clause) in the context of the wider grounds for referral specified in Principle 4.

### ***Lis Pendens***

4.1 *Where proceedings involving the same parties and the same subject-matter are brought in the courts of more than one state, any court other than the court first seized shall suspend its proceedings until such time as the jurisdiction of the court first seized is established, and not declined under this Principle, and thereafter it shall terminate its proceedings. The court first seized shall apply Principle 4.3. Should that court refer the matter to a court subsequently seized in accordance with Principle 4.3, the latter court will not be obliged to terminate its proceedings.*

60. Principle 4 specifies three exceptional circumstances in which an originating court shall decline jurisdiction. The first of these is *lis pendens*. The Committee gave anxious consideration to whether it ought to preserve a formal *lis pendens* rule, or whether it should simply include the existence of parallel litigation as one of factors to be considered by the court as a ground for referral of jurisdiction. In the end, it concluded that the special complexities of parallel litigation, which carry with it the problems of conflicts between courts, justify

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<sup>48</sup> Kinsch 'Jurisdiction Clauses and Forum Non Conveniens Considerations', Committee Working Paper

a separate rule. But the Committee desired to avoid some of the rigidity, and the potential for forum shopping, which could be the result of the strict operation of a “first past the post” rule. In the result, therefore, Principle 4.1 preserves the strictness of the *lis pendens* test found, for example, in Article 21 of the Brussels Convention, by requiring identity of parties’ and subject matter and by requiring an allocation of priorities between the court first seized and that subsequently seized.

61. But it departs in the result radically from the automatic priority on the merits vouchsafed to the court first seized under the Brussels Convention. That is because Principle 4.1 simply requires courts subsequently seized to suspend their proceedings until the court first seized has established its jurisdiction, and not declined it under the Principles. The court first seized has a positive obligation to apply Principle 4.3. If the court first seized then decides to refer the matter to the court subsequently seized, the latter court may lift its suspension and continue with the proceedings. Thus, all that Principle 4.1 does is to give priority to the court first seized in the determination of the appropriate court for the determination of the merits of the matter. In this way, the Committee considered that the potential for the abuse of a *lis pendens* system by a race to the courthouse could be curbed, whilst a specific regime for the determination of priorities between competing actions was still preserved. This was seen as a more effective mechanism than one which sought to proscribe the use of actions for negative declarations, which Committee members observed had been the means by which prospective defendants had sought to ensure litigation in the forum of their choice.

62. As Principle 4.3(d) makes clear, one of the factors which the originating court must consider is the desirability of avoiding multiplicity of proceedings or conflicting judgments *having regard to the manner of resort to the respective court’s jurisdiction and the substantive progress of the respective actions*. The Committee considered that this provision would enable the court first seized to distinguish between cases in which its jurisdiction had been invoked for purely forum shopping purposes from cases where there was a much more substantial link to the forum. It would also enable the court first seized to consider how far advanced the action in its own courts was, so as to avoid a purely mechanistic application of the *lis pendens* rules, when the two courts were seized of the action within days, or even hours, of each other.

### ***Related Actions***

4.2 *Where related actions are pending in the courts of more than one state either court may suspend or terminate its proceedings and refer the matter to the alternative court in accordance with the procedures in Principle 5, provided that the actions can be consolidated in the alternative court.*

63. The Principle preferred by the Committee in relation to related actions also represents a development from Article 22 of the Brussels Convention. It enables either of the two courts concerned to extend or terminate their proceed-

ings in favour of the alternative court. But Principle 4.2 adds two important innovations. First, it requires the formal operation of the referral procedure laid down in Principle 5. This will have the result of ensuring that the decision to suspend or terminate proceedings on the grounds of related proceedings does not leave a case in limbo, requiring the plaintiff to start completely afresh in the alternative court. Thus, for example, Principle 5.3 enables parties in the originating court to consider the appropriate terms of referral to deal with the applicant's submission to jurisdiction of the alternative court and the terms on which the applicant may advance defences of limitation or prescription of action in the alternative court.

64. The second additional requirement is that the actions must be capable of consolidation in the alternative court. The Committee felt that the underlying principle concerning related actions should be the achievement of consolidation of litigation, and not merely a proliferation of cases in one jurisdiction rather than many. It considered that this should be given effect in the Principles. The practical consequence of this will be to require an applicant, who must, in accordance with Principle 2.1, substantiate the application, to establish that the action may be consolidated with the related proceedings in the alternative court in accordance with the rules of civil procedure of the alternative jurisdiction.

