LIS PENDENS OR *FORUM NON CONVENIENS*: BALANCE BETWEEN STABILITY AND FLEXIBILITY

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I. INTRODUCTION

In cases involving international elements, problems may arise with regard to the choice of forum and the court's decision of whether to exercise jurisdiction. *Forum non conveniens* and *lis pendens* are two different doctrines courts use to determine jurisdiction. Generally, in cases involving conflicts of jurisdiction, a court that has jurisdiction may nevertheless decline to hear the case or seek a stay according to either *forum non conveniens* or *lis pendens*. This comment will explain the doctrines, focusing on the approach taken by English courts and European legislatures. The two doctrines vary in various aspects, including the scope, procedures, and criteria of application. This comment will examine these differences through aspects of the courts' attitude towards judicial flexibility and stability, as well as through requirements under different social and legal backgrounds.

II. OVERVIEW OF *FORUM NON CONVENIENS* AND *LIS PENDENS*

The doctrine of *forum non conveniens* is an equitable principle that, conditioned on application of the defendant, grants the court discretionary power to decline to exercise jurisdic-

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tion over a cause of action.[1] *Lis pendens,* on the other hand, allows the court to stay its proceeding when another case under the same cause of action and between the same parties is seized first by another court.[2] Both doctrines are intended for situations in which claims arising from a single cause of action may be resolved in multiple possible jurisdictions. Both allow courts to stay a current proceeding and leave the case under the jurisdiction of another court. However, the two doctrines differ in their scope, procedures, and criteria.

A. *Scope of Application*

Forum non conveniens and *lis pendens* apply differently depending on the residence of the parties, the international elements of the cause of action, and the subject matter of the dispute. The scope of application of *forum non conveniens* relies on the identification of the defendant's residence, though certain international elements can be involved in the whole case. *Forum non conveniens* is originally a Scottish judiciary principle that became firmly established in English law after *Spiliada Maritime Corporation v. Cansulex Ltd.*[3] In that case, the House of Lords held that *forum non conveniens* was appropriately applied to determine jurisdiction based on service within England.[4] According to Part Six of the Civil Procedure Rules, service within England can be made on persons present in England, companies registered in England, or overseas companies with a place of business in England.[5]

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1. Barry J. Rodger, *Forum Non Conveniens Post*-Owusu, 2 J. PRIV. INT'L L. 71, 71 (2006).

2. If the court first seized determines it has jurisdiction, all other courts must decline to hear the case. However, if the court first seized finds it does not have jurisdiction, "the other courts will regain the power to hear that case." Catherine Longeval & Quentin Declève, *Court of Justice of European Union Rules on* Lis Pendens *Doctrine After Initiation of Interlocutory Proceedings*, VAN BAEL & BELLIS (Aug. 5, 2017), https://www.vbb.com/insights/corporate-commercial/corporate-commercial/court-of-justice-of-european-union-rules-on-lis-pendens-doctrine-after-initiation-of-interlocutory-proceedings#:~:text=parallel%20litigation%20and%20lis%20pendens%20refer%20to%20a%20situation%20in,the%20courts%20of%20different%20forums.

3. Spiliada Mar. Corp. v. Cansulex Ltd. (The Spiliada) [1987] 1 AC (HL) 460 (appeal taken from Eng.).

4. *Id.* at 474.

5. Civil Procedure Rules 1998, SI 1998/3132, pt. 6.9 (Eng.).

In contrast, *lis pendens* is applied in pending parallel proceedings of civil and commercial matters.[6] The jurisdictional element in these cases is determined based on the place of residence of the defendant, or where the accident at issue occurred in tort cases, or where a contract was to be performed in contract disputes.[7] An international element may be found when the parties are residents of two different E.U. member states; or one member state and one non-member state; or two non-member states, provided there exists another connection to the European Union.[8]

Therefore, the country of residence of the defendant is the fundamental question for the doctrine of *forum non conveniens*, while *lis pendens* extends its scope of application to recognize a wider realm of international elements, even when the defendant is not resident of the European Union.

B. *Procedure of Application*

Although *forum non conveniens* and *lis pendens* both allow a court to stay proceedings when more than one jurisdiction exists for the same cause of action, they differ in their procedure of application. In *Spiliada*, the court held that it is the defendant who may ask the court to exercise its discretion to stay the proceedings on the ground of *forum non conveniens*.[9] Accordingly, English courts may only apply *forum non conveniens* if the defendant so pleads.

