

FORUM CONVENIENS AND FORUM NON CONVENIENS — JUDICIAL DISCRETION AND THE APPROPRIATE FORUM

By

William Martin Finch*

Introduction

In recent years, in both common law and civil law countries, the jurisdiction of courts has undergone significant expansion.¹ This is in keeping with the rapid increase in world commerce and travel and resulting increases in litigation with a foreign element. Australian law has kept pace with the general thrust of these changes. As well, it has developed a complex system of law governing interstate jurisdiction in response to changing needs peculiar to the Australian Federation.² Provisions for the service ex juris of a writ of summons have expanded in a number of common law jurisdictions including some in Australia.³ Courts, in part in response to such increases in jurisdiction, have developed discretionary powers to limit the litigant's access to the court through the adoption of the concepts of Forum Conveniens and Forum Non Conveniens. The law in Australia in this regard has now become unnecessarily complicated.

This paper considers recent innovations in the law governing judicial discretion to reject jurisdiction in the pleas of Forum Conveniens and Forum Non Conveniens. The subject arises in situations where an alternate forum in another jurisdiction is available to try the action. Fundamentally two jurisdictional contexts exist: that where the alternate forum is another Australian jurisdiction and that where the alternate forum is in another country. In both these contexts there are two fundamental scenarios where the foreign⁴ litigant may ask the court to stay proceedings. They arise in different ways. First, the defendant may have been properly served with a writ in the jurisdiction and the court on the strict application of

* Law Faculty, Queensland University of Technology.

1. For example, litigation amongst domiciliaries in the European Economic Community may be subject to *The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968*. This convention overrides the domestic law of jurisdiction in specific circumstances. To resolve the question of jurisdiction where a state claims sovereign immunity in its activities as a trader, Foreign Sovereign Immunities Acts, inter alia, in the United States, the United Kingdom, and Australia have clarified jurisdiction. — *Foreign State Immunities Act 1985*, (Cth.).

2. *Service and Execution of Process Act, 1901* (Cth); Cross-vesting of jurisdiction legislation — eg. — *Jurisdiction of Courts (Cross-vesting Act 1987*, Queensland, #88; *Jurisdiction of Courts (Cross-vesting) Act 1987*, Victoria #29; *Jurisdiction of Courts (Cross-vesting) Act 1987*, (Cth) #24. Discussed infra.

3. eg. The provisions of Order 11 of the Supreme Court Rules of Queensland, Order 10 in New South Wales and Order 7 of the Rules of the Supreme Court in Victoria. These provisions were all originally derived from Order 11 of the Rules of the Supreme Court, 1883 in England. They have undergone amendment and in the cases of New South Wales and Victoria complete revision. References to service ex juris provisions generally, unless the context otherwise requires is by the phrase "Order 11".

4. "Foreign" in the context of this paper and the Conflict of Laws entails a party from any other jurisdiction, i.e. — Different Australian states or overseas.

jurisdictional rules will have jurisdiction to try the matter.⁵ The foreign defendant may ask for a stay on a number of bases including the fact that the same issues are already being tried between the parties elsewhere (*lis alibi pendens*)⁶ or that there is another court which, for any of a number of reasons, is a more appropriate tribunal to try the matter. On this latter head, the defendant may raise the Plea of *Forum Non Conveniens*. The stay, if granted, is done so by the exercise of the court's discretion to decline jurisdiction that has been ordinarily invoked by the plaintiff — i.e. by serving the writ in the jurisdiction. The effect is severe since it bars the plaintiff's access to justice in the jurisdiction he has selected to obtain a judicial remedy. In the second fundamental scenario a plaintiff seeks to have the court issue a writ which will be served on the defendant outside the jurisdiction (*service ex juris*), for example, pursuant to Order 11 of the Queensland Supreme Court Rules.⁷ This exercise of jurisdiction over such a party has been described in England as "exorbitant jurisdiction"⁸ and in the United States as "long arm jurisdiction". Various procedural methods to control such exorbitant provisions have operated at different times and in different jurisdictions.⁹ They all remain subject, however, to a discretionary power of the court to decline jurisdiction, either by refusing to issue a writ or by staying proceedings where a writ has issued and the defendant has appeared. In such cases the defendant may be able to plead "Forum Conveniens" and have the action stayed on the basis that there is another more appropriate forum to try the case.

In a recent decision, *Oceanic Sun Line Shipping Co. v Fay*,¹⁰ the majority of the High Court of Australia declined to expand the provisions for a stay of proceedings where the defendant alleged that another forum was more appropriate (i.e. — to admit a Plea of *Forum Non Conveniens*). In support of this position, Brennan J. said:

If the court has a discretion to decline to exercise its jurisdiction in favour of the jurisdiction of a foreign court administering another system of law whenever the

-
5. That courts in common law jurisdictions obtain jurisdiction when the defendant is served with a writ in the jurisdiction is certain. The rationale behind this is less certain. Three theories have been posited to explain jurisdiction in these circumstances: Power, Consent, and Allegiance. The first, propounded by Justice Holmes, of the United States Supreme Court, is based on the power of the sovereign to seize and imprison the defendant. *Michigan Trust v. Ferry* (U.S.S.C.) 228 U S 346,353. The theory has been criticized. Viz. — A.A. Ehrenzweig, 'The Transient Rule of Personal Jurisdiction: The Power Myth and Forum Convenience' (1956) 65 Yale Law Journal 289. The consent of the defendant is uncontroversial. The third basis — allegiance is suggested by the editors of Dicey and Morris, *The Conflict of Laws* 11th ed. London: Stephen & Co. Ltd., 1987. They suggest that "any person whilst in England owed at least temporary allegiance to the King". The objection to a court taking jurisdiction on the mere basis that the defendant was served with a writ in the jurisdiction is that courts may thus obtain jurisdiction where there is very little connection between the forum and the event or the parties. See: M. Pryles, 'The Basis of Adjudicatory Competence in Private International Law' (1972) *International and Comparative Law Quarterly* 61. C. Smith, 'Personal Jurisdiction' (1953) *International and Comparative Law Quarterly* 511. A.T. Von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) 63 *Boston University Law Review* 279.
 6. The law applicable to the plea of *lis alibi pendens* is beyond the scope of this paper. See L. Collins *Dicey and Morris — The Conflict of Laws* 11th ed. London: Stevens & Sons 1987 at 589 seq. E.I. Sykes, M.C. Pryles *Australian Private International Law* 2nd ed. Sydney: The Law Book Co. 1987 at 84 seq.
 7. In the case of intra Australia service of a writ, the *Service and Execution of Process Act (Cth.)* governs.
 8. Initially so referred to by Lord Diplock in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.* [1984] AC 50 at 65.
 9. *Service ex juris* provisions in the Rules of Court typically have a limited number of connecting factors which will allow jurisdiction where the case involves a foreign element. The connecting factors vary from state to state. Victoria, for example, has provision for jurisdiction over torts wherever occurring where, inter alia, "the proceeding is brought in respect of damages suffered wholly or partly in Victoria." (Order 7.01 (1)(j)). New South Wales has a similar provision. By contrast Queensland, for example, does not have such a broad connecting factor in its Order 11 provisions.
 10. (1987-88) 165 CLR 197.

foreign court is thought to be “the appropriate forum”, the rights and obligations created by Australian municipal law become provisional, dependent on a discretionary judgment. A plaintiff seeking to enforce a right vested in him by Australian law would have to approach the court as a suppliant, seeking the favourable exercise of a discretion to enforce that right. That is not the character in which a plaintiff invokes the jurisdiction of a court to enforce a legal right in contract or in tort.

Our jurisprudence is designed to protect the litigant against an unnecessarily wide discretionary power: “optima est lex quae minimum relinquit arbitrio iudicis, optimus iudex qui minimum sibi”... translates “that system of law is best which leaves least to the discretion of the judge — that judge the best, who relies least on his own opinion.”

The maxim expresses a value fundamental to the legal system of a free society. A legal right cannot be defeated by the exercise of a judicial discretion though there may be occasions when the court must determine whether there is a countervailing public interest to which the legal right is subordinated (as where the court refuses to enforce a contract which is contrary to public policy).¹¹

The application of judicial discretion in cases where there is an alternate, perhaps more appropriate, forum available to try an action underlies and motivates the subject of this paper. Presently in Australian law, there are at least two conflicting tests which a judge may use to determine whether to accept or reject jurisdiction in cases where an alternate forum exists.

The particular test to be used depends on whether the alternate forum is found in another Australian jurisdiction or one outside Australia, and whether the defendant was served with a writ in the jurisdiction or pursuant to the extraordinary procedures of Order 11. If that jurisdiction is outside Australia, and the defendant has been served in Australia, Australian courts may *not* apply the tests for discretion inherent in the plea of Forum Non Conveniens.¹² If the alternate forum is another Australian superior court and the case is subject to the *Jurisdiction (Cross-vesting) Act 1987* provisions, then the court may apply the tests inherent in the plea of Forum Non Conveniens. If jurisdiction has been obtained pursuant to Order 11 type provisions then possibly a Forum Conveniens test will apply. This paper examines the pleas of Forum Conveniens and Forum Non Conveniens, compares the tests used and considers the powers of Australian superior courts to refuse jurisdiction on the basis that an alternate more appropriate jurisdiction is available. It ultimately questions the utility of such separate tests.

The Court's General Power to Stay Proceedings Where Jurisdiction is Ordinarily Invoked

The pleas of Forum Conveniens and Forum Non Conveniens ultimately are applications involving a possible stay of proceedings.¹³ The power of superior courts to stay proceedings is broad and in part found in the nature of the court itself. English courts from early times have granted stays of proceeding where the continuation of the action would amount to an abuse of the court's process.¹⁴ An action could be stayed where the court considered it to be vexatious or frivolous in nature.¹⁵ Discretion to decline jurisdiction focused on the

11. Ibid. 238-239.

12. *Oceanic Sun Line Shipping Co. v Fay* (1987-88) 165 CLR 197. The use of this plea is examined infra., but it should be noted that, as is explained, the present ambit of application of this plea is uncertain.

13. “Suspension of proceedings in an action, which may be temporary until something requisite or ordered is done, or permanently, where to proceed would be improper.” *R. Bird, Osborn's Concise Law Dictionary* 7th ed. (London: Sweet and Maxwell, 1983).

14. I.H. Jacob ‘The Inherent Jurisdiction of the Court’ [1970] *Current Legal Problems* 23 at 40.

15. *Ibid* and see *Tidd's Practice* Vol. 1 (1828) 515 seq.

fundamental concern of justice. Superior courts have an inherent power to control their own process to avoid abuse of that process that would result in the court becoming a vehicle of injustice.¹⁶

A fundamental characteristic of the law that has developed in this area is the recognition that plaintiffs, commencing an action, may be motivated by factors of unfairness, insincerity, dishonesty or bad faith. Courts have recognised these propensities on the part of some litigants, and allowed stays of proceedings where such factors were operative.¹⁷ The possibility that the plaintiff may be bringing an action in a particular forum to frustrate the means for a proper defence elicited concerns over the convenience of the parties. From this concern with convenience it is not a large step to the general question of what is the most appropriate forum. This entails considerations of convenience in a larger sense. What is most suitable considering all the circumstances which may include the location of the parties, the evidence, the proper law, the costs and the possibility of obtaining justice in the alternate forum.¹⁸ These broader concerns have come to represent factors in the application of the court's discretion to decline jurisdiction. The key factor, initially, was whether the action brought was vexatious and oppressive. In *McHenry v Lewis*¹⁹, Lord Justice Bowen said these considerations varied with the circumstances of the individual case.²⁰

English law did not, however, generally recognise the convenience of the parties per se, as a ground for a stay where the jurisdiction is properly invoked by service in the jurisdiction.²¹ By contrast in service ex juris cases it did.²² Until recently, the leading English case governing an application for a stay on the basis of an alternate forum was *St. Pierre v South American Stores*²³. This was not a case calling for a stay on the basis of Forum Non Conveniens, but on the basis of Lis Alibi Pendens. The application was based on section 41 of the *Judicature (Consolidation) Act 1925* which recognised the inherent power of the court to stay proceedings and also empowered the court to stay proceedings where it was "necessary for the purpose of justice". The Court of Appeal in *St. Pierre* consolidated the reasoning from earlier cases of abuse of process and posited a rule that prevailed in England until 1974. Lord Justice Scott said, in language much quoted:

The true rule about a stay under section 41 so far as relevant to this case, may I think be stated thus, (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff.²⁴

It should be noted that Lord Justice Scott specifically declined to consider cases for service out of the jurisdiction. He felt discretion was a significant factor in those cases:

16. *Metropolitan Bank v Pooley* (1885) 10 AC 210 at 220-221.

