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Forum Non Conveniens *in Australia: A Comparative Analysis*

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Abstract: This paper critically examines the law of *forum non conveniens*, in particular the use of the 'clearly inappropriate forum' test in Australia, compared with the 'more appropriate forum' test applied in jurisdictions such as the UK and the US. It traces the development of the law in the UK in relation to *forum non conveniens*, including the English acceptance of the doctrine, and how it has been applied in various cases. Some criticism of the 'more appropriate forum' test is noted, and it is not recommended that the courts adopt the 'laundry list' approach evident in some US decisions, where up to 25 different factors are considered in assessing a *forum non conveniens* application. It considers the Australian 'clearly inappropriate forum' test, and concludes that the 'clearly inappropriate forum' test should no longer be followed in that it is unnecessarily parochial and is not consistent with other goals of the rules of private international law including comity. Links between Australia and the subject matter may well be tenuous. Confusion attends the application of the test in Australia at present, the court has rejected the English approach but claims to apply some of the factors mentioned in the English approach in the Australian test, and there is an undesirable schism between statutory rules applicable in domestic cases and the approach when the common law doctrine of *forum non conveniens* is used. The law regarding *forum non conveniens* should be harmonious with choice of law rules, and interest analysis can assist in formulating the desired approach to *forum non conveniens* applications.

Keywords: *forum non conveniens*, jurisdiction, decline of jurisdiction

I. Introduction

In a recent High Court of Australia decision,[1] two members[2] of the High Court indicated that they were at least willing to listen to a full argument that the present formulation of the *forum non conveniens* test should be reconsidered. In this paper, I will explore in more detail the current *forum non conveniens* doctrine as applied in Australian

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1 *Puttick* v *Tenon Ltd* (2008) 83 ALJR 93.

2 Heydon and Crennan JJ.

and overseas courts, before considering whether the law in Australia in this respect should be liberalized, as has occurred in other countries. It will be necessary to consider in some detail the test used, and how it has been applied, in other chosen jurisdictions. We can learn from the overseas experience, with a much greater volume of case law to test particular rules, in reviewing the Australian rule. It is beyond the scope of this paper to consider the grounds upon which jurisdiction is exercised by courts; my concern here is with the right to refuse to exercise jurisdiction that is otherwise properly asserted. However, links between decline of jurisdiction and choice of law are noted, and interest analysis discussed, and these aspects support the author's preferred test for the application of the doctrine.

II. Brief History of Jurisdiction in Great Britain

In order to fully appreciate the Australian position, it is necessary to trace some of the developments relating to jurisdiction as they relate to *forum non conveniens*. There was originally no need for the doctrine; trials were held in the jurisdiction in which the relevant events arose, due to the need for members of the jury, who then acted as witnesses, to have local actual knowledge of events.[3] As the role of the jury changed, so the need that a matter be heard only by courts in the jurisdiction in which the events occurred waned, and courts became more comfortable about hearing matters with more tenuous links with a jurisdiction.

At this time, however, the existence of jurisdiction required the presence of both parties. Defendants had a natural incentive to leave or remain outside of a jurisdiction in which a claim might be brought against them. This led to the introduction of the so-called mesne process, involving seizure of the defendant's property or even arrest in order to secure their presence in court.[4] Commentators at the time noted the trend of English residents fleeing the jurisdiction in order to avoid suit, and called for legislative action.[5] Legislative action resulted, with a list of three instances whereby a court could hear a matter involving a defendant absent from the jurisdiction who had been properly notified of the proceedings. This list grew to five and then to seven. A common call was the need for broad grounds in order to facilitate British commerce, not surprising in the Industrial Revolution

3 Henry Stephen, *A Treatise on the Principles of Pleading in Civil Actions: Comprising a Summary of the Whole Proceedings in a Suit at Law* (Stevens: London, 1895) 315–28; William Holdsworth, *A History of English Law*, Vol. 5 (Methuen: London, 1923) 117–19, 140–2; James Thayer, *Preliminary Treatise on Evidence at the Common Law* (Little, Brown: Boston, 1898) ch. 2.