### ***Other Grounds for Referral***

4.3 *An originating court shall decline jurisdiction and refer the matter to an alternative court where it is satisfied that the alternative court is the manifestly more appropriate forum for the determination of the merits of the matter, taking into account the interests of all the parties, without discrimination on grounds of nationality. In making this decision, the court shall have regard in particular to the following factors:*

- (a) *the location and language of the parties, witnesses and evidence;*
- (b) *the balance of advantages of each party afforded by the law, procedure and practice of the respective jurisdictions;*
- (c) *the law applicable to the merits;*
- (d) *in cases under Principle 4.1, the desirability of avoiding multiplicity of proceedings or conflicting judgments having regard to the manner of resort to the respective court's jurisdiction and the substantive progress of the respective actions;*
- (e) *the enforceability of any resulting judgment;*
- (f) *the efficient operation of the judicial system of the respective jurisdictions ;*
- (g) *any terms of referral under Principle 5.3.*

65. Principle 4.3 may rightly be regarded as the centrepiece of the Principles, since it defines the circumstances, beyond the context of *lis pendens* and related actions, where an originating court shall decline jurisdiction and refer the matter to an alternative court. In developing Principle 4.3, the Committee had regard to the Canadian Uniform Court Jurisdiction and Proceedings Transfer Act and also

to working documents prepared by Committee members.<sup>49</sup> But, in the end, the language of Principle 4.3 is distinctively that of the Committee, operating by consensus as a whole. By proceeding in this way, the Committee was able to eliminate some of the more parochial aspects of the way in which declining jurisdiction may operate within national legal systems. Instead it adopted a balanced international test which emphasises the interests of *all* the parties, without discrimination on grounds of nationality and includes consideration of the efficient operation of both of the relevant judicial systems.

66. The other two key aspects of Principle 4.3 are:

- (a) it is mandatory in its operation where the requisite test is satisfied. Thus, the Principle does not involve the exercise of discretion by the originating court. On the contrary, that court is obliged to decline jurisdiction where all the elements of Principle 4.3 are met; but
- (b) one of those elements is the existence of an alternative court to which the matter can be referred in accordance with the procedures set forth in Principle 5. Thus, jurisdiction may never be declined unless the originating court is satisfied as to the basis upon which the matter will be referred to an alternative available court.

67. The overall test in Principle 4.3 is the requirement that the court be satisfied that the alternative court “*is the manifestly more appropriate forum for determination of the merits of the matter, taking into account the interests of all the parties*”. The seven listed factors are then simply particular matters which the court is obliged to consider in deciding on the application of the overall test. The Principle does not attempt to ascribe a weight or hierarchy to those factors. The list of factors is not intended to be exhaustive of the factors to which a court may have regard in applying the overall test. Each of the listed factors may have a different significance depending upon the facts of a particular case. The Principle prohibits discrimination on grounds of nationality and thus the operation of a different approach depending on whether the plaintiff is a national of the originating court or a foreigner. But Committee members considered that the originating court would be entitled to give particular weight, if it considered it appropriate to do so, to the domicile of the defendant, so as to refuse to decline jurisdiction where the action was brought in the courts of the defendant’s domicile. The Committee did not consider that the possibility of declining jurisdiction in cases brought in the defendant’s domicile should be wholly eliminated.

68. The particular factors are designed to ensure that the court weighs in the balance the position of both parties and both jurisdictions, without any *a priori* preference for one over the other (see especially factors (a), (b) and (f)). This is, of course, subject to the overriding tests which require that the alternative court is the *manifestly more appropriate forum*, taking into account the interests of all the parties.

69. The majority of the factors, and the overriding test, emphasise that the court’s role is to determine the appropriate forum for the particular dispute

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<sup>49</sup> Trooboff ‘Declining Jurisdiction’ Draft Unified Proposal, Committee Working Paper

between the parties to it. But factor (f) is designed to enable the court to consider the wider position of the judicial systems of both jurisdictions in terms of efficient operation. This may include both the extent to which the respective systems will decide the dispute efficiently, and the impact which hearing the dispute will have on the efficient operation of the respective systems.

70. Factors (d) and (g) tie in the determination to be made under Principle 4.3 to other parts of the Principles. The significance of factor (d) has already been mentioned. Factor (g) specifically entitles the court to take account of any terms volunteered by an applicant or agreed between the parties under Principle 5.3 as to the basis upon which the case may be referred to an alternative court. The Committee considered that this would encourage applicants who wished to take the benefit of Principle 4.3 to ensure so far as possible that their counterparty would not be at a disadvantage on matters such as limitation periods in the alternative court.

***Referral : Procedure in the Originating Court***

5.1 *On the hearing of an application under Principle 4.3, and subject to any terms of referral under Principle 5.3, the applicant shall satisfy the originating court that the alternative court:*

*(a) has and will exercise jurisdiction over the matter; and*

*(b) is likely to render its judgment on the merits within a reasonable time.*

5.2 *The originating court may communicate directly with the alternative court on any application for referral in order to obtain information relevant to its determination under Principle 4, where such communication is permitted by the respective states. States are encouraged to permit their courts to make, and respond to, such communications.*

*Any such communication shall be either on the application of one of the parties or on its own motion. Where the court acts on its own motion it shall give reasonable notice to the parties of its intention to do so, and hear the parties on the information to be sought.*

*The originating court shall either communicate in writing or otherwise on the record. It shall communicate in a language acceptable to the alternative court.*

5.3 *The parties and the originating court are encouraged to consider appropriate terms of referral. These may deal in particular with:*