17. See Jacob, op cit. and references therein for a general review of cases involving abuse of process.

18. These are discussed further below.

19. (1882) 22 Ch D 397.

20. *Ibid.* 407-408.

21. See *Re Norton's Settlements* 1 Ch 471; *Thornton v. Thornton* 11 PD 176.

22. *Rosler v. Hilbury* [1925] 1 Ch 250. See further discussion infra.

23. [1936] 1 KB 382.

24. *Ibid* 398.

I do not think that the cases upon service out of the jurisdiction, some of which were cited to us, are sufficiently germane to the principles upon which this appeal turns to call for discussion. Discretion looms larger in that exercise of statutory jurisdiction; under S:41 there is little, if any, room for discretion, decisions on questions of degree often look alike, but are not instances of discretion.²⁵

It is interesting that his Lordship limited judicial discretion to grant a stay in the application of the S:41 “purposes of justice” test because it is to this very test of “the purposes of justice” that the test in the Forum Non Conveniens cases ultimately arrives in *Spiliada Maritime Corporation v Cansulex*²⁶. The introduction of this doctrine of Forum Non Conveniens represents the latest development of the court’s powers to control access to its jurisdiction.

Judicial Discretion in the Issuance of a Writ Involving Exorbitant Jurisdiction — Forum Conveniens

Originally, issuance of a writ for service ex juris pursuant to the English Supreme Court Rules Order 11 was at the discretion of the court. “May”, in the phrase “service out of the jurisdiction of a writ of summons or notice of writ of summons may be allowed by the court or a judge...”²⁷, has been interpreted to reserve to the court a final discretion as to whether a writ should issue.²⁸ The court must first consider in an Order 11 application if the facts of the case fall within a class of the enumerated connecting factors.²⁹ That is determined on a prima facie basis.³⁰ Once established, however, the court retains a discretion to refuse the application.³¹ This discretion developed a considerable jurisprudence for the determination of when a writ under Order 11 should issue. In essence, the burden of convincing the court to accept jurisdiction is on the Plaintiff.³² Doubt should be resolved in favour of the foreign located defendant and the court should be careful in acceding to jurisdiction. Inconvenience to the defendant was and remains a primary consideration.³³ The burden of satisfying the court that the writ should issue or alternatively not be stayed is on the plaintiff.³⁴ In *The Hagen*,³⁵ Lord Farwell enunciated the appropriate considerations:

During the present sittings Vaughan Williams L.J. and myself have on more than one occasion had to consider Order 11 and we have had many authorities discussed and

25. [1936] 1 KB 382 at 398.

26. [1987] 1 A.C. 460. Discussed infra.

27. Rules of the Supreme Court (England), Order 11, r 1.

28. *Johnson v Taylor Bros. & Co. Ltd* [1920] AC 144, 153; followed in *Sheldon Pallet Manufacturing Co. Pty. Ltd. v New Zealand Forest Products Ltd* [1975] 1 NSWLR 141.

29. Although provisions for service vary in Australian jurisdictions the fundamental notion is common — the cause of action has some connection to the jurisdiction. This connection may include inter alia, depending on the provisions of the particular legislation, factors such as, the fact that the contract was made or a tort was committed in the jurisdiction, the defendant is domiciled in the jurisdiction, or that the res is situate in the jurisdiction. The breadth of the extended jurisdiction thus varies between states depending on the extent of the connecting factors listed in the ex juris provisions of that jurisdiction’s Rules of Court.

30. *Vitkovice Horni etc. v Korner* [1951] AC 869. Lord Radcliffe said: “It must sufficiently appear to him [the judge] that it is a proper case. The phrase is a composite one and is not elucidated by taking it to pieces, but it seems to me clear that the use of the word “sufficiently” in this context shows that it is not necessary that the judge should be satisfied beyond reasonable doubt as to the existence of the qualifying conditions. Further, a case does not appear to be a proper case for the purpose of this order unless a consideration of all admissible material there remains a strong argument for the opinion that the qualifying conditions are indeed satisfied.” 883 approved in *Carroll v Laurie* [1959] VR 275, 277.

31. *Richardson v Tiver* [1960] VR 578.

32. *Spiliada Maritime Corporation v Cansulex Ltd.* [1987] 1 AC 460.

33. *The Hagan* [1908] PD 189.

34. *Hayel Saeed Anam & Co. v Eastern Sea Freighters Pty. Ltd. et al.* [1973] 7 SASR 200.; followed in *Freckmann v. Pengendar Timur SDN BHD* (1988) 94 FLR 312, discussed below.

35. [1908] PD 189 at 201.

fully considered by the Court, and the conclusions to which the authorities led us I may put under three heads. First we adopted the statement of Pearson J. in *Societe Generale de Paris v Dreyfus Bros.* (1885) 29 Ch 239 @242, that “it becomes a very serious question whether or not, even in a case like that, it is necessary for the jurisdiction of the court to be invoked and whether this Court ought, to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country and I for one say, most distinctly that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.” The second point which we considered established by the cases was this, that if on the construction of any of the sub heads of Order 11 there was any doubt it ought to be resolved in favour of the foreigner; and the third is that in as much as the application is made *ex parte*, full and fair disclosure is necessary, as in all *ex parte* applications, and a failure to make such full and fair disclosure would justify the court in discharging the order.³⁶

The concept of the “convenient forum” is among factors the courts have considered in applying the considerations of *The Hagan*. In *Rosler v Hilbury*³⁷ the Court of Appeal determined that what constituted the “convenient forum”³⁸ was a relevant consideration in exercising discretion under Order 11. Mister Justice Pollock M.R. said:

The jurisdiction is discretionary, and there is no question that in deciding whether or not it will exercise its discretion the Court pays attention to a great number of matters, in particular it would pay attention to what is the *forum conveniens*. It would have regard to what is the substance of the matter that has to be decided. If regard is to be had to the *forum conveniens* I can imagine no forum less convenient than the Court of this country, because what will have to be decided is what is the sum to which three foreigners, none of whom is resident in this country, are entitled in the ultimate wind up... But I go further. What is the substance of this case? It is very well to comply with the letter of the sub-rules of rule 11, but one ought to have regard to the true spirit of the rule.³⁹

In *Logan v The Bank of Scotland*⁴⁰ the English Court of Appeal distinguished the doctrine of “Forum Conveniens” from the power to stay in a case where the defendant is served in the jurisdiction. The Court of Appeal adapted the basic grounds for granting a stay; that is where the action is vexatious or frivolous.⁴¹ From these cases it is clear that since at least 1924 and perhaps as early as 1885⁴², there has existed in English law a doctrine of Forum Conveniens for determining the issuance of a writ under Order 11 and this concept included

36. *Ibid.* 201., see also *The Brabo* [1949] AC 326 at 357.

37. [1925] 1 Ch 250.

38. The phrase “forum conveniens” has been used since at least 1885 — *Ewing v Orr Ewing* (1885) 10 AC 453 at 506. Therein Lord Selbourne said:

It appears also that the doctrine of Forum Conveniens, which in England seldom comes into consideration when jurisdiction exists apart from service of process abroad, unless there is an actual competition of suits.... 506. The concept was however more fully enunciated in *Rosler v. Hilbury* [1925] 1 Ch 250.

39. [1925] 1 Ch 250 at 259. Followed in *Re Schmitz* [1926] 1 Ch 710. and *Oppenheimer v Louis Rosenthal and Co. A.G.* [1937] 1 All E.R. 23.

40. [1906] 1 KB 141.

41. The court held that where all the parties and witnesses to an action, save one defendant bank, were resident in Scotland it was vexatious to proceed with the action in England after serving the defendant in England. The court declared that the matter clearly could more conveniently be brought in Scotland and held that the English action was vexatious. The ulterior motive for bringing the action in England had been to force a settlement, thus avoiding foreign litigation costs for the defendants. The case is particularly significant because the court adverted to the similarity between the concept of *forum conveniens* and the Scottish doctrine of Forum Non Conveniens — [1906] 1 KB 141 at 149.

42. *Ewing v Orr Ewing* (1885) 10 AC 453.

considerations of appropriateness, convenience and the determination of whether the matter should properly proceed.

Unfortunately, the term “Forum Conveniens” has not been used consistently by all judges and commentators.⁴³ This may be explained on the basis of an early confusion over the nature of the plea of *Forum Non Conveniens*. The two have been confused, interchanged and merged as one in different applications and discussions. With the gradual development of the doctrine of *Forum Non Conveniens*⁴⁴ it is clear that the concept of a different discretion applicable in Order 11 cases to that where a stay was sought where the defendant was served in the jurisdiction was operating consistently in the cases even if the term was used inconsistently. In *Spiliada Maritime Corp. v Cansulex Ltd.*⁴⁵, both Lord Goff and Lord Templeman recognised this conceptual distinction. Lord Templeman used the phrase “forum conveniens” in counter distinction to “Forum Non Conveniens”:

Where the plaintiff is entitled to commence his action in this country, the court applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court applying the doctrine of forum conveniens will only grant leave if the plaintiff satisfies the court that England is the most appropriate forum to try the action.⁴⁶

Prior to recent amendments⁴⁷ to the Victorian Rules of Court the law in Victoria was uncertain on the question of convenience in service ex juris cases. In Queensland, and other jurisdictions without a convenience provision in their Order 11 provisions, the law remains unclear. As the question is not governed by statute, it falls to be determined by the common law. Australian authority on the question conflicts. In *Richardson v Tiver*⁴⁸, Justice Adam of the Supreme Court of Victoria did not think that a mere balance of convenience would justify the granting of a stay under Order 11. His Honour limited *Logan v Bank of Scotland*⁴⁹, finding that it was a case based on vexatious proceedings. He characterized the complete line of English cases discussed above as all being instances where “the action had not been properly brought”.⁵⁰ That is to say, presumably, that they were all vexatious or frivolous, for example as a result of an improper motive. His Honour, with respect, trod a very fine line in that it is very difficult to determine when an action is merely extremely inconvenient to a defendant and where bringing the action amounts to vexation.

Must an improper motive be established before the defendant will be successful? Sir Gorrel Barnes in *Logan v Bank of Scotland*, did not appear to confine the application of *Forum Conveniens* to cases of improper motive. By way of obiter dicta, he said:

It seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the differences of trying in one country rather than in

43. See B.D. Inglis ‘Jurisdiction, the Doctrine of *Forum Conveniens* and Choice of Law in Conflict of Laws’ (1965) 81 *Law Quarterly Review* 380. Inglis regularly blurs the concepts of *Forum Conveniens* and *Forum Non Conveniens*. As discussed above, this is unjustifiable.

44. Discussed below.

45. [1987] 1 AC 460.

46. *Ibid.* 464-465.

47. Under rule 7.05 (2)(b) (of the General Rules of Procedure in Civil Proceedings 1986, SR 1986 #99 as amended by SR 1986 No 286) a judge may stay proceedings or set aside a writ involving service ex juris where the court considers Victoria not “a convenient forum for the trial of the proceeding”. Order 11 in Queensland does not contain a similar provision.

48. [1960] VR 578.

