

Table of Contents

PREFACExiii

**CHAPTER 1: COMMON LAW FORUM NON CONVENIENS:
FOUR COUNTRIES, FOUR APPROACHES** 1

CHAPTER 2: THE UNITED KINGDOM 7

 I. Scotland: From forum non competens to most
 appropriate forum 7

 II. England: From reticence to recognition 11

 A. First steps: the oppressive and vexatious principle 11

 B. The most suitable forum approach 14

 C. Modern forum non conveniens doctrine in England 21

 III. The impact of the *Brussels Convention and Regulation* 24

 A. The basic framework 25

 B. *Owusu v. Jackson* 28

 IV. Current forum non conveniens analysis
 in the United Kingdom 33

CHAPTER 3: THE UNITED STATES 37

 I. Introduction 37

 II. Early development 37

 A. Admiralty roots in the federal courts 39

 B. State courts and constitutional issues 40

 C. Extending the doctrine beyond admiralty cases 41

 III. Modern forum non conveniens doctrine 44

 A. *Gilbert* and *Koster*: The foundations of current doctrine 44

 B. Federal transfer rules 48

 C. Jurisdictional developments limiting the need
 for forum non conveniens 49

D. Refinement in the Supreme Court: <i>Piper Aircraft</i>	50
E. Forum non conveniens and international comity	54
F. Discretion to dismiss in whole or in part	57
G. The nationality of the plaintiff.	58
H. Parallel litigation and forum selection clauses.	64
I. State or federal law?	66
J. Jurisdiction and forum non conveniens	68
K. Non-uniformity among the states	71
IV. Conclusion	73

CHAPTER 4: CANADA 75

I. Common law development of forum non conveniens.	75
A. One doctrine, three purposes	75
B. <i>Amchem Products</i> : Clarifying the modern doctrine.	78
II. Discretion to decline jurisdiction in the Québec Civil Code.	83

CHAPTER 5: AUSTRALIA 87

I. Between “vexation and oppression” and the “most appropriate forum”	87
II. The “clearly inappropriate forum” test	87
A. <i>Oceanic Sun Line Special Shipping Co. Inc. v. Fay</i>	88
B. <i>Voth v. Manildra Flour Mills Pty. Ltd.</i>	90
C. <i>Dow Jones & Co., Inc. v. Gutnick</i>	97
III. Internal case allocation: the Cross-Vesting Act	99
IV. Summary and conclusion	100

CHAPTER 6: SIMILARITIES AND DIFFERENCES IN COMMON LAW FORUM NON CONVENIENS DOCTRINE. 101

I. Introduction.	101
II. Similarities in forum non conveniens doctrines.	101
A. The requirement of an available, alternative forum	102
B. Allocation of the general burden of proof on the defendant.	103
C. Consideration of private interest factors	104

D. Trial court discretion in applying forum non
conveniens analysis..... 105

E. Ability to impose conditions on a stay or dismissal 105

F. Benefits of existing similarities in comparative analysis 106

III. Differences in forum non conveniens doctrines..... 107

A. Distinctions setting Australia apart..... 107

1. The clearly inappropriate forum test..... 107

2. The plaintiff’s juridical advantage from
its choice of forum 108

B. Distinctions setting the United States apart..... 111

1. Consideration of public interest factors 111

2. The post-jurisdiction nature of the doctrine 113

3. The false distinction: assumed bias against
foreign plaintiffs..... 114

C. Other distinctions..... 116

1. A shifting burden of proof..... 116

2. The *Brussels Regulation* in the United Kingdom..... 119

IV. Conclusions: similarity with distinctions..... 119

**CHAPTER 7: RELATED DOCTRINES IN CIVIL
LAW SYSTEMS..... 121**

I. Introduction..... 121

II. Germany 122

III. Japan..... 124

IV. The *Brussels Regulation* 125

V. Latin American efforts to frustrate common law
forum non conveniens..... 128

A. The foundations of Latin American concern..... 128

B. *Delgado v. Shell Oil* and increased expressions
of concern..... 130

C. The emergence of forum non conveniens
blocking statutes 132

D. A mixed reception for Latin American blocking
statutes in U.S. courts..... 135

VI. Concluding thoughts 139

CHAPTER 8: THE GLOBAL SEARCH FOR A CONVENTION ON JURISDICTION AND JUDGMENTS AND RELATED PROJECTS ADDRESSING LIS PENDENS AND DECLINING JURISDICTION. 141

I. Introduction.....	141
II. The Hague Conference process.....	142
A. The original mixed convention model.....	142
B. Negotiation of a double convention text.....	144
C. Problems resulting from differing approaches to jurisdiction.....	146
D. Conclusion of a <i>Convention on Choice of Court Agreements</i>	147
III. Rules for declining jurisdiction in a global convention: a place for forum non conveniens?	148
IV. The American Law Institute and UNIDROIT.....	159
A. The ALI/UNIDROIT <i>Principles and Rules of Transnational Civil Procedure</i>	159
B. The ALI Recognition and Enforcement of Foreign Judgments Project	162
V. Lessons for the future	166
A. Issues among common law states	167
1. <i>Hague Interim Text</i> Article 22 and common law similarities	167
2. <i>Hague Interim Text</i> Article 22 and common law differences	169
B. Issues between civil law and common law states	172
1. The general problem of the “homeward-trend”.....	172
2. The civil law focus on jurisdiction based on the defendant’s domicile.....	173
3. Differing approaches to the concept of mandatory rules.....	178
VI. Looking ahead	180

CHAPTER 9: THE FUTURE FOR NOW: FORUM NON CONVENIENS AND THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS..... 183

I. Introduction.....	183
II. Forum non conveniens and choice of court agreements in the United States	184

A. Choice of court in U.S. law	185
B. The convergence of choice of court clauses and the forum non conveniens doctrine	191
1. Apparent resolution in <i>Bremen</i>	192
2. Separate doctrines, common issues.	192
3. Litigant problems at the intersection of choice of court and forum non conveniens	194
a. The possibilities	194
b. The case law	197
1) Exclusive (mandatory) clauses	198
2) Non-exclusive (permissive) clauses.	200
3) Non-exclusive clauses with waiver of objections to venue.	201
4) The importance of the clause to the analysis	202
5) Problems with categorization.	202
III. The rationale for a <i>Hague Convention on Choice of Court Agreements</i>	204
IV. The 2005 <i>Hague Convention on Choice of Court Agreements</i>	206
V. Conclusion	209

APPENDICES

A. 1999 <i>Hague Preliminary Draft Convention Text for a Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters</i>	211
B. Relevant provisions of the <i>Nygh/Pocar Report</i>	233
C. 2001 <i>Hague Interim Text for a Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters</i>	253
D. 2005 <i>Hague Convention on Choice of Court Agreements</i>	311