*(a) the applicant's submission to the jurisdiction of the alternative court;*

*(b) the terms on which the applicant may assert a defence of limitation or prescription of action in the alternative court.*

5.4 *Save where international convention provides otherwise, the originating court, if satisfied of the matters in paragraph 5.1, shall on an order to decline jurisdiction either suspend further proceedings at least until the jurisdiction of the alternative court has been established, or, where national law provides, terminate its proceedings.*

71. The provisions of Principle 5 represent perhaps the most innovative part of the Committee's work, since they embody the working out of the practicali-

ties of a procedure for referral of cases between countries in pursuance of the decision to decline jurisdiction. The research and experience of the Committee has shown that these practical matters may offer the key to an improved system for the allocation of international jurisdiction.

72. The first four points relate to procedure in the originating court. Principle 5.1 embodies the most important aspect of referral, namely the requirement that the applicant satisfies the originating court that the alternative court has and will exercise jurisdiction over the matter and is likely to render judgment on the merits within a reasonable time.

73. Principle 5.2 deals with communication between courts. The Committee has gone as far as it feels it properly may to encourage states to permit direct communication between courts. But the Committee was also concerned to ensure that the due process implications of direct communication were properly dealt with. Thus, it has provided that, where the court acts of its own motion, it should give reasonable notice to the parties and hear the parties on the information to be sought. It also required that the communication should be either in writing or otherwise on the record (i.e. recorded by official transcript). The Committee felt that the language of communication should be a matter for the alternative court. It considered that it was unduly cumbersome to require the originating court always to communicate in the official language of the alternative court. But it did consider it appropriate to specify that the language be acceptable to the alternative court.

74. Principle 5.3 developed the concept which has been recognised both in common law systems through the medium of undertakings and in civil law systems through the institution of procedural agreements between the parties. In the context of the referral procedures, these are designated “terms of referral”. They may deal, for example, with the terms on which the applicant may assert a defence of limitation or prescription of action in the alternative court. But the Committee envisages that, in appropriate cases, terms of referral may also stipulate as to other measures necessary for the smooth transfer of the case to another jurisdiction in particular so as to ensure, so far as possible, that the benefit of preparation already undertaken in the originating court is not lost.

75. Principle 5.4, while recognising the constraint on which courts may be under by virtue of both international conventions and national law, admits the possibility that the originating court may choose either to suspend further proceedings or to terminate them.

### ***Procedure in the Alternative Court***

5.5 *The alternative court shall decide any question as to its own jurisdiction at the outset of the proceedings before it and in any event before the defendant is required to plead on the merits.*

5.6 *The applicant shall transmit the order for referral, together with the originating court's reasons for judgment, if any, to the alternative court which shall be entitled to take it, and the terms of referral, into account whether in*

- deciding its own jurisdiction or as otherwise relevant to the issues before it.*
- 5.7 *The applicant shall promptly inform the originating court when the alternative court has assumed jurisdiction over the matter and shall co-operate in the making of any further order which the originating court may wish to make, including an order to terminate its proceedings.*
- 5.8 *In the event that the alternative court were not for any reason to assume jurisdiction, then the originating court may lift any suspension of its own proceedings and shall be entitled to resume jurisdiction over the merits.*

76. Principles 5.5 to 5.8 follow through the referral procedure into the alternative court. They are designed to ensure that the jurisdiction of the alternative court is established as swiftly as possible, and thus that any period of uncertainty after a decision by an originating court to decline jurisdiction and to refer the case shall be kept to a minimum. Principle 5.8 enables an originating court to resume jurisdiction over the merits if the alternative court were not for any reason to assume jurisdiction. In keeping with the overall approach adopted in the Principles, it is the applicant in the originating court who continues to have primary responsibility for the conduct of the referral in the alternative court, and, following a decision by the alternative court, in concluding the proceedings in the originating court.

### ***Consequences of Referral***

6. *Without prejudice to any other grounds upon which the courts of the state originally applied to may be entitled to decline to recognise or enforce any resulting judgment of the alternative court, once the originating court has, pursuant to Principle 3 or 4, declined jurisdiction in favour of the alternative court, the courts of its state shall not be entitled to review the jurisdiction of the alternative court on an application for the recognition or enforcement of a judgment of that court.*

77. Principle 6 is designed to buttress the application of the Principles by pursuing the effect of a determination made by an originating court to decline jurisdiction and to refer the matter to an alternative court on the enforcement by the originating court of any judgment granted by the alternative court. It would be wholly illogical if, having referred the matter, it would still be open to a judgment debtor to contest the validity of the assumption of jurisdiction by the alternative court in the originating court. The removal of this possibility by Principle 6 supports the whole operation of the Principles because it enables the originating court to refer a matter in the confidence that it will not be denying the successful plaintiff the prospect of enforcement over assets within the jurisdiction of the originating court. The Committee noted that a similar (although more qualified) approach underlies the ABA Conflict of Jurisdiction Model Act<sup>50</sup> adopted in Connecticut.<sup>51</sup>