49. [1906] 1 KB 151, referred to supra.

50. [1960] VR 578 at 480.

another were merely measured by some extra expense, but where the difficulty for the defendant of trying in the country where the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses and keeping them during a long trial and of having to deal with masses of books, documents and papers which are not in the country where the action is brought and of dealing with law foreign to the tribunal, it appears to me that a case of vexation in some circumstance may be made if the plaintiff chooses to sue in that country rather than in that where everybody is and where all the witnesses and material for the trial are.⁵¹

There is a strong indication in this that what is practical in all the circumstance may justify a stay. *Logan* does not, it is submitted, go so far as to require necessarily an element of improper purpose on the part of the plaintiff before a stay may be justified.

In *Earthwork & Quarries v Eastment & Sons Pty. Ltd.*⁵², Mr Justice Dean of the Supreme Court of Victoria adopted a different approach to that of the Supreme Court of Victoria in the earlier *Richardson v Tiver*. He referred, inter alia, to *Rosler v Hilbery* and *Richardson v Tiver* in determining whether service in New South Wales should be set aside. His Honour, however, did not address the position taken by Adam J. in *Richardson*. He considered the application on the basis of Forum Conveniens and clearly did not require that the balance of convenience must constitute vexation or oppression in order to grant a stay. His Honour's position is, it is respectfully submitted, consistent with the unbroken line of English authority that does not restrict the granting of a stay in an Order 11 application to proceedings that are frivolous or vexatious, but also includes convenience and appropriateness of the forum. His Honour considered the location of the parties, witnesses, the location of the cause of action and the possibility of a jury trial in New South Wales. He concluded that as a matter of convenience the case could be as easily tried in Victoria as in New South Wales. On that basis, it could not be said that the matter should not proceed in Victoria and therefore the application for a stay on the ground of convenience was dismissed. The case is not significant for its facts, but rather for the application in Australia of tests of convenience in an Order 11 case.⁵³ On the basis of the present analysis, it represents the law governing notions of convenience in Order 11 cases in jurisdictions, such as Queensland, which have no Forum Conveniens component in the legislation. The High Court of Australia in *Oceanic Sun Line Shipping Co. v Fay*⁵⁴ recently considered the application of the Forum Non Conveniens doctrine to the equivalent of Order 11 provisions, as found in New South Wales legislation.⁵⁵

The Changing Law of Forum Conveniens and Forum Non Conveniens

Origins of the Plea of Forum Non Conveniens — Scotland

The plea of Forum Non Conveniens is in nature a request for justice or fairness in the court's decision to accept jurisdiction where an alternate forum exists and the defendant has been properly served in the jurisdiction. It is significant because the test used in its application

51. [1906] 1 KB 141 at 151-152.

52. [1966] VR 24.

53. In a review of all the relevant factual considerations his Honour Dean J. said:

How, then, should I exercise my discretion in this case? Weight must be attached to the FORUM CONVENIENS [writer's emphasis]. But what is the FORUM CONVENIENS?... In the end it comes back to the question of which state is the more convenient... I see no reason of convenience for preferring one jurisdiction to the other. ... The plaintiff had a right to choose the place of trial, as it has brought itself within s:11(1)(c). That choice should not be interfered with except on some definite and clear ground of inconvenience or otherwise.

[1966] VR 24 at 28.

54. (1987-88) 165 CLR 197.

55. Order 10, Supreme Court Procedure N.S.W.

is very broad in what the court may take into account in determining whether to accept jurisdiction. Certainly it is broader than the mere considerations of vexation and oppression provided in the *St. Pierre test*. The earliest specific references to an actual doctrine of Forum Non Conveniens are in Scottish cases of the 19th century.⁵⁶ Initially, the concept was framed as “forum non competens”.⁵⁷ The use of Latin has caused some confusion, leading on occasion to a construction based on the competence of the forum. In the Scottish case of *Longworth v Hope*⁵⁸ the House of Lords criticised this usage as inaccurate. The Lord President, stating the fundamental proposition in remarkably broad language, said:

...the plea usually thus expressed does not mean that the forum is one in which it is wholly incompetent to deal with the question. The plea has received wider signification, and is frequently stated in reference to cases in which the Court may consider it more proper for the *ends of justice* [writer's italics] that the parties should seek their remedy in another forum.⁵⁹

This notion of the “end of justice” runs through Scottish cases applying the plea. Because it is both broad and vague, the phrase admits to the court a higher degree of power to stay cases, not merely because of convenience or abuse of process, but on a miscellany of grounds all of which may fall under the general rubric of “the ends of justice”.

In *Sim v Robinow*⁶⁰, the House of Lords, sitting in its jurisdiction over Scottish law, adopted the phrase “forum non conveniens” to replace “forum non competens”. These developments in Scottish law culminated in 1926 in the test enunciated in *La Societe du Gaz de Paris v La Societe Anonyme de Navigation “Les Armateurs Francois”*.⁶¹ Lord Sumner made clear that Forum Non Conveniens did not merely entail a consideration of the convenience of the parties as a primary test:

Is the forum — “... more convenient and preferable for serving the ends of justice?” The true course is to leave out the words “more convenient” and because one cannot think of convenience apart from the convenience of the pursuer or the defender or the court and the convenience of all these three, as the cases show, is of little, if any importance. If you read it as “more convenient, that is to say preferable, for serving the ends of justice.” I think the true meaning of the doctrine is arrived at.⁶²

Thus the Scottish courts devised the doctrine along narrow lines using as the ultimate test the vague appeal to the “interest of justice”. It was Lord Dunedin who ultimately articulated the test which later satisfied the English House of Lords:

In my view, “competent” is just as bad a translation for “competens” as “convenient” is for “conveniens”. The proper translation for these Latin words so far as this plea is concerned, is “appropriate”.⁶³

It was the House of Lords (sitting in their jurisdiction over Scottish law) that developed the doctrine of Forum Non Conveniens. It took the English courts, ultimately through the

56. A.E. Anton, *Private International Law* Edinburgh W. Green and Co. 1967. According to Anton there never was such a doctrine in other civil law countries. See J.P. Verheul ‘The Forum (non) Conveniens in English and Dutch law and under some International Conventions (1986), 35 ICLQ 413. Verheul examines the development of Forum Non Conveniens in English law and suggests similar developments may be necessary in civil law jurisdictions “so that the courts correct the existing rules of their national legal system in order to adapt them to international standards.” at 423.

57. *Longworth v Hope* [1865] 3 Macpherson 1049.

58. (1865) 3 Macpherson 1049.

59. *Ibid.* 1054.

60. (1892) 19 R 665.

61. [1926] SC 13.

62. *Ibid.* 22.

63. *Ibid.* 18.

decisions of the House of Lords, over another fifty years, however, to adopt the concept.⁶⁴ In brief, where a defendant was properly served in the jurisdiction and an alternate forum existed the court should only accept jurisdiction where it was appropriate, that is in the interests of justice to do so. This is of course a remarkable notion for a judge to refuse to try a case where the law has given him jurisdiction to do so. As Brennan J. observed it negates the fundamental certainty of access to the court's jurisdiction, a litigant had when he served a writ on the defendant in the jurisdiction.* Yet this notion has now come to prevail in England.

England: The General Principle Determined

Through a series of cases⁶⁵, commencing in 1974 with the *Atlantic Star*⁶⁶, the House of Lords introduced the law of Forum Non Conveniens to govern the power of a court to stay proceedings where the defendant is properly served within the jurisdiction. Their Lordships also refined the court's discretionary power governing extraordinary or exorbitant jurisdiction under Order 11 of the English Rules of Court. These developments were fully realised in the judgment of Lord Goff in *Spiliada Maritime Corp. v Cansulex*⁶⁷ which states the present English law. Though it is a summary of the present English law, it cannot be regarded as the final or definitive statement on the subject however, since Lord Goff makes it clear that he regards the law in the area as continuing to develop through a gradual evolution.⁶⁸

In *Spiliada Maritime Corporation v Cansulex Ltd.*⁶⁹ the issue of the appropriate forum arose from a dispute involving the defendant, Cansulex, a Canadian shipper of sulphur in Vancouver, Canada and the plaintiff, Spiliada Maritime Corporation, Liberian shipowners. They claimed for damage caused by the sulphur to their Liberian ship managed partly in Greece and partly in England. The plaintiff brought an action in England relying on the service ex juris provisions in R.S.C. Order 11. The defendant applied, pursuant to R.S.C. Orders 12 R.8,⁷⁰ and R. 11(4)(2)⁷¹ to have the action dismissed, inter alia, on the basis that the case was not a proper one for service out of the jurisdiction and that the matter should be tried in Canada. The trial judge had already begun hearing another action involving similar facts with the same defendant. He dismissed the defendant's application in *Spiliada*. In doing so, he considered a number of factors including the availability of witnesses, the multiplicity of proceedings and the fact that a concurrent action involving the same counsel, the same issues and same defendant was pending in the English courts.

The members of the Court of Appeal allowed the defendant's appeal and the plaintiff appealed to the House of Lords. Lord Goff stated that the fundamental principle of English law applicable to cases of service in the jurisdiction was the same as the Scottish principle of Forum Non Conveniens.⁷² He considered the Scottish and the English law as being

64. Lord Goff adopted the term in *Spiliada Maritime Corp. v. Cansulex Ltd* [1987] 1 AC 460.

65. The major cases include: *The Atlantic Star* [1974] AC 436, *MacShannon v Rockware Glass* [1978] AC 975, *Amin Rasheed Shipping Corp. v Kuwait Insurance Co.* [1984] AC 50, *The Abidin Daver* [1984] AC 398. A full discussion of these cases is found in A. Barma, D. Elvin, 'Forum Non Conveniens: Where Do We Go From Here?' (1985) 101 LQR 48. A. Briggs 'Forum Non Conveniens — Now We are Ten' (1983) 3 Legal Studies 74, 'Forum Non Conveniens — An Update' (1985) 3 Lloyds Maritime and Comparative Law Quarterly 360.

66. [1974] AC 436.

67. [1987] 1 AC 460.

68. *Ibid.* 475.

69. [1987] 1 AC 460.

70. General provisions that provide a mechanism for disputing jurisdiction.

71. R.S.C. Order 11, r 4(2): "No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under the order."

72. *Ibid.* 474.

* *Oceanic Sun Line Shipping Co v Fay* (1987-88) 165 CLR 197 at 238-239.

indistinguishable and held that Lord Kinnear's statement in *Sim v Robinow*⁷³ expressed the present English law. Lord Kinnear had said:

The plea [of Forum Non Conveniens] can never be sustained unless the court is satisfied that there is some other tribunal having competent jurisdiction, in which the case may be tried more suitably for the interest of all the parties and the ends of justice.⁷⁴

The notion of "suitability", Lord Goff held did not entail "convenience", but rather "appropriateness". Thus he adopted the position articulated earlier by the Scottish judges. His Lordship did distinguish between the concept of Forum Conveniens (without using the phrase, as Lord Templeman did in his concurring judgment) and Forum Non Conveniens. He considered them, however, to refer, in principle, to the same notion:

...while sharing Lord Wilberforce's concern about help to be derived, in Order 11 cases, from cases where an injunction is sought to restrain proceedings abroad, I respectfully doubt whether similar concern should be expressed about help to be derived from cases of Forum Non Conveniens. I cannot help remarking upon the fact that when Lord Wilberforce came ... to state the applicable principle, his statement of principle bears a marked resemblance to the principles applicable in Forum Non Conveniens cases. It seems to me inevitable that the question in both groups of cases must be, at the bottom, that expressed by Lord Kinnear in *Sim v Robinow* 19 R 665, 668 Viz. to identify the forum in which the case can be suitably tried for the interests of all the parties and the ends of justice.⁷⁵

Lord Goff referred to these two fundamental applications of the "appropriate jurisdiction" test: (a) — where the defendant has been served in the jurisdiction, (b) — where the defendant has been served pursuant to Order 11 outside the jurisdiction. With respect to Forum Non Conveniens, Lord Goff summarised the English law as follows:

1 — The basic principle is that a stay will be granted only on Forum Non Conveniens grounds where the court is satisfied there is another available forum.