In contrast, the Brussels I Regulation states that under *lis pendens*, "any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established".[10] The two doctrines thus adopt contradictory approaches in terms of the court's active role in determining jurisdiction. Moreover, each

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6. The Brussels I Regulation adopted the doctrine of *lis pidens* for conflicting jurisdiction. Council Regulation 1215/2012 of Dec. 12, 2012, of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast), arts, 1, 29, 2012 O.J. (L. 351) 6, 12 [hereinafter Brussels I Regulation].

7. *Competent Courts in Cross-Border Disputes,* EUR. COMM'N, https://ec.europa.eu/info/law/cross-border-cases/competent-courts-cross-border-disputes_en (last visited June 2, 2020).

8. Brussels I Regulation, *supra* note 6, arts. 29, 33

9. The Spiliada, *supra* note 3, at 474.

10. Brussels I Regulation, *supra* note 6, art. 29(1).

doctrine's procedure of application influences the claimant's ability to secure its choice of forum and the defendant's right to refute.

Lis pendens is criticized because the Brussels I Regulation grants hardly any protection to the defendant if the party considers the court first seized inappropriate. However, it is exactly this feature of *lis pendens* that increases the court's predictability, efficiency, and uniformity,[11] all desirable attributes when dealing with cases involving residents of different member states.

A defendant's ability to secure the forum of its choice is slightly greater under *forum non conveniens*, but success depends on whether the defendant can meet the requisite burden of proof. Although a defendant may challenge a claimant's choice of forum under *forum non conveniens*, this function in and of itself does not necessarily create unpredictability. In *Owusu v. Jackson*, the Court of Justice of the European Union complained that *forum non conveniens* weakens the predictability of law by failing "to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued."[12] However, because the defendant must be the party to raise *forum non conveniens*, the claim that a defendant cannot reasonably foresee before which courts he may be sued is unconvincing. The real uncertainty lies in the claimant's reliance on its choice of forum, but this is assuaged by burden of proof limitations upon the defendant.

C. *Criteria of Application*

The English court in *Spiliada* held that a *forum non conveniens* plea can be sustained only if the court is satisfied that there is another tribunal with competent jurisdiction where the case may be tried, and that this other jurisdiction more suitably addresses the interests of all the parties and the ends of justice.[13] These are difficult criteria to meet, making it un-

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11. LAWRENCE W. NEWMAN & MICHAEL BURROWS, PRACTICE OF INTERNATIONAL LITIGATION 688 (2d ed. 2013).

12. Case C-281/02, Owusu v. N.B. Jackson, 2005 E.C.R. I-1445, ¶ 40.

13. Alan Reed, *To Be or Not to Be: The* Forum Non Conveniens *Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 86 (2000).

likely that a court will dismiss an action for *forum non conveniens*. Furthermore, *forum non conveniens* is interpreted as a doctrine of appropriateness rather than one of convenience.[14] Therefore, *forum non conveniens* will not be applied simply due to a party's claims of inconvenience relating to evidence gathering, witness residence, or cost of litigation. Indeed, criteria such as appropriateness indicate that English courts establish a strict standard for *forum non conveniens,* consequently reserving a degree of respect for the claimant's choice of forum.

As for *lis pendens*, the Brussels I Regulation leaves little room for a court to exercise discretion; the required elements of (1) a case arising from the same cause of action (2) in the court first seized are straightforward. For example, in *Gubisch v. Palumbo*, the same parties were involved in two legal proceedings in different member states.[15] One case was a contract enforcement action, while the other was based on rescission.[16] The European Court of Justice determined that the two actions stemmed from the same cause of action, holding that key phrase could not be restricted to mean "two claims which are entirely identical".[17] Likewise, the European Union has tried to establish a uniform interpretation of "the court first seized" through codification in Article 32 of the Brussels I Regulation.[18]

Considering that the European Union comprises member states of different legal traditions, the goals uniformity and harmonization can better be achieved under a set of clear rules than vague principles requiring a case-by-case analysis. Therefore, in making derogation from the claimant's choice of forum difficult, *lis pendens* helps to achieve uniformity and harmonization within the European Union.[19]

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14. The Spiliada [1987] 1 AC (HL) at 474.