<sup>50</sup> Teitz, 'Taking Multiple Bites of the Apple : A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings' (1992) 26 Intl Law 21; for a critique see Juenger op cit note 4

<sup>51</sup> Conn. Gen. Stat. Ann, s 50a-200

***Injunctions in Relation to Foreign Proceedings***

7.1 *Where the respective states are parties to an international convention providing common rules for the exercise of original jurisdiction, no court of either state shall be entitled to restrain by injunction any party from proceeding in the court of the other state.*

*It shall be for the court in which the proceedings on the merits are instituted to determine its own jurisdiction and any application pursuant to these Principles.*

7.2 *Where there is no such applicable international convention, a court to which a request for such an injunction is made shall not grant an injunction where it is satisfied that these Principles will be applied by the court in which proceedings have been instituted.*

7.3 *This Principle is without prejudice to the power of a court to grant redress where an exclusive jurisdiction clause has been manifestly breached according to the law applicable in the courts of both states.*

78. It is perhaps unsurprising that the place of “anti-suit injunctions” within the scheme of the Principles proved one of the most controversial and difficult parts of the Committee’s task. The Committee did not consider that such injunctions should be at the centre of the scheme which they were developing. On the contrary, it was felt that an effective system of declining jurisdiction should reduce, and for the most part eliminate, the need for injunctions in relation to foreign proceedings as between states applying the Principles. The procedural innovations instituted by the Committee, in particular the requirement that determinations of declining jurisdiction issues be made at the outset of the proceedings, should remove many of the perceived procedural impediments to the efficient operation of a system of allocation of jurisdiction in which an alternative court could with confidence await the decision of an originating court.

79. Plainly, it was not the function of the Principles to seek to specify the positive criteria on which a court should grant injunctions to restrain any party from proceeding in the court of another state. That would be outside the scope of the Principles. Nevertheless, there was a strong feeling amongst some members from different legal traditions that the possibility of such a remedy should not be wholly excluded, particularly in the case of a manifest breach of an exclusive jurisdiction clause.

80. In the result, Principle 7.1 excludes the possibility of the exercise of such an injunction where both states are parties to an international convention providing common rules for the exercise of original jurisdiction.

81. Principle 7.2 precludes the court from granting an injunction even where there is no international convention, where it is satisfied that these Principles will be applied by the court in which the proceedings have been instituted. This requirement was acceptable to the Committee because it was based on an assumption underpinning all of the Principles, namely that the Principles would be applied in accordance with their terms by the courts of the affected state. Moreover, Principle 7.2 constitutes a recognition of a developing principle in

the existing common law jurisprudence on anti-suit injunctions, recognised in particular by the Supreme Court of Canada in *Amchem v Workers' Compensation Board*<sup>52</sup> that, ordinarily, the court to which application is made for an anti-suit injunction should defer to the court where the substantive proceedings have been filed, provided that that court itself has rules enabling it to decline jurisdiction in appropriate cases.

82. Finally, however, the Committee achieved consensus on a formulation in relation to exclusive jurisdiction clauses which would still enable another court to grant redress (whether by way of injunction, damages or otherwise) where an exclusive jurisdiction clause had been manifestly breached according to the law of the courts of both states. Principle 7.3 qualifies both Principle 7.2 and Principle 7.1. Of course, in most cases, the originating court would be best placed to deal with any application in relation to an action commenced in breach of an exclusive jurisdiction clause in accordance with Principle 3.2. Principle 7.3 is designed to be a wholly exceptional measure available to be exercised additionally by the court designated in the jurisdiction clause. There are two safeguards incorporated into this provision. The first safeguard is the requirement that the clause has been *manifestly* breached. The second is that the applicant be able to establish that the manifest breach was according to the law applicable in the courts of both states. The purpose of this requirement is in order to avoid any forum shopping over the determination of the validity of the jurisdiction clause. Thus, in these wholly exceptional cases, another court will only be able to intervene where, on any view, the action has been commenced in breach of the clause.

#### IV CONCLUSION

83. The Rapporteur concludes this Report by thanking all those Committee members who participated in the work of the Committee on this subject. It is hoped that the Principles will be received as an innovative effective means of resolving conflicting claims to jurisdiction in a way which promotes international civil justice.

**Dr C A McLachlan**  
*Rapporteur*  
London  
5 May 2000

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<sup>52</sup> [1993] 1 SCR 897. As Carter noted for the Committee, the tests propounded by the Supreme Court of Canada in that case have now been somewhat flexibly applied in several Provinces. See, e.g. *Hudon v Geos Language Corporation* (1997) 34 OR (3d) 14

**INTERNATIONAL LAW ASSOCIATION**  
**COMMITTEE ON INTERNATIONAL CIVIL AND COMMERCIAL**  
**LITIGATION**

**ANNEXURE TO**  
**THIRD INTERIM REPORT ON**  
**DECLINING & REFERRING JURISDICTION**  
**IN INTERNATIONAL LITIGATION**

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**TEXT OF THE LEUVEN/LONDON PRINCIPLES**  
**IN ENGLISH AND FRENCH**