2 — The burden of proof rests on the defendant.

3 — The burden on the defendant is to show that the other forum is "clearly or distinctly more appropriate than England".⁷⁶

4 — The "appropriate forum" will be the natural forum; that is the forum with which the matter has the most "real and substantial" connections. On this point his Lordship noted that factors could include availability of evidence and witnesses, residence of the parties, location of the business, convenience and expenses and the governing law of the "relevant transaction".

5 — If the above were not met his Lordship proposed that a stay should not be granted. He thought it difficult to imagine circumstances where a stay in a case lacking these factors might be granted.⁷⁷

6 — If these considerations are made out then a stay should ordinarily be granted. This is subject, however, to the existence of circumstances which for reasons of justice require that a stay not be granted. If, for example, the plaintiff establishes objectively through cogent evidence that he could not obtain justice in the alternate forum then the burden shifts back to the defendant.

The Application of the Principle to Order 11

Lord Goff posited three factors which distinguish a case under Order 11 from one where

73. (1892) 19 R 665.

74. *Ibid.* 668.

75. [1987] 1 AC 460, 480.

76. *Ibid.* 477.

77. *Ibid.* 478.

the jurisdiction is invoked in the ordinary way (i.e. — through service of a writ in the jurisdiction):⁷⁸

1 — The burden of proof lies on the *plaintiff* to establish that the court should hear the case. This is the opposite to that in a Forum Non Conveniens case where the defendant bears the burden.

2 — In Order 11 cases the plaintiff must persuade the court to exercise its discretionary power. The provisions of Order 11 establish through the elaboration of particular circumstance when a court may permit service. This permission is however discretionary and subject to the provision in Order 11 that it “be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction”.⁷⁹

3 — Regard must also be had to the notion that Order 11 jurisdiction may be characterised as “exorbitant jurisdiction”. As such it may offend comity between states.⁸⁰ Thus the plaintiff must show not only that England is the appropriate forum, but that it is clearly so. His Lordship seemed to indicate that this burden on the plaintiffs may be great. He likened it to the obverse burden on the defendant in a Forum Non Conveniens case. A difficult and unformulated factor in the balance is the granting or denial of an advantage to a party. For example, where a party would obtain better discovery in an English action, should this affect the decision to stay? The court did not commit itself to a precise formulation of relevant factors or tests. Lord Goff adverted to different outcomes in various past cases, but restricted himself to the general statement of principle:

...regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases.⁸¹

His Lordship did note, however, that the principles applicable in individual types of cases would become more clearly known and thus he accepted the notion that greater certainty would come to this question, as indeed to the whole area of the law.⁸²

Spiliada is a particularly significant case because it draws together the previously separate concepts of Forum Non Conveniens and Forum Conveniens and develops the power of the court to decline jurisdiction. As Lord Goff has stated however, the doctrine can be expected to continue to evolve. What direction is that likely to take? What degree of sophistication will be involved? Would such a doctrine from a unitary system be appropriate in a federal system? Some of these questions are considered, if not definitively answered, by examining the operation of the doctrine in the United States.

78. [1987] 1 AC 460,478-482.

79. R.S.C. Order 11, r 4(2).

80. The theory of territoriality of jurisdiction has come to prevail in Public International Law as the basis for a state's right to legislate and adjudicate over a place, events and parties. The theory has however been subject to criticism. It is beyond the scope of this paper to consider in detail the validity of these theories which are properly the subject of Public International Law. See E.G. Lorenzen 'Territoriality, Public Policy and the Conflict of Laws' (1924) 33 Yale LJ 736. F.A. Mann 'The doctrine of jurisdiction in International Law' in *Studies of International Law* Oxford Clarendon Press 1973 at 4. Mann argues for a re-evaluation of the theory at 34 seq. It has been argued that the theory does not apply in Private International Law. See M. Pryles 'The Basis of Adjudicatory Competence in Private International Law' (1972) 21 ICLQ 61, J.H. Beale 'The Jurisdiction of a Sovereign State' (1922-23) 36 Harvard Law Review 241. M. Gutzweiller, 'Le Développement Historique du droit Internationale Prive', *Recueil Des Cours* (29-iv Paris: Libraire Hachete, 1930) 291 at 327-328.

81. [1987] 1 A.C. 460,483.

82. *Ibid.* 484.

Forum Non Conveniens in U.S. Law:

The doctrine of Forum Non Conveniens⁸³ has operated in some United States courts since the turn of this century.⁸⁴ However, because of the large number of jurisdictions represented in the system of state and federal courts, a uniform law did not develop throughout the country.⁸⁵ The U.S. court system is constituted on the basis of state and federal jurisdiction.⁸⁶

The federal courts have a limited jurisdiction which includes matters where there is diversity in the citizenship of the litigants. Thus where a matter involves citizens from two different states in the union, the federal courts can have jurisdiction over a matter that would otherwise be the exclusive jurisdiction of the litigants' state courts. In the case of state jurisdiction, each state develops its own law of jurisdiction. Because of the number of jurisdictions, the amount of litigation, and the potential for diversity of citizenship, both state and national, the United States has developed a relatively mature and sophisticated doctrine of Forum Non Conveniens to control litigation in the courts. Its approach is particularly relevant to Australia because of the common federal nature of the two countries. Thus, unlike English courts, United States courts may confront the situation where the foreign defendant is simply a resident of a different U.S. state as well as the situation where the defendant is located in another country.⁸⁷ In two landmark cases, the first in 1947, the U.S. Supreme Court stated the American doctrine. Although they are only binding on federal courts, the guide-lines have been adopted by numerous state courts.^{88 89}

Application of the Principle to Litigants Resident in the United States — *Gulf Oil Corporation v Gilbert*

*Gulf Oil Corporation v Gilbert*⁹⁰ involved an inter-state question of appropriate jurisdiction. The plaintiff, Gilbert, was a resident of Virginia. He brought an action in the Southern District of New York for damages suffered in Virginia, allegedly as a result of careless acts of the defendant. The defendant was incorporated in Pennsylvania, but was qualified to do business in both Virginia and New York. When sued in New York, the defendant raised the doctrine of Forum Non Conveniens, arguing that the matter should be tried in Virginia. The trial court dismissed the case. On a final appeal, by the defendants, the Supreme Court of the United States reviewed the law and affirmed the trial court decision to dismiss the New York action. In the majority judgment, Mr. Justice Jackson defined the

83. The activity of scholars in the United States in this area is prolific and long standing. See for example: R.T. Abbott 'The Emerging Doctrine of Forum Non Conveniens: A comparison of the Scottish, English and United States Applications' (1985) 18 Vanderbilt Journal of Transnational Law 111. R. Braucher 'The Inconvenient Federal Forum' (1947) 60 Harvard Law Review, 908. L.J. Lawrence 'The Convenient Forum Abroad Revisited' (1977) 17 Virginia Journal of International Law 755. J.D. Morley 'Forum Non Conveniens: Restraining Long-Arm Jurisdiction' (1973) 68 Northwestern University Law Review 24.

84. P. Blair 'The Doctrine of Forum Non Conveniens in Anglo-American law' (1929) 29 Columbia Law Review 1. See also *Canada Malting Co. v. Paterson Steamships* (1932) 285 US 41.

85. J. Kane 'The Doctrine of Forum Non Conveniens: History, Application and Acceptance in Iowa' (1984) 69 Iowa Law Review 957.

86. See generally: C.A. Wright, *The Law of Federal Courts* St. Paul West Publishing Co. 1983, and *Corpus Juris Secundum* 21 & 36.

87. The application for a change of venue in England should be distinguished from a plea of Forum Non Conveniens. The former involves a mere transfer within English jurisdiction. In the case of Forum Non Conveniens, the matter is stayed in England and may be continued somewhere else.

88. Wright, *op.cit.*

89. The year following *Gulf Oil Corporation v Gilbert* 330 U.S. 501 Congress enacted a federal transfer law — 28 U.S.C.A. S:1404(a). This statute permits a federal court in one of the thirteen districts of the federal courts to transfer a suit to a district court sitting in another district in the country. (The provisions though obviously different in specifics, are similar in principle to the cross-vesting provisions of Australia). The test for transfer under the Federal transfer law is similar to that used in Forum Non Conveniens stated in *Gilbert*. These provisions are considered below.

90. 330 US 501.

doctrine as “simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute”.⁹¹ To determine when the court may resist that jurisdiction he posited two main heads of consideration: *Public interests* and *Private interests*. “Matters of public interest” go beyond many of the considerations in *Spiliada* and thus make the U.S. test wider. The public have an interest in avoiding congested courts. Jury duty is a burden on a community and this ought not to be imposed on a community that has no relation to the litigation. There exists also a community interest in holding the trial in the view of the community which the case has affected rather than in a remote location. A further factor is the desirability of holding the trial of a diversity case (where a non-state litigant is involved) in the forum of the state with the proper law in the case. This avoids the difficulty of another forum having to “untangle problems in conflict of laws”.⁹² “Matters of private interest” are those of the litigants. Matters of great importance to the litigants might likely include whether compulsory process was available to insure the attendance of an unwilling witness. The costs of securing the attendance of witnesses and the possible need for the fact-finder to have a view were also considered relevant. On these points the court adverted, in essence, to the practical problems that make running a trial in one location less convenient, more expensive or difficult than running it somewhere else.

In formulating the components of the doctrine, Justice Jackson did not trouble with precedent. He adverted to the concepts of vexation and oppression (as posited in *St. Pierre v South American Stores*⁹³, though *St. Pierre* was not actually referred to in *Gilbert*), but these were only aspects of the more general concept that he outlined:

It is often said that the plaintiff may not, by choice of an inconvenient forum “vex”, “harass” or “oppress” the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favour of the defendant, the plaintiff’s choice of forum should rarely be disturbed.⁹⁴

His Honour finally considered whether the instant case was one of those “rather rare cases where the doctrine should apply” and determined it was.⁹⁵

Application of the Principle to a Foreign Litigant: *Piper Aircraft*.

The Supreme Court of the United States again considered Forum Non Conveniens in 1981. In *Piper Aircraft Co. v Reyno*⁹⁶, it examined the doctrine in the context of a non U.S. litigant. This is significant since it recognizes the difference in the application of the principle of comity between litigants of the same nation and litigants of different nations. The court specifically limited the access of foreign plaintiffs to U.S. courts. It decided that the mere fact that the law of the chosen U.S. forum was more favourable to the position of the foreign plaintiff than a law applicable in the alternate forum of the plaintiff’s own nation was not sufficient to bar the use of Forum Non Conveniens.⁹⁷

91. *Ibid.* 507.

92. *Ibid.* 509.

93. [1936] 1 KB 382 referred to supra.

94. 330 US 501 at 508.

95. *Ibid.* 509. The plaintiff had argued that a Virginia jury would be intimidated by the large amount sought in damages (\$400,000) while a New York jury would be more familiar with such a quantum. His Honour held that there was no evidence to support such a supposition. There was then no connection of the case to New York that could justify New York as a suitable forum. All the witnesses were in Virginia, 400 miles from New York. There was no connection with New York that could justify forcing them to travel the distance.

96. (1981) 454 US 233.

97. *Reyno* involved the crash of an aircraft in Scotland with the deaths of all on board. The plaintiff, Reyno — the representative of the deceaseds’ estates, was an American, employed as a legal secretary to counsel for the actual plaintiffs. She and her employer lived in California. The deceased were all Scottish, as were their heirs and kin. The aircraft was manufactured in Pennsylvania by Piper Aircraft. The propellers were made in Ohio by another defendant. The aircraft was owned by an English firm, and was operated by a Scottish Company. There were no witnesses to the accident.