15. Case 144/86, Gubisch Maschinenfabrik v. Palumbo, 1987 E.C.R 4861, 4862.

16. *Id.*

17. *Id.* at 4876.

18. Brussels I Regulation, *supra* note 6, art. 32.

19. *See* Owusu, *supra* note 12, ¶ 34 (noting that the Brussels Convention rules are meant to "eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject.").

III. Balance Between Flexibility and Stability

To determine the appropriateness of either *forum non conveniens* or *lis pendens*, it is important to consider the social and legal backgrounds of a particular system and the dispute settlement requirement.

First, *forum non conveniens*, which is predominantly a common law doctrine, requires case law that can provide sufficient precedent to fill in the gap caused by the vague description of criteria. Case law allows a court to determine the suitability of each forum so that people can reasonably predict where they may be sued. On the other hand, civil law countries find it unreasonable to leave the responsibility of clarification to judges without any specific guidance prescribed in written law. Therefore, *lis pendens* is more suitable for those countries that rely on statutory law. Additionally, in regions like the European Union where various legal systems coexist, flexible rules ultimately lead to different legal standards. Thus, a uniform rule must be established if the aim is to harmonize the jurisdictional rules of a diverse region.

Second, by not allowing derogation from the forum that is seized first, *lis pendens* increases the efficiency of the dispute settlement system. By comparison, although *forum non conveniens* pleas require a high burden of proof, the doctrine provides more opportunity for prolonged proceedings. However, because *forum non conveniens* grants courts discretion to dismiss cases, the doctrine may also help courts to reduce their workload and increase settlement efficiency.

Disparities between the social and legal backgrounds of different countries helps explain their preferences. Comparing the scope, procedures, and application criteria of the two doctrines leads to a conclusion that *forum non conveniens* works flexibly through case-by-case analysis while *lis pendens* emphasizes stability by determining jurisdiction according to the Brussels I Regulation. But in fact, the line between flexibility and stability for either doctrine is not clear; both embody the wisdom of both flexibility and stability.

In cases based on *forum non conveniens* pleas, the defendant may consider, for instance, the place where the contract was concluded or was to be performed, or where the tort accident or the event that gave rise to the accident occurred. The defendant must select a forum with an actual connection to

the case and cannot select a forum simply because a particular jurisdiction has a more favorable law. Therefore, the doctrine of *forum non conveniens* prioritizes stability, as only a forum with an actual connection to the case may be considered to sustain the plea. On the other hand, the Brussels I Regulation embodies flexibility by extending the connecting point for the claimant to rely on when initially choosing the forum. For example, the jurisdiction in a consumer contract case could be the residence of the claimant or the defendant.

Each doctrine's balance of flexibility and stability promotes justice in unique ways. *Forum non conveniens* looks to the defendant's residence to establish jurisdiction based on service within England, while specifying the range within which the defendant could argue for another natural forum. Exemplifying a different approach, *lis pendens* includes more connecting points for choosing the forum than the defendant's jurisdiction of residence. Problems may arise when a claimant abuses the doctrine to file a lawsuit in a country that is inappropriate to the defendant, or when the chosen forum is very unfavorable to the weak party. It is true that a doctrine can rarely always satisfy both parties' expectations or protect both their interests, but these procedural mechanisms function to ensure substantial justice by at least allowing the parties to make a claim.

IV. Conclusion

In considering social and legal backgrounds and the dispute settlement requirement, one may conclude that *forum non conveniens* is more suitable for common law countries and places where disputes are not settled primarily through litigation, while *lis pendens* fits best in civil law countries and places that prefer to settle disputes with litigation.

Flexibility and stability are balanced in each approach to fit their unique social and legal backgrounds and pursue justice. However, the two approaches are unlikely to exist within the same jurisdiction because they embody contradictory policies regarding whether to allow derogation from the jurisdiction of the claimant's originally chosen court.

When choosing which doctrine to apply in determining jurisdiction questions, a court may be satisfied that either doctrine will protect the overriding value of justice. Both provide procedural mechanisms that allow each party opportunities to

justify their claims and protest inappropriate forum selection. Ultimately, both *forum non conveniens* and *lis pendens* assist in the pursuit of substantial justice.