**INTERNATIONAL LAW ASSOCIATION**  
**COMMITTEE ON INTERNATIONAL CIVIL AND COMMERCIAL**  
**LITIGATION**

**LEUVEN/LONDON PRINCIPLES ON DECLINING AND REFERRING**  
**JURISDICTION IN CIVIL AND COMMERCIAL MATTERS**

**THE INTERNATIONAL LAW ASSOCIATION:**

**RECOGNISING** that all systems of civil and commercial jurisdiction afford the parties some choice of forum in many cases

**DESIRING** to promote the proper allocation of cases between courts; to discourage improper forum shopping; and to reduce the unnecessary incidence of concurrent jurisdiction and the risk of irreconcilable judgments

**ENCOURAGING** the adoption of a system of resolving questions of jurisdiction and forum which promotes international civil justice

**MINDFUL** of the fundamental right of all persons to access to a fair hearing before an impartial tribunal without undue delay and without discrimination on grounds of nationality

**CONSIDERING** that, irrespective of whether there exists an international convention governing civil and commercial jurisdiction between relevant states, circumstances may arise in which it will be desirable for a national court to decline jurisdiction in favour of the court of another state, and that the above objectives may be assisted by elucidation of the principles upon which a court shall decline jurisdiction

**BELIEVING** that, when a court declines jurisdiction, the fairest and most efficient means of resolving the matter shall be to refer it to an alternative available forum

URGING enhanced co-operation between courts for the more efficient referral of cases

HEREBY DECIDES TO ADOPT the following Principles:

### **Scope and Purpose**

- 1.1 These Principles determine the extent to which a court otherwise having original jurisdiction shall decline to exercise such jurisdiction, whether by suspension or termination, and refer the matter to a court of competent jurisdiction in another state in the exceptional circumstances set out below.
- 1.2 These Principles do not determine the rules of original jurisdiction in civil and commercial matters. Such rules are a matter of national law subject to international law, including any applicable international conventions.

### **Preliminary Matters**

- 2.1 It shall be for a party to make and substantiate an application to an originating court. The originating court shall not act of its own motion.
- 2.2 An application shall be made at the outset of the proceedings. It shall be finally determined by the originating court on summary proceedings by separate order at the earliest opportunity and in any event before the defendant is required to plead on the merits.
- 2.3 If either party wishes to pursue such rights of appeal as are allowed under national law from such an order, it must do so expeditiously.

### **Jurisdiction Clauses**

- 3.1 If the parties have chosen the originating court as the exclusive forum for resolution of the matter, then that court shall exercise jurisdiction and shall not decline it under Principle 4.
- 3.2 If the parties have chosen an alternative court as the exclusive forum for the resolution of the matter, then the originating court shall either terminate its proceedings on the ground that it has no jurisdiction over the matter or as the case may be decline jurisdiction.
- 3.3 If the parties' choice of forum is not exclusive, the court may hear an applicant pursuant to Principle 4.

### **Declining Jurisdiction**

4. The originating court shall decline jurisdiction in the following exceptional circumstances:

#### ***Lis Pendens***

- 4.1 Where proceedings involving the same parties and the same subject-matter are brought in the courts of more than one state, any court other than the court first seized shall suspend its proceedings until such time as the jurisdiction of the court first seized is established, and not declined under

this Principle, and thereafter it shall terminate its proceedings. The court first seized shall apply Principle 4.3. Should that court refer the matter to a court subsequently seized in accordance with Principle 4.3, the latter court will not be obliged to terminate its proceedings.

#### ***Related Actions***

- 4.2 Where related actions are pending in the courts of more than one state either court may suspend or terminate its proceedings and refer the matter to the alternative court in accordance with the procedures in Principle 5, provided that the actions can be consolidated in the alternative court.

#### ***Other Grounds for Referral***

- 4.3 An originating court shall decline jurisdiction and refer the matter to an alternative court where it is satisfied that the alternative court is the manifestly more appropriate forum for the determination of the merits of the matter, taking into account the interests of all the parties, without discrimination on grounds of nationality. In making this decision, the court shall have regard in particular to the following factors:
- (a) the location and language of the parties, witnesses and evidence;
  - (b) the balance of advantages of each party afforded by the law, procedure and practice of the respective jurisdictions;
  - (c) the law applicable to the merits;
  - (d) in cases under Principle 4.1, the desirability of avoiding multiplicity of proceedings or conflicting judgments having regard to the manner of resort to the respective court's jurisdiction and the substantive progress of the respective actions;
  - (e) the enforceability of any resulting judgment;
  - (f) the efficient operation of the judicial system of the respective jurisdictions ;
  - (g) any terms of referral under Principle 5.3.