The Supreme Court incorporated a degree of judicial chauvinism in its analysis. It held that where the plaintiff is a foreigner, he is not necessarily entitled to the same court access as a resident or a citizen. The greater deference to be paid to the citizen in his home forum is not to be given undue weight, however. Where a plaintiff sues in his own jurisdiction, that choice is always subject to the general rule that the application of the doctrine is to be flexible, attending to the particular considerations of the case and subject to the discretion of the court as stated in *Gilbert*. The court's distinction between domestic and foreign plaintiffs is of particular relevance in the Australian context. A nation has an interest in ensuring that its citizens and residents have access to the nation's courts in order to obtain relief. This is surely so in the case of torts committed against people, as opposed to, perhaps, multinational corporations whose resources may allow suit in a number of jurisdictions.⁹⁸

In Australia, a person suffering injury for a wrong committed overseas may ill afford the costs of litigation in a foreign country. Access to the Australian courts for relief may be the only economically viable approach. Australian courts face a fine balance however in avoiding problems of comity with other nations. This could be reflected in the refusal of foreign jurisdictions to enforce Australian judgments which are deemed to be based on unjustified jurisdiction.⁹⁹ With these and other considerations the High Court has considered the introduction of the law of Forum Non Conveniens for Australia.

Judicial Discretion in the Acceptance of Jurisdiction in Australian Law

The power of Australian courts to decline jurisdiction is complicated by a number of statutes that vary from state to state.¹⁰⁰ The position is further complicated by the recent decision of the High Court in *Oceanic Sun Line Special Shipping Co. v Fay*¹⁰¹ wherein the concept of Forum Non Conveniens was purportedly rejected for Australian law. This ruling makes the law governing judicial discretion over the appropriate forum more complex in both interstate and international matters.

Interstate jurisdiction has recently been changed by the introduction of cross-vesting of jurisdiction legislation. This legislation has a Forum Non Conveniens type component in it. This will be examined and the relation between it and the position of the High Court is considered.

Judicial Discretion Involving a Foreign Litigant — Forum Non Conveniens: *Oceanic Sun Line Shipping Co. Inc. v Fay*

Dr. Fay, the plaintiff, and his wife were on a cruise through the Greek Islands. On the voyage, he suffered serious injury as a result of an incident on board the vessel. The defendant owner of the ship, a Greek company, was a subsidiary of an American company incorporated in the state of Delaware. The plaintiff and his wife, both residents of

98. See S.L. Cummings, 'International Mass Tort Litigation: Forum Non Conveniens and the adequate Alternative Forum in the Light of the Bhopal Disaster' (1986) 16 Georgia Journal of International and Comparative Law 109. G.J. Fitzpatrick, "'Reyno': Its Progeny and its Effect on Aviation Litigation' (1983) 48 Journal of Air Law & Commerce 539.

99. It is unlikely that this would be an immediate result. Mechanisms reflecting the changes in comity may be slow to react to extended jurisdiction. All Australian jurisdictions have legislation permitting registration of overseas judgments. The legislation, in most cases, modelled on the United Kingdom's *Foreign Judgments (Reciprocal Enforcement) Act 1933* applies only to foreign jurisdictions where a reciprocal enforcement of judgment agreement has been entered. In all other cases, the common law governs. Recognition was once thought to be based purely on reasons of comity between states. Later justifications, however, have included the recognition by a court of the obligation to obey a court's judgment. See: *Russell v. Smith* (1842) 9 M&W 810; 152 ER 343. *Schibsby v. Westenholz* (1870) LR 6 QB 155; and more recently on the basis of avoiding relitigation — see: *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (#2)* [1967] 1 AC 853, 967. In the case of Australian inter-state enforcement the *Service and Execution of Process Act 1901* applies.

100. For example the service ex juris provisions of the Rules of Court are not uniform throughout Australia.

101. (1987-88) 165 CLR 197.

Queensland, had purchased their passage through a travel agency in Sydney. At the time of purchase, the agent gave the plaintiff an exchange voucher, which could be redeemed in Greece for the actual ticket required for the voyage. That ticket contained a number of significant conditions including, inter alia, a forum selection clause designating the courts of Athens, Greece, as the only place to bring an action.¹⁰² Initially the plaintiff attempted to sue the defendant in the state of New York. That action was dismissed in New York on the basis of Forum Non Conveniens. The plaintiff then sued in the Supreme Court of New South Wales.¹⁰³ The plaintiff obtained leave to serve the defendant in Greece and subsequently the defendant entered a conditional appearance. The defendant, by notice of motion, then sought to strike out the statement of claim for lack of jurisdiction. Alternatively, he wanted the statement of claim set aside or finally that the case be stayed. The defendant failed on his first two submissions regarding validity of the claim and hence the only issue for Yeldham J., the trial judge, was whether the matter should be stayed. He declined such an order. The New South Wales Court of Appeal¹⁰⁴ upheld his decision and the matter was appealed to the High Court of Australia.

The jurisdictional issue, as framed by the High Court, was whether the doctrine of Forum Non Conveniens as it has developed either in England, Scotland or the United States should apply to the defendant's application for a stay. The court split on the question. The minority (Wilson and Toohey J.J.) adopted the approach of Lord Goff in *Spiliada*. The majority (Brennan, Deane and Gaudron J.J.) rendered separate judgments, each considering separate aspects of the fundamental issue, but all agreeing on the decision. They purported to affirm that the concept of Forum Non Conveniens is not law in Australia.¹⁰⁵ In terms of strict stare decisis the decision applies only to New South Wales, but the manner in which the court approached the case indicates that their judgments were intended to have strong persuasive effect in other Australian jurisdictions.¹⁰⁶ All members of the High Court agreed that the contract of carriage was made in New South Wales and therefore the Athens forum selection clause could not determine the issue of jurisdiction since it was not a term in the original contract made in New South Wales. In consequence, the court considered the application of a discretion to stay the case. This required the court to examine the law in this area in light of the English developments culminating in *Spiliada*. In their separate judgments, the court evaluated the appropriateness of the Forum Non Conveniens doctrine as stated in *Spiliada* for contemporary Australian circumstances. The court did expand slightly the parameters for the application of the *St. Pierre* test of oppression and vexation. In particular the judgments of Justices Gaudron and Deane are complementary and instructive of the present Australian law. With respect, however, they are made difficult by an apparent blurring of the concepts of Forum Non Conveniens and Forum Conveniens and the appropriate circumstances for the

102. A further clause purported to limit the defendant shipping company's liability to \$5,000 U.S. It was never established that the exclusion clause was brought to the attention of the plaintiff before the booking.

103. The plaintiff relied on the ex juris service provisions of Order 10 R 1(1)(e) to found jurisdiction: "Where the proceedings are founded on or are for the recovery of damages suffered wholly or partly in the state by a tortious act or omission wherever occurring". The action was presumably brought in New South Wales because of the wider provisions for ex juris than those in Queensland.

104. [1987] 8 NSWLR 242.

105. For a full discussion of this case see M. Pryles 'Judicial Darkness on the Oceanic Sun 1988 62 ALJ 774. Also F.M. Reynolds 'Forum Non Conveniens in Australia — a Note' 1989 106 LQR 40.

106. Because of the specific provisions in the Victorian Order 7 for Forum Non Conveniens the case may not however affect Victorian order seven cases — Order 7.05 (2)(B). This conclusion only follows however if one assumes that the provisions of the Victorian provision will be construed in light of the general principle for both Forum Non Conveniens and Forum Conveniens as explained by Lord Goff in *Spiliada*.

application of each. The Majority relied on an earlier decision of the High Court. In *Maritime Insurance Co. Ltd. v Geelong Harbour Trust Commissioners*¹⁰⁷, the court, in 1908, initially stated the general principle for staying proceedings on the basis of convenience where the case involved alternate jurisdictions. In that judgment, the court did not enunciate any new principle of law, but merely applied the judgment of the President, Sir Gorrel Barnes in *Logan v Bank of Scotland*.¹⁰⁸

The facts in *Maritime Insurance Co. Ltd.* relate to the situation where both parties are in the jurisdiction of the court and the defendant is served in the jurisdiction, but where the defendant alleges that another jurisdiction is a more appropriate forum. The situation which Lord Templeman in *Spiliada* considered engaged the concept of Forum Non Conveniens.¹⁰⁹ This was different on its facts from *Oceanic Sun Line* where the defendant was served overseas. Yet the majority of the court in *Oceanic Sun Line* placed great emphasis on *Maritime Insurance Co. Ltd.* In effect, the majority of the High Court considered the two separate concepts of Forum Conveniens and Forum Non Conveniens under the single notion of whether a discretion to stay proceedings should exist on the mere basis of convenience. This blurring of the concepts is consistent with the conclusions of Lord Goff in *Spiliada*. It is not, however, consistent with his conceptual approach which maintains a distinction between the application of Forum Non Conveniens where an alternate forum exists and the application of Forum Conveniens in Order 11 cases.¹¹⁰ Lord Goff did determine that the tests were essentially now the same in England. Importantly, his Lordship also maintained a distinction regarding the burden of proof for stay applications in the two distinct situations of service in the jurisdiction and service ex juris. The majority in the High Court, by contrast, did not clarify the distinction between the two concepts. The difficulty on this point is that the old test of oppression and vexation does not engage the same breadth of considerations for convenience as the new test of the "appropriate forum" does, mutatis mutandis, for both Forum Conveniens and Forum Non Conveniens. Under the old test for service ex juris cases, as discussed above, the court could take into account factors of convenience. In cases involving the *St. Pierre* test of vexation and oppression, however, also discussed above, such a consideration was limited to the extent that it constituted an abuse of process. Under the new appropriate forum test, a judge considers all the factors that make one forum more appropriate than another, including, inter alia, convenience, vexation and oppression.

Justice Brennan considered that the grounds for granting a stay should be "grave and narrowly confined".¹¹¹ His fundamental premise was that access to the court's jurisdiction should not be prejudiced where that jurisdiction is "regularly invoked".¹¹² His Honour then applied the oppressive and vexatious tests stated in *St. Pierre*.¹¹³ He considered this to be the "best known statement of the established principle".¹¹⁴ His Honour preferred this test for a stay based on whether the action is vexatious or frivolous because he considered it to have the virtue of certainty, being based on an established line of authority. This is certainly correct, but it is respectfully submitted, that a more appropriate line of authority for service ex juris cases is that followed in *Earthwork & Quarries v Eastment & Sons Pty. Ltd.*¹¹⁵ Central to his

107. (1908) 6 CLR 194.

108. [1906] 1 KB 141 see supra.

109. *Spiliada Maritime Corporation v Cansulex Ltd.* [1987] 1 AC 460,464-465.

110. See discussion supra.

111. (1987-88) 165 CLR 179, 233.

112. *Ibid.* 233.

113. See supra.

114. (1987-1988) 165 CLR 197, 233.

115. [1966] VR 24 discussed above. See also *St. Pierre v South American Stores Ltd.* [1936] 1 KB 382 at 398.

Honour's criticism of contemporary English developments was the apparent arbitrariness to which the law would be subjected:

The new approach can offer little guidance to a judge in ascertaining what is "suitable" when the parties have opposing interests... . Once the test invokes a balancing of the interests of plaintiff and defendant, the court is inevitably involved in a discretionary conferring of an advantage on one party and a disadvantage on the other... . If the touchstone to guide the exercise of such a discretion is to be the "ends of justice", how can a court decide what is just in the particular case except by reference to the law which will govern the matter if it were tried in that court...? The justice which our courts dispense is justice according to our law; the courts cannot compare justice according to differing laws in order to say what satisfies the ends of justice in some abstract sense.¹¹⁶

His Honour thought that trial judges would be left without guidance as to when a stay is appropriate. Thus the exercise of justice would be premised on nothing more than the discretion of a judge. This, his Honour thought, not acceptable. He preferred the position represented by the maxim — "That system of law is best, which leaves least to the discretion of the judge — that judge the best, who relies least on his own opinion."¹¹⁷

Like Justice Brennan, his Honour also settled on the test in *St Pierre* as enunciating the present law in Australia. In this regard, he aligned his views with those adopted by the High Court in *Maritime Insurance Co*. The breadth of the tests for a stay on the basis of Forum Non Conveniens used in the United States and Scotland, Justice Deane thought, made them inappropriate for Australia.¹¹⁸ His Honour noted that the U.S. approach has been to see the doctrine as primarily concerned with convenience, forum shopping and the workload of the courts. He contrasted these considerations with the more limited considerations in England. His Honour concluded that if a broader approach was warranted it should be limited to the English test stated in *Spiliada*. The *policy* considerations, he thought, did not all point in one direction. He referred to considerations of court administration and efficiency, convenience to witnesses, costs, judicial workloads, delay, international comity and private convenience. Some of these policy considerations were not of a kind which Australian judges would consider in determining principles of law, he observed. But surely it is, however, this very task that they are now obliged to consider in a number of other contexts?¹¹⁹

The interest in public convenience, he did not think, was such that the small number of actions that would be determined on the basis of the old test would imperil that convenience. He further considered comity to be difficult to assess. Although his Honour remained committed to the traditional test of oppression and vexation, he proposed a limited expansion of it through a restatement which would appear to admit the possible future development of the test. He said:

For the reasons which I have explained, that test is whether a continuation of the proceedings would be vexatious and oppressive by reason of the inappropriateness of the local court. ...that test will be satisfied if the defendant establishes that there is an available and appropriate tribunal in some other country and that the local court is a clearly inappropriate tribunal in all the circumstances.¹²⁰

In one sense this is a mere abbreviated statement of what is oppressive and vexatious. That is, where a forum is clearly inappropriate it must ipso facto, be oppressive and vexatious to

116. *Ibid.* 406.

117. "Optima est lex quae minimum relinquit arbitro iudicis, optimus iudex qui minimum sibi".

118. (1987-88) 165 CLR 197, 247-248.

119. See *infra*. re: cross-vesting legislation. Also provisions in Victorian Order 7, Rule 7.05 for a stay of an action commenced *ex juris* where, *inter alia*, "...Victoria is not a convenient forum for the trial of the proceeding."

120. (1987-1988) 165 CLR 197 at 251.

bring an action there. But matters of inappropriateness would appear to be broader than the traditional notions of oppression and vexation. Can matters of convenience be given great weight now in applying the traditional tests? The use of "inappropriate" is indeed only the negative of "appropriate". Although this may create a presumption that the domestic forum is "appropriate" until shown otherwise it does seem to permit the consideration of a broader range of factors than under the traditional test and would seem to imply that these additional factors may be given greater weight in determining if the forum is not inappropriate.

Justice Gaudron also declined to expand the test for a stay. Her decision was premised on a perception of different circumstances. Although England and Australia enjoy a common legal heritage, contemporary changes in English common law, she thought, may not suit Australian circumstances and therefore those English changes should be examined carefully to insure their suitability. Her Honour then noted the massive changes in the English position in light of its membership in the European Economic Community. This explained England's policy of judicial comity in preference to its past judicial chauvinism. Her Honour, however, did advance the power of Australian courts to stay in a limited sense. She adopted the "inappropriate forum" test of Deane J. She also posited the situation where under expanded conflict of law rules the case falls to be determined under foreign substantive law. Her Honour sought to confine this to a practical limited consideration by providing that the selected forum should not be seen as inappropriate where "it is fairly arguable that the substantive law of the forum is applicable in the determination of rights and liabilities of the parties."¹²¹ Thus applying the "inappropriate forum" test of Deane J., cases that may likely be governed by the substantive law of the forum are less likely to be deemed oppressive and vexatious.

In dissent, Justices Wilson and Toohey concluded that the doctrine of Forum Non Conveniens as stated in *Spiliada* should be a part of Australian law. In a joint judgment they considered the old test of *St. Pierre* as being rooted in nineteenth century circumstances. Developments in world trade, travel, and technology in the latter twentieth century had made the *St. Pierre* principle inappropriate. They aligned themselves with the views of Kirby J., of the New South Wales Court of Appeal, and held that the old test kept too tight a rein on the court. This limited its control over forum shopping, even in blatant cases. On the strength of these reasons, and in light of the apparent shift elsewhere in the common law world, they justified the adoption of Forum Non Conveniens and the concept of the appropriate forum. The justices concluded that once the appropriate forum is established, a stay of proceedings should follow unless there exists circumstances by reason of which justice requires that a stay should not be granted.¹²² Their Honours referred to two matters of significance in the operation of the doctrine: the relation of Forum Non Conveniens to Order 10 (Order 11 as used elsewhere in this paper) and the concept of the "ends of justice". As to the first point,

121. This consideration her Honour would place within the context of the inappropriate forum test posited by Deane J. She thought that the question of whether foreign substantive law applies to the case should not become a complicated pre-trial matter. (1987-88) 165 CLR 197,266.

122. The burden of proof in this regard rests with the plaintiff. The plaintiff argued that currency restrictions in Greece, personal expenses, and the need to use interpreters disadvantaged him. The first objection was resolved by the defendants undertaking to give security in New South Wales. The second point, their Honours felt did not carry much weight. The only disadvantage left was the use of interpreters and this they felt was insufficient to oust Greece as the appropriate forum.

they acknowledged that Order 10 (as it then was)¹²³ was discretionary and obliquely adopted the rationale of Lord Goff in *Spiliada* on the relationship between Forum Non Conveniens and Forum Conveniens. Their Honours, in dissent, also developed the concept of "the ends of justice". They observed that the initial onus on the defendant is to demonstrate that a more appropriate forum exists. The plaintiff must then persuade the court that the ends of justice would be more completely satisfied by refusing the stay. In this regard, evidence could be tendered to show that the plaintiff would be at a substantial judicial disadvantage. For example, through the non-application of particular mitigating legislation or other prejudice, a foreign litigant may not get substantial justice in another jurisdiction's courts.

Cases Subsequent to *Oceanic Sun Line*:

Oceanic Sun Line does not resolve the complexities of judicial discretion in limiting court access. Indeed, cases considering it have displayed a variety of responses which only demonstrate the need for a re-examination of the general question of the application of Forum Non Conveniens to Australian law. Chief Justice Malcolm of the Supreme Court of Western Australia considered the application of *Oceanic Sun Line* in *Freckmann v Pengendar Timur SDN BHD*.¹²⁴ Wallace and Brinsden JJ. concurred in his judgment. Therein the appellant challenged an order setting aside proceedings commenced under the Western Australian equivalent to Order 11 (Order 10).¹²⁵ This raised the question of the proper test to apply in determining a stay under Order 11. The Chief Justice did not follow the majority of the High Court in *Oceanic Sun Line*. He said:

In my opinion, it is apparent that although the majority of the High Court rejected the *Spiliada* approach of forum non conveniens they were not agreed on the test to be applied. The majority also spoke in terms of the jurisdiction "regularly invoked" and proceedings commenced "within jurisdiction" and applied the test laid down in *Maritime Insurance* where the jurisdiction had been invoked as of right to a case where the jurisdiction had been invoked as a matter of discretion on an ex parte application. The majority were not, however, agreed on the meaning of the test. With very great respect to the majority they appear, on the face of it, not to have considered the distinction between cases of a stay under O. 10 and cases of a stay where proceedings had been commenced as of right, particularly in regard to onus of proof.¹²⁶

His Honour then correctly, it is respectfully submitted, applied the test of Forum Conveniens used in *Hayel Seed Anam & Co. v Eastern Sea Freighters Pty. Ltd.*¹²⁷ and *Earthworks and Quarries v Eastment & Sons Pty. Ltd.*¹²⁸. His Honour focused on the question of who bore the onus of proving the stay was or was not justified. This he said had not been determined by *Oceanic Sun Line*. He held that the ultimate onus is on the plaintiff to show that the case is a proper one for service.¹²⁹ This his Honour thought was an approach

123. Pursuant to recent amendments to Order 10 different rules apply for service outside New South Wales, but inside Australia and service outside Australia. Pursuant to the new rules, leave is only needed when the service is outside Australia. Service in other parts of Australia may be effected under Rule 2 B(1). Where service is outside Australia, service may be effected without leave, but if the foreign defendant does not enter an appearance in time, then leave must be obtained before the plaintiff may proceed further. Amendment 209: Gaz.102 of 17 June 1988 p.3184 r. 3. The grounds for obtaining jurisdiction remain substantially the same as prior to the amendments.

124. [(1988) 94 FLR 312].

125. Order 10, rr1(1)(e)(i) R.S.C. 1971.

126. (1988) 94 FLR 312 at 328.

127. (1973) 7 SASR 200.

128. [1966] VR 24, discussed above.

129. His Honour acknowledged that an onus arose on the defendant if the plaintiff satisfied the initial onus, but this, it is submitted, is merely an evidentiary burden. The ultimate legal burden would appear on his view to ultimately always reside with the plaintiff, (1988) 94 FLR 312 at 329.

consistent with Wilson and Toohey JJ. in *Oceanic Sun Line*. Thus his Honour avoided the limitation of the majority in the High Court, by finding that although the doctrine of Forum Non Conveniens as stated in *Spiliada* had not been adopted by the High Court, nothing else had been specifically provided by the majority either. This allowed the application of the doctrine of Forum Conveniens which could be readily justified, as discussed above.

The majority of the New South Wales Court of Appeal did apply *Oceanic Sun Line* in another application to stay proceedings under the New South Wales equivalent to Order 11. In *Voth v Manildra Flour Mills Pty. Ltd. and another*¹³⁰ Chief Justice Gleeson followed the approach of the majority of the High Court and adopted a test drawing on the features of the oppressive and vexatious test and Deane J.'s expanded version of it. His Honour considered that the High Court had used an expanded notion of the expression "regularly invoked" jurisdiction to include not only ordinary jurisdiction, but also "exorbitant jurisdiction" and thus considered *Oceanic Sun Line* properly determined. McHugh J.A. (as he then was) held that *Oceanic Sun Line*, at the least, decided that Forum Non Conveniens was not a part of Australian law. He then resolved the issue by applying principles he thought appropriate in light of the judgments in *Oceanic Sun Line*, that is those expounded in *Maritime Insurance Co Ltd. v Geelong Harbor Trust Commissioners*.¹³¹ Justice Kirby dissented. He accepted the view that the law stated in *Spiliada* was not operative in Australia. He, however, considered the law to have moved beyond that stated in *Maritime Insurance Co. Ltd.* to the position of the "clearly inappropriate" forum test stated by Deane J. His Honour went further, however, towards advancing the "inappropriate forum" as not radically dissimilar in conception to the appropriate forum test of Forum Non Conveniens. He considered the inappropriate forum test different from the English appropriate forum test. In Australia the question was whether the jurisdiction ordinarily invoked was clearly inappropriate under Deane J.'s test. This he observed evidenced a bias to uphold Australian jurisdiction, lawfully invoked.

Thus a number of views are available to courts ruling on an application for a stay of proceedings under Order 11. The view of Brennan J. of oppression and vexation, the broader view of Deane J. of the "clearly inappropriate forum", the Forum Conveniens view affirmed in *Frickmann* or the view of *Spiliada*, which is clearly not yet part of the common law in Australia. As well the matter varies with the legislation in each jurisdiction. Victoria now has a Forum Conveniens component in its Order Seven, service ex juris provisions. New South Wales did not. Further, at the domestic level, some judges now have the discretion to transfer cases to other courts, inter alia, on the basis of the "appropriate forum". The situation is not hopelessly confused. It is, however, difficult to justify a multiplicity of tests, particularly in light of the position taken in the national cross-vesting legislation.