### **Referral**

#### ***Procedure in the Originating Court***

- 5.1 On the hearing of an application under Principle 4.3, and subject to any terms of referral under Principle 5.3, the applicant shall satisfy the originating court that the alternative court:
- (a) has and will exercise jurisdiction over the matter; and
  - (b) is likely to render its judgment on the merits within a reasonable time.
- 5.2 The originating court may communicate directly with the alternative court on any application for referral in order to obtain information relevant to its determination under Principle 4, where such communication is permitted by the respective states. States are encouraged to permit their courts to make, and respond to, such communications.
- Any such communication shall be either on the application of one of the

parties or on its own motion. Where the court acts on its own motion it shall give reasonable notice to the parties of its intention to do so, and hear the parties on the information to be sought.

The originating court shall either communicate in writing or otherwise on the record. It shall communicate in a language acceptable to the alternative court.

- 5.3 The parties and the originating court are encouraged to consider appropriate terms of referral. These may deal in particular with:
  - (a) the applicant's submission to the jurisdiction of the alternative court;
  - (b) the terms on which the applicant may assert a defence of limitation or prescription of action in the alternative court.
- 5.4 Save where international convention provides otherwise, the originating court, if satisfied of the matters in paragraph 5.1, shall on an order to decline jurisdiction either suspend further proceedings at least until the jurisdiction of the alternative court has been established, or, where national law provides, terminate its proceedings.

#### *Procedure in the Alternative Court*

- 5.5 The alternative court shall decide any question as to its own jurisdiction at the outset of the proceedings before it and in any event before the defendant is required to plead on the merits.
- 5.6 The applicant shall transmit the order for referral, together with the originating court's reasons for judgment, if any, to the alternative court which shall be entitled to take it, and the terms of referral, into account whether in deciding its own jurisdiction or as otherwise relevant to the issues before it.
- 5.7 The applicant shall promptly inform the originating court when the alternative court has assumed jurisdiction over the matter and shall co-operate in the making of any further order which the originating court may wish to make, including an order to terminate its proceedings.
- 5.8 In the event that the alternative court were not for any reason to assume jurisdiction, then the originating court may lift any suspension of its own proceedings and shall be entitled to resume jurisdiction over the merits.

#### **Consequences of Referral**

6. Without prejudice to any other grounds upon which the courts of the state originally applied to may be entitled to decline to recognise or enforce any resulting judgment of the alternative court, once the originating court has, pursuant to Principle 3 or 4, declined jurisdiction in favour of the alternative court, the courts of its state shall not be entitled to review the jurisdiction of the alternative court on an application for the recognition or enforcement of a judgment of that court.

**Injunctions in relation to Foreign Proceedings**

- 7.1 Where the respective states are parties to an international convention providing common rules for the exercise of original jurisdiction, no court of either state shall be entitled to restrain by injunction any party from proceeding in the court of the other state.  
It shall be for the court in which the proceedings on the merits are instituted to determine its own jurisdiction and any application pursuant to these Principles.
- 7.2 Where there is no such applicable international convention, a court to which a request for such an injunction is made shall not grant an injunction where it is satisfied that these Principles will be applied by the court in which proceedings have been instituted.
- 7.3 This Principle is without prejudice to the power of a court to grant redress where an exclusive jurisdiction clause has been manifestly breached according to the law applicable in the courts of both states.

**ASSOCIATION DE DROIT INTERNATIONAL**

**COMITÉ SUR LA PROCÉDURE CIVILE ET COMMERCIALE INTERNATIONALE**

**PRINCIPES SUR LE DESSAISSEMENT DES TRIBUNAUX ET LE RENVOI DES INSTANCES À DES JURIDICTIONS ÉTRANGÈRES EN MATIÈRES CIVILE ET COMMERCIALE**

L'Association de droit international :

*Reconnaissant* que tous les systèmes nationaux de compétence des juridictions en matière civile et commerciale accordent aux parties, dans de nombreux cas, une faculté de choisir la juridiction qui sera saisie;

*Voulant* favoriser une attribution adéquate des affaires entre juridictions, décourager la recherche inappropriée de la juridiction la plus favorable à la cause du demandeur et réduire les conséquences fâcheuses de la compétence concurrente de différentes juridictions et le risque de jugements inconciliables ;

*Encourageant* l'adoption d'un système de solution des questions de compétence et de for qui favorise la justice internationale sur le plan civil ;

*Attentive* au droit fondamental de toute personne à un procès équitable devant un juridiction impartiale, dans un délai raisonnable et sans discrimination quant à sa nationalité ;

*Considérant* qu'indépendamment de l'existence d'une convention internationale réglant la question de la compétence civile et commerciale entre différents Etats, il peut apparaître comme souhaitable qu'une juridiction nationale se dessaisisse en faveur d'une juridiction étrangère, et que les objectifs visés plus haut puissent être mieux atteints par une clarification des principes en vertu desquels une juridiction devrait se dessaisir ;

*Persuadée* que, lorsqu'une juridiction se dessaisit, la façon la plus équitable et efficace de ce faire consistera à renvoyer l'instance vers une juridiction adéquate disponible ;

*Incitant* à une coopération renforcée entre juridictions pour un renvoi plus efficace ;

*décide d'adopter* les principes qui suivent :

### **Champ d'application et objet des principes**

- 1.1 Les présents principes ont pour objet de définir les cas dans lesquels une juridiction, dont la compétence juridictionnelle est par ailleurs établie, se dessaisira – soit en suspendant l'instance pendante devant elle, soit en y mettant fin – et renverra l'instance à une juridiction compétente d'un autre Etat eu égard aux circonstances exceptionnelles qui suivent.
- 1.2 Les présents principes n'ont pas pour objet de déterminer les règles de compétence juridictionnelle en matière civile et commerciale. Ces règles relèvent du droit national sous réserve des principes du droit international, y compris des conventions internationales applicables.