Domestic Litigation: Cross-Vesting of Jurisdiction and Forum Non Conveniens

Significant legislative changes have recently been introduced to the jurisdictional relationship of federal and state courts in Australia. As a consequence of problems with jurisdiction¹³², and within the context of an ongoing assessment of jurisdiction in

130. (1989) 15 NSWLR 513.

131. (1908) 6 CLR 194.

132. Jurisdiction over family law cases and Trade Practice matters have conflicted, permitting the split of a case between two courts. Conflict between two courts over a single controversy was a potential result. Jurisdiction over rights to family property in marital disputes are governed by s. 40 of the *Family Law Act 1975 (Cth.)*. However, it is also possible that such property could be subject to dispute with a third party in which case the general law would govern and jurisdiction could rest with the appropriate state Supreme Court as well as the Family Court. See for example — *In the Marriage of Prince* (1984) F.L.C. 91-501. Also the Australian Law Reform Commission's *Report on Matrimonial Property* (A.L.R.C.) 39.1987.

Australia¹³³, the Standing Committee of Attorneys-General recommended the passage of legislation designed to, inter alia, facilitate transfer of cases between different courts throughout the country. A series of uniform Acts, entitled *Jurisdiction of Courts (Cross-Vesting) Act 1987*, was passed by the state, territory and federal governments.¹³⁴ Each jurisdiction enacted the same legislation, *mutatis mutandis*. It was proclaimed on July 1, 1988. The Acts introduce a cross-vesting of jurisdiction between the state Supreme Courts, the Federal Courts and the Family Courts. Thus, it is now possible to have a matter heard in any of these courts, after a transfer order has been made in appropriate circumstances.¹³⁵

The Act, remarkably brief, has two primary components. First, the vesting of a particular court's jurisdiction in other enumerated courts and vice versa.¹³⁶ Second, the establishment of a mechanism for the transfer of cases between the enumerated classes of courts. It is the latter that engages judicial discretion in the exercise of jurisdiction and raises questions of when a matter should be transferred and on what basis. Transfer of proceedings is governed by Section Five in the various acts. It is sub-divided to permit transfers on the variety of grounds stipulated.¹³⁷ The grounds for a transfer are very broad. A case may be transferred where related proceedings occur in another court and it is "*more appropriate*" to hear the matter there. Alternatively, the matter may be transferred, notwithstanding no related proceedings exist, where the case essentially has greater connection to the other court and it is in the "*interests of justice*" to transfer it.¹³⁸ Finally, there is a plenary power for courts to transfer a case where it is "*otherwise in the interests of justice*".¹³⁹ The Act makes the transfer mandatory — "the first court shall transfer", but this assumes that the court has (a) found

133. 3. See the Constitutional Commission Advisory Committee on the Australian Judicial System Report (1987) and also Law Reform Commission, *Service and Execution of Process Report #40*. Canberra: Australian Government Publishing Service, 1987.

134. For a detailed consideration of aspects of the legislation see: D. Kovacs 'Cross Vesting of Jurisdiction — New Solutions or New Problems?' (1988) 16 Melbourne University Law Review 669. J. Crawford, K. Mason Q.C. 'The Cross-Vesting Scheme' (1988) 62 ALJ 328 G. Griffith, D. Rose, S. Gageler, 'Choice of Law in Cross-Vested Jurisdiction: A Reply to Kelly and Crawford' (1988) 62 ALJ 698. G. Griffith, D. Rose, S. Gageler, 'Further Aspects of the Cross-Vesting Scheme' (1988) 62 ALJ 1016, D. St.L. Kelly, J. Crawford, 'Choice of Law Under the Cross-Vesting Legislation' (1988) 62 ALJ 698.

135. The preamble to the Act outlines succinctly the objectives of the legislation:

"Whereas inconvenience and expenses have occasionally been caused to litigants by jurisdictional limitations in Federal, State and Territory Courts and whereas it is desirable —

a — to structure a system of cross-vesting of jurisdiction between those courts, without detracting from the existing jurisdiction of any court;

b — to structure the system in such a way as to ensure as far as practicable that proceedings concerning matters which, apart from this Act and any law of the Commonwealth or another state relating to cross-vesting of jurisdiction, would be entirely or substantially within the jurisdiction (other than any accrued jurisdiction) of the Federal Court or the Family Court or the jurisdiction of a Supreme Court of a State or Territory are instituted and determined in that court, whilst providing for the determination by one court of federal and state matters in appropriate circumstances.

c — if a proceeding is instituted in a court that is not the appropriate court, to provide a system under which the proceeding will be transferred to the appropriate court."

136. s. 4.

137. Section: 5(1) is typical of the provisions for transfer and governs transfers between a state Supreme Court and the Federal Court or the Family Court. Other subsections of Section 5 provide for transfer between State Supreme Court (s. 5(2)) and Family Courts and State Supreme Courts (s. 5(3)); Federal Court or Family Court to a state Supreme Court (s. 5(4)) and Federal and Family Court (s. 5(5)). There is also a class of federal cases that are narrowly considered in the scheme. See definition of "special Federal Matters" — s. 3(1) *Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)*. These include federal administrative law and some Trade Practices cases over which the Federal Court retains primary jurisdiction.

138. s. 5, 1 (b)(ii) A,B,&C.

139. s. 5 (1) (b)(iii).

that the other court is “more appropriate”, or (b) *inter alia*, that it is in the “interests of justice” that the matter be transferred.

These terms attract the exercise of tremendous judicial discretion from which there is no appeal.¹⁴⁰ Thus the present legislation elicits the very uncertainties and fears concerning the role of a judge in determining the plaintiff’s right of access to the court, which Justice Brennan sought to avoid in *Oceanic Sun Line* when he declined to expand the power to stay proceedings. The legislation raises the difficult question of ascertaining meanings for these vague phrases the “interests of justice” and “more appropriate [forum]” which are commonly found in the Forum Non Conveniens cases discussed above.

The Act Judicially Considered: *Bankinvest A.G. v Seabrook*

Questions of definition were considered by the New South Wales Court of Appeal in *Bankinvest A.G. v Seabrook and others*.¹⁴¹ The decision was rendered after the High Court’s judgment in *Oceanic Sun Line* and made particular reference to it and its relation to the scheme. It is clear that in New South Wales, at least, the principles articulated in *Spiliada* are applicable if not in cases with a non-Australian alternate forum, at least in cases with an inter-Australian alternate forum where the cross-vesting legislation is operative.

The facts in *Bankinvest* are particularly relevant since all three bases for transfer under the scheme were engaged. Bankinvest, a Swiss merchant bank, operating in Sydney, sued a number of unit holders of a Queensland trust on their guarantees to Bankinvest. It brought the action in the Supreme Court of New South Wales. In a counter-claim, the guarantors alleged they had entered the agreements as a result of fraud by promoters of the trust. They further alleged that the guarantees, violated provisions of the *Money Lenders Act 1916-1979 Qld.* and hence were void. That Act gave the Supreme Court of Queensland jurisdiction over matters arising pursuant to the Act. As well, another action was proceeding in the Supreme Court of Queensland involving some of the same parties and relevant issues.

The defendants sought to transfer the matter to the Supreme Court of Queensland. The question was referred to the New South Wales Court of Appeal by the trial judge, Justice Rogers. Sitting in the Court of Appeal, Justice Rogers A-J.A. then determined that the matter should be transferred to the Supreme Court of Queensland. Kirby P.J.A. and Street J.A. concurred in separate judgments.

Justice Rogers ordered the transfer on the basis that Queensland was the more “appropriate forum”. The concept of the “appropriate forum” and the “interests of justice” tests he distinguished from the concept of Forum Non Conveniens in the Common Law. His Honour said:

One consequence is that the principles of Forum Non Conveniens applied in circumstances where the competition is between an Australian and a non-Australian court, have no role to play in the resolution of application made under the legislation or its interpretation. Legislation prescribes the criteria whereby such applications are to be determined. The criteria are rather more specific in some respects, but in referring to the “interests of justice”, call for considerations of a more general kind than the judicially established rules for forum non conveniens. Professor Crawford has described the phrase “interests of justice” as a residual forum non conveniens test.¹⁴²

140. S:13(1).

141. (1988) 14 NSWLR 711.

142. *Ibid.* p.726.

His Honour dismissed the concept of onus as having any bearing on the determination of the appropriate forum and with it the notion that the scheme was not to affect traditional notions of the right to jurisdiction. In this, I suggest, he identifies the difference between a transfer application made under the cross-vesting scheme and an application for a stay based on Forum Non Conveniens. He contended that the only concern was where in the interests of justice the trial should take place. This was to be an administrative matter. Indeed this characterisation is consistent with the notion that the scheme is to further the aims of a unified national system of courts. It is to be distinguished from a Forum Non Conveniens application which determines not precisely where a trial will take place, but rather simply whether or not a trial will take place in the jurisdiction where the plaintiff seeks to bring the matter. In this characterisation as administrative, Street C.J. concurred with Justice Rogers.¹⁴³ He was concerned to ensure that the test for transfer remain simple and sought therefore to bar the application of the common law notion of Forum Non Conveniens.¹⁴⁴ Justice Kirby, who had rendered a major dissenting judgment in *Oceanic Sun Line* in the Court of Appeal decision, specifically reserved the question of the application of Forum Non Conveniens and the principles stated in *Spiliada*. He also reserved any view on the question of onus.¹⁴⁵ Justice Rogers, however, did address the relevance of the High Court decision in *Oceanic Sun Line*. He determined that the traditional approach of cases such as *Maritime Insurance Co. Ltd. v. Geelong Harbour Trust Commissioner* and *St. Pierre*, affirmed by the majority of the High Court, were clearly not relevant to transfer cases under the scheme:

Here the legislation works in terms to displace that "traditional approach". The very test in s. 5(2)(b)(i) is the proscribed "more appropriate". Even if, ultimately the accepted test for Forum Non Conveniens, in relation to non-Australian venues should remain the traditional approach described by Deane J., the Australian Parliaments have prescribed different criteria for determining a place for hearing within Australia.¹⁴⁶

In consequence, Justice Rogers considered *Spiliada* as relevant to the determination of a transfer question. His Honour settled on the notion of connecting factors and the natural forum as posited in *Spiliada* as a useful guide. He determined that the case should be transferred to the Supreme Court of Queensland.¹⁴⁷ His Honour concluded by considering the "interests of justice" as a separate head for transfer under ss. (iii) of the various subsections of section 5. He held that the section was "designed to provide a basis for a transfer in circumstances where the requirements of sub clauses (i) and (ii) are not satisfied".¹⁴⁸ His Honour suggested that the test was essentially that posited in *Spiliada*. As well, he noted the remarkable similarity of the language used in the legislative tests to that in Lord Goff's judgment in *Spiliada*:

143. *Ibid.* p.714.

144. *Ibid.* p.714.

145. *Ibid.* p.717.

146. *Ibid.* p.727.

147. His Honour examined the factors in favour of New South Wales and found them limited. The governing law was that of Queensland. The Queensland court, he felt would have a keener appreciation of the local practice of money lending and solicitors (an allegation of solicitor's negligence had been made). All the wrongs were alleged to have occurred in Queensland. On all of this the only connection with New South Wales was the residence of the plaintiff. Convenience was a relevant factor as well and this fell in favour of Queensland. The preponderance of witnesses, documents, and parties were in Queensland. The cost of the litigation would be lower in Queensland as a result. All these factors suggested Queensland.

148. *Ibid.* p.730.

I am not suggesting that the draftsman had the speech available when drafting the Act. However, quite obviously, both the House of Lords in *Spiliada* and the Parliaments enacting the cross-vesting legislation were responding to the same needs.¹⁴⁹

The concept of Forum Non Conveniens, Rogers A-J.A. held was subsumed within the provisions “interests of justice” in sub clause (iii). He distinguished Justice Brennan’s criticism of the *Spiliada* test in *Oceanic Sun Line* that the “interests of justice” were too uncertain. He said:

...they [the “interests of justice” test] have already, in effect, been made applicable in Australian courts in relation to transfers between Supreme Courts by the various Australian Parliaments. As this jurisdiction comes to be exercised more frequently and the courts better acquainted with the discretion conferred (if not before) it may be that the perception in *Oceanic* that the criteria are uncertain in content will undergo review.¹⁵⁰

In this confidence, he echoes the remarks of Lord Goff in *Spiliada*.¹⁵¹

There is thus in Australia a considerable diversity of application of the notion of the appropriate forum. Under the limited test of *St. Pierre*, the jurisprudence is established and authority for judicial discretion is limited. Under the broader tests enunciated in *Spiliada* there has developed a limited commonwealth case law illustrating the application of the expanded doctrine. If other courts adopt the position of Justice Rogers, the concept of Forum Non Conveniens may be operative despite the position taken to date by the High Court. To consider how an Australian Supreme Court might approach the concept of the “appropriate forum” or the most suitable forum in “the interests of justice” it is useful to consider cases from the United States. The test of what is an “appropriate forum”, though broader in the United States than in England, is not dissimilar. The U.S. experience may well demonstrate the direction of the expanding English law, given Lord Goff’s comments in *Spiliada* that the concept is continuing to expand and change.¹⁵² As well, and importantly, in the United States courts have considered the application of the doctrine in both the situation where the alternate court is not in the U.S. (i.e. — a truly foreign forum) and the situation where the alternate forum is in another U.S. jurisdiction. The latter is particularly relevant in the determination of the appropriate forum in cross-vesting cases.

Factors Considered in United States’ Transfer Applications

Forum Non Conveniens principles are not applicable in total to transfers of venue in the U.S. district courts. Section 1404 of the *United States Code (title 28 — Judiciary and Judicial Procedure)* provides, inter alia:

- (a) For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

149. *Ibid.* p.728.

150. *Ibid.* p.730.

151. [1987] 1 AC 460,484.

152. “...the law on this subject is still in a state of development...” [1987] 1 AC 460,473.

This provision is to be distinguished from Forum Non Conveniens in that the action is merely transferred and not stayed. It is thus similar to Australian cross-vesting provisions.¹⁵³

The United States Supreme Court has stated the purpose of the legislation is to prevent the waste of time, energy, and money and to protect litigants, witnesses and others from such wastes.¹⁵⁴ The transfer is regarded as administrative in nature, more a matter of "judicial housekeeping".¹⁵⁵ The U.S. Supreme Court has held that a lesser degree of inconvenience need be demonstrated to justify a transfer. In *Glick v Bradford*¹⁵⁶, Forum Non Conveniens was characterised as a harsh rule which should only be applied in rare cases such as those involving another nation's courts or a state's courts (i.e. — a non federal matter). U.S. courts have varied in their approaches to the application of Section 1404(a). The task has been described by one Judge of the second Circuit Court of Appeal as a "guess" at what is the proper forum.¹⁵⁷ The court's touchstones for guidance are the three factors mentioned in the section: the *convenience of parties*, *convenience of witnesses* and "*in the interests of justice*". These heads, particularly the third, are broad and vague. This is, however, appropriate since it permits the trial judge to exercise judgment without the restrictions of a rigid catalogue of limited factors. It is also significant, in the Australian context, since the "interests of justice" is precisely the same formulation as used in one of the heads in the Australian cross-vesting legislation.¹⁵⁸ Perhaps, not completely coincidentally, it is also an element in Lord Goff's test in *Spiliada*: "...the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice..."¹⁵⁹ The convenience of parties and witnesses is limited in scope. It allows for consideration of logistic factors relevant to the transfer application. Factors considered have included the distance of witnesses from the forum, the nature of witness testimony, the number of witnesses, the ability of parties to compel witnesses to attend particular forums, whether witnesses are willing to attend the particular forum, their residence, and the expertise of the witnesses.¹⁶⁰ Clearly the nature of witnesses' testimony is vital to a determination of situs. Where the applicant merely lists the number and location of

153. The legislation differs, however, from Australian cross-vesting legislation in that it merely transfers the action to another venue. It does not take the action out of the Federal Court system and place it in the state court system, a possibility that the Australian system admits. The section also should be distinguished from the Forum Non Conveniens applications in the courts of a single state. Where a state court determines that the state's courts are not appropriate the matter must simply be stayed. As well, it should be distinguished from a change of venue within the jurisdiction. For example, where a trial is simply transferred from a state court in one city in the state to the same courts in another city in the same state.

The general common law doctrine of Forum Non Conveniens in U.S. Federal Courts is limited by section 1404(a) U.S.C., but it is not completely excluded. Where the alternate forum is outside the United States, the section does not apply and the court must use the common law Forum Non Conveniens doctrine instead.

154. *Van Dusen v Barrack* (1964) 84 SC 805; 376 US 612.

155. *Norwood v Kirkpatrick* (1955) 349 US 29. Consistent with the concept of a mere change in courtrooms, the Supreme Court has also ruled that the court receiving the matter must apply the proper law that the transferring court would have applied, had it tried the case. Because a transfer does not involve staying the action, it has been held to be a more easily obtained order.

156. D.C.N.Y., 204 F. Supp. 300.

157. *Ford Motor Co. v Ryan* 182 F 2d 329 at 331.

158. For example — s. 5(1)(b)(ii)(C).

159. *Spiliada Maritime Corp. v Cansulex Ltd.* [1987] 1 AC 460 at 483.

160. 309 F Supp 1386. In *Charon v Great Northern Railway Co.* the fact that eleven of twelve witnesses lived in a town five hundred miles from the chosen forum was held a sufficient reason to transfer the trial to the location of the witnesses. By contrast the convenience of expert witnesses has been held to carry little weight in the determination. For example — *McCrystal v Barnwell County*, D.C.N.Y. (1978) 422 F Supp 219. Generally, this is sensible. Since most expert witnesses are paid for their testimony and attendance, their interest should be subordinate to that of other witnesses. In *Spiliada*, the location of expert witnesses was considered a significant factor in determining the appropriate forum.

the witnesses, the court remains uncertain as to the relevance and value of the witnesses. Thus courts have required applicants to provide a detailed precis of anticipated testimony.¹⁶¹ Consistent with this is the approach the courts have taken to the number of witnesses to be called. The mere fact that the majority of the witnesses are in one location does not, ipso facto, make that location the appropriate forum.¹⁶² It is simply another factor and it should be considered in light of the relevance of the witnesses' testimony and their materiality.

U.S. courts have also considered relevant the fact that non-party witnesses would not be subject to subpoena in the particular district where the trial is sited as a factor warranting a transfer where that witness is material.¹⁶³ This consideration would be of little relevance inside Australia due to the provisions for service of subpoenas nation-wide.¹⁶⁴ The reviser's notes to section 1404(a) state that the "subsection (a) was drafted in accordance with the doctrine of Forum Non Conveniens, permitting transfer to a more convenient forum."¹⁶⁵ Thus the statements of guiding principle for Forum Non Conveniens and the considerations enumerated in *Gulf Oil v. Gilbert*¹⁶⁶ have been held relevant, although the burden on the applicant to justify the transfer is not as great as in a Forum Non Conveniens application. Thus the "interests of justice" test, which is used in the Australian cross-vesting legislation, may admit a great many of the considerations used by courts in the United States. It is possible to enumerate major classes of factors that the U.S. courts have considered and these are useful in the Australian context. The U.S. federal courts have considered inter alia, the following as relevant considerations¹⁶⁷:

- Access to proof.
- Location of evidence.
- Application of foreign law.
- Binding nature of a choice of forum clause.
- Court calendar demands.
- Convenience of counsel.
- Convenience of parties.
- Distance between the two courts involved.
- Expense of the litigation.
- Likelihood of a fair trial in the new venue.
- Government convenience.
- Quantum of damages available in the various forums.
- The relative ability of juries in the forums.
- Lis Alibi Pendens.
- Public interest.
- Changes in party convenience.
- Situs of the cause of the action.
- Situs of the Res.
- Situs of corporations involved.

161. *Popkin v Eastern Airlines Inc.* D.C.Pa. (1966) 253 F Supp 244.

162. *Paul Allison Inc. v Minikin Storage of Omaha Inc.* D.C. Okl. (1977) 436 F Supp 179.

163. *Horowitz v Southwest Forest Industries Inc.* D.C. Nev. (1985) 612 F Supp 444.

164. *Service and Execution of Process Act*, 1901.

165. U.S.C.A. 260.

166. 330 U.S. 501 — see discussion above.

167. See generally: *United States Code Annotated, 28 Judiciary and Judicial Procedure*, West Publishing Co., St. Paul, Minn.

- Likelihood of a speedy trial.
- Need for a view by the factfinder.
- Connection of the plaintiff to the forum.
- Prejudice to the plaintiff or defendant.
- Time in which the motion for transfer is made in the proceedings.
- Difficulty of applying the proper law in the transferee court.
- Capacity of plaintiff to sue in the transferee court.
- Residence of the parties.
- Oppressive or vexatious nature of the litigation.
- All other practical problems that may make trial difficult in a particular location.

Clearly the provisions operate in response to the exigencies of the individual case and ultimately, the cases turn on their own facts. U.S. courts have however, been characteristically broad in their approach to the provisions. They have allowed unfettered consideration of all factors in determining the appropriate forum. The dicta in *Bankinvest* would suggest a similar approach may be given to consideration of the same test of "interests of justice" and the exclusion of the doctrine of Forum Non Conveniens in the application of the cross-vesting legislation. Such an approach recommends itself for its practicality and its realism. The great fear in the introduction of additional discretion is the concomitant introduction of expensive and lengthy pre-trial motions on the issue of jurisdiction. The caveat of Street C.J. in *Bankinvest* to ensure that "... the day to day working of the cross-vesting scheme is not encumbered by an encrustation of judge made principles..."¹⁶⁸ is, it is submitted, prudent. Yet, the fear that such motions, whether inter-state or domestic — foreign, will become protracted will certainly not be realised if the motions are not permitted. It is only through the experience of arguing such issues and considering them regularly, surely, that both the Bench and the Bar become able to efficiently deal with them.

Conclusion

This paper has reviewed the law governing the discretion of a court to decline jurisdiction where an alternate forum exists. Through a comparison of the law in a number of jurisdictions it is apparent that both within and outside Australia the concept of the "appropriate forum" is regarded, in a number of applications, as the key to determining when a court should accept jurisdiction notwithstanding the existence of an alternate forum.

What constitutes an "appropriate forum" varies between jurisdictions and indeed the relevant factors may vary depending on whether the matter involves a mere transfer of jurisdiction as opposed to the more severe stay of proceedings. Courts in the United States are more practiced in the determination of the "appropriate forum". English law, however, now allows counsel great opportunity to explore the outer reaches of the factors that will determine the "appropriate forum". The introduction of the concept of the "appropriate forum" into Australian law is incomplete. Arguably the concept of Forum Conveniens from the common law operates in those jurisdictions which do not have convenience provisions in their ex juris legislation. Victoria's Order 7, by contrast, is clear in its provision of the convenient forum as a factor to be considered by a judge accepting jurisdiction in service ex juris cases. A similar position exists when the cross-vesting legislation operates. The concept of Forum Non Conveniens has not been adopted into Australian law. The judgments in *Oceanic Sun Line Shipping Co. v Fay* indicate, however, that the High Court itself is not of one mind on the question and the matter may receive further attention.¹⁶⁹ The opportunity

168. *Bankinvest AG v. Seabrook* 1988 14 NSWLR 711 at 714.

169. The High Court has given leave to appeal in *Voth v. Manildra Flour Mills Pty. Ltd. and another* (1989) 15 NSWLR 513.

still exists to simplify this area of the law by introducing a consistent policy in all instances involving an alternate forum, based on the discretion of the court to determine the appropriate forum. Much precedent for it now exists both within and without Australian law.