### **Questions préliminaires**

- 2.1 L'initiative de présenter une demande motivée de renvoi à la juridiction initialement saisie appartiendra aux parties. La juridiction initialement saisie ne pourra statuer d'office.
- 2.2 La demande doit être formulée au début de la procédure. Elle doit faire l'objet, de la part de la juridiction initialement saisie, d'une décision immédiate et définitive, au terme d'une procédure, rendue aussi rapidement que possible et en tout cas avant que le défendeur ne soit tenu de conclure sur le fond.
- 2.3 Si l'une des parties souhaite exercer, à l'encontre de la décision prise par la juridiction initialement saisie, le droit d'appel prévu par le droit national, elle devra le faire à bref délai.

### **Clauses attributives de juridiction**

- 3.1 Lorsque les parties ont choisi la juridiction initialement saisie en lui donnant compétence exclusive pour résoudre le litige, cette juridiction exercera sa compétence et ne se dessaisira pas conformément au principe n° 4.
- 3.2 Lorsque les parties ont choisi une autre juridiction en lui donnant compétence exclusive pour connaître de l'affaire, la juridiction initialement saisie mettra fin à l'instance en se déclarant incompétente ou, selon le cas, se dessaisira au profit de cette autre juridiction.
- 3.3 Lorsque le choix de for des parties n'est pas exclusif, une demande de renvoi conforme au principe n° 4 sera recevable.

### **Dessaisissement de la juridiction**

4. La juridiction initialement saisie se dessaisira dans les circonstances exceptionnelles suivantes:

*Litispendance*

- 4.1 Lorsque des demandes ayant le même objet et la même cause sont formées entre les mêmes parties devant les juridictions d'Etats différents, la juridiction saisie en second lieu surseoir à statuer jusqu'à ce que la compétence de la juridiction saisie en premier soit établie – sans que cette juridiction ne se soit dessaisi conformément au présent principe, dès que la compétence de la juridiction saisie en premier est établie, elle mettra fin à la procédure pendante devant elle. La juridiction saisie en premier lieu appliquera le principe n° 4.3. Si cette juridiction décide de renvoyer, conformément au principe n° 4.3, l'instance à la juridiction saisie en second lieu, cette juridiction ne sera pas obligée de mettre fin à la procédure pendante devant elle.

*Connexité*

- 4.2 Lorsque des demandes connexes sont pendantes devant des juridictions d'Etats différents, chacune de ces juridictions peut suspendre l'instance ou y mettre fin et renvoyer l'instance à l'autre juridiction conformément à la procédure prévue au principe n° 5, à condition que toutes les instances puissent être jointes devant la juridiction bénéficiaire du renvoi.

*Autre raison d'un renvoi*

- 4.3 La juridiction initialement saisie se dessaisira et renverra l'instance à une autre juridiction, lorsqu'il est démontré qu'afin de trancher le fond du litige, le choix de cette juridiction bénéficiaire du renvoi est manifestement plus approprié eu égard aux intérêts de toutes les parties sans discrimination quant à leur nationalité. Dans sa décision, la juridiction prendra plus particulièrement en considération les facteurs suivants :
- (a) la localisation et la langue des parties, des témoins et des pièces ;
  - (b) la pesée des avantages que peut présenter pour les différentes parties le droit et la procédure de l'une ou de l'autre juridiction ;
  - (c) la loi appliquée au fond ;
  - (d) dans des cas visés par le principe n° 4.1, le souhait d'éviter une multiplication des instances et des jugements inconciliables, en ayant égard à la manière dont les parties ont eu recours à la compétence de l'une ou de l'autre juridiction et au degré d'instruction quant au fond des instances pendantes devant l'une ou l'autre juridiction;
  - (e) la possibilité d'exécuter le jugement qui doit résulter de l'une ou de l'autre procédure ;
  - (f) le fonctionnement efficace du système juridique de l'un ou de l'autre Etat;
  - (g) les conditions du renvoi de l'instance, auxquelles il est fait référence au principe n° 5.3.

### **Renvoi à une autre juridiction**

#### *Procédure devant la juridiction initialement saisie*

- 5.1 Lorsqu'il est demandé à la juridiction initialement saisie de statuer sur une demande de renvoi conformément au principe n° 4.3, et sous réserve des conditions du renvoi prévues au principe n° 5.3, le demandeur du renvoi devra démontrer, à la juridiction initialement saisie, que la juridiction bénéficiaire du renvoi:
- (a) est compétente pour connaître du litige, et exercera sa compétence ;
  - (b) statuera sur le fond du litige dans un délai raisonnable.
- 5.2 La juridiction initialement saisie, saisie d'une demande de renvoi, pourra se mettre directement en rapport avec la juridiction bénéficiaire du renvoi, afin d'obtenir les informations pertinentes à son appréciation conformément au principe n° 5, lorsque'une telle communication directe est autorisée par les Etats respectifs. Il convient d'encourager les Etats à permettre à leurs juridictions d'effectuer pareilles communications, et d'y répondre.
- Ces communications seront faites sur demande de l'une des parties ou d'office. Lorsque la juridiction agit d'office, elle avertira les parties en temps utile de son intention d'y procéder, et elle entendra les parties quant aux informations qu'il convient de solliciter.
- Les communications de la juridiction initialement saisie seront écrites, ou il en sera dressé procès-verbal. La communication doit se faire dans une langue acceptable pour la juridiction bénéficiaire du renvoi.
- 5.3 Il convient d'encourager les parties et la juridiction initialement saisie d'envisager des conditions de renvoi appropriées. Ces conditions pourront en particulier porter sur les questions suivantes :
- (a) l'acceptation, par le demandeur au renvoi, de la compétence de la juridiction bénéficiaire du renvoi;
  - (b) les conditions selon lesquelles le demandeur au renvoi pourra faire valoir la prescription de la demande principale devant la juridiction bénéficiaire du renvoi.
- 5.4 Sauf disposition contraire d'une convention internationale, la juridiction initialement saisie, si les faits auxquels il est fait référence au paragraphe n° 5.1 sont démontrés à sa satisfaction, prévoira dans la décisions de dessaisissement, soit de suspendre l'instance au moins jusqu'au moment où la compétence de la juridiction bénéficiaire du renvoi aura été établie, soit, si telle est la solution retenue par son droit national, mettre fin à la procédure pendante devant elle.

#### *Procédure devant la juridiction bénéficiaire du renvoi*

- 5.5 La juridiction bénéficiaire du renvoi prendra toute décision relative à sa compétence au seuil de la procédure et en tout cas avant que le défendeur soit tenu de conclure ou plus généralement de prendre position quant au fond.

- 5.6 Le demandeur au renvoi transmettra la décision de la juridiction initialement saisie de renvoyer l'instance – ensemble avec ses motifs, s'il y a lieu – à la juridiction bénéficiaire du renvoi ; cette juridiction sera en droit de prendre en considération le contenu de cette décision et les conditions du renvoi de l'instance en statuant sur sa propre compétence ou sur les autres questions pertinentes.
- 5.7 Le demandeur au renvoi informera sans délai la juridiction initialement saisie dès que la juridiction bénéficiaire du renvoi aura établi sa compétence sur le litige ; il offrira sa coopération lorsque la juridiction initialement saisie souhaitera prendre d'autres décisions dans ce contexte, y compris une décision de mettre fin à la procédure pendante devant elle.
- 5.8 Si la juridiction bénéficiaire du renvoi n'entend, pour quelque raison que ce soit, pas affirmer sa compétence pour connaître du litige, la juridiction initialement saisie peut mettre fin à la suspension de l'instance pendante devant elle et sera en droit de connaître du fond du litige.

### **Conséquences du renvoi de l'instance**

6. Sans préjudice des autres causes de refus par les juridictions – de l'état sur le territoire duquel siège la juridiction initialement saisie, de la reconnaissance ou de l'exécution rendu par la juridiction bénéficiaire du renvoi, l'incompétence de la juridiction bénéficiaire du renvoi ne pourra pas être retenue par ces juridictions après que la juridiction initialement saisie se sera dessaisie en faveur de la juridiction bénéficiaire du renvoi conformément aux principes n<sup>os</sup> 3 ou 4.

### **Injonction de ne pas introduire de procédure devant une juridiction étrangère, ou d'y mettre fin**

- 7.1 Lorsque les Etats concernés sont liés par une convention internationale définissant des règles communes relatives à la compétence juridictionnelle, aucune juridiction ne pourra enjoindre à une partie de ne pas introduire une procédure devant une juridiction de l'autre Etat ou lui enjoindre d'y mettre fin.  
Il appartiendra à la juridiction devant laquelle une procédure sur le fond est introduite de décider de sa propre compétence et d'une demande de renvoi formulée conformément à ces principes.
- 7.2 En l'absence de pareille convention internationale, une juridiction à laquelle il est demandé de prononcer une injonction de ce type refusera de la prononcer lorsqu'elle estime qu'il est établi que les présents principes seront appliqués par la juridiction devant laquelle une procédure a été introduite.
- 7.3 Ce principe est formulé sans préjudice du pouvoir d'une juridiction de sanctionner la violation, manifeste au regard de la loi applicable devant les juridictions des deux Etats concernés, d'une clause d'attribution exclusive de juridiction.