4 See Michael Karayanni, 'The Myth and Reality of a Controversy: "Public Factors" and the Forum Non Conveniens Doctrine' (2003) 21 *Wisconsin International Law Journal* 327.

5 'Service of Common Law Process Abroad' (1844) 27 *Legal Observer* 387 at 389.

era.[6] The common feature was a meaningful connection between England and the controversy.

The requirement for a connection between the jurisdiction selected and the dispute has been replicated to various degrees in the US,[7] Canada[8] and Australia.[9]

On the other hand, writers such as Huber, Story and Dicey emphasized the territorial aspect of jurisdiction. Parliaments and courts did not have unlimited jurisdiction; if they were to assert such jurisdiction, it would be offensive to the sovereign authority of other nations. An example of this thinking occurs in *Ex Parte Blain*, where the court denied jurisdiction in respect of a foreigner's bankruptcy petition brought in England:

> The whole question is governed by the broad, general universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subjects of English jurisdiction. . . . It is not consistent with ordinary principles of justice or the comity of nations that the legislature of one country should call on the subject of another country to appear before its tribunals when he has never been within their jurisdiction.[10]

As a result, the law needed to reach some accommodation between the need, on the one hand, to deal with difficulties associated with defendants absent from the jurisdiction and, on the other hand, not to claim unlimited jurisdiction and in so doing offend the sovereignty and interests of other nations. This accommodation came to be the

6 William Charley, *The New System of Practice and Pleading Under the Supreme Court of Judicature Acts 1873, 1875, 1877, The Appellate Jurisdiction Act 1876 and the Rules of the Supreme Court*, 3rd edn (Waterlow: London, 1877) 415–36. The application of the common law doctrine of *forum non conveniens* in England is now excluded in cases where the court's jurisdiction is determined by European Council Regulation No. 44 (2001).

7 *International Shoe Co* v *Washington* 326 US 310 (1945).

8 *Morguard* v *De Savoye* (1990) 76 DLR (4th) 256, SCC; *Beals* v *Saldanha* [2003] 3 SCR 416; Uniform Court Jurisdiction and Proceedings Transfer Act (Uniform Law Conference of Canada).

9 Factors include that the defendant is ordinarily resident or domiciled in the jurisdiction, the litigation concerns activities that have occurred or will occur within the state, it concerns property within the state, the defendant has submitted to the jurisdiction, where local legislation applies to the dispute, or the defendant's participation will facilitate local litigation: see Mary Keyes, *Jurisdiction in International Litigation* (Federation Press: Sydney, 2005) 53–6.

10 (1879) 12 LR ChD 522, CA; 'all jurisdiction is properly territorial': *Sirdar Gurddyal Singh* v *Rajah of Faridkote* [1894] App Cas 670 at 683, PC; 'the general rule of law based upon the comity of nations is that an English writ has no efficacy and cannot be served in a foreign country': *Wilding* v *Bean* [1891] 1 QB 100 at 101–2, CA. The principle was recently recognized by members of the High Court: 'The considerations of comity and restraint, to which reference has so often been made in cases concerning service out of the jurisdiction, will often be of greatest relevance in considering questions of forum non conveniens': *Agar* v *Hyde* (2000) 201 CLR 552 at 571.

leave provisions providing for service of process outside of the jurisdiction with the court's permission, coupled with a right to stay proceedings based on the defendant's presence within the jurisdiction if the interests of justice required it, or *forum non conveniens*.

We can of course argue about the extent to which the balance between these principles is correct, or whether the growth of the doctrine of *forum non conveniens* discussed below has occurred because the rules of jurisdiction are not appropriately strict.[11] On the other hand, it can be argued that there is a need for some general rules of jurisdiction to provide certainty, balanced by principles that consider the specific circumstances of the case. The reality might be that it is not possible to come up with rules of jurisdiction that will serve the interests of justice in every case, and that there is a need, at least to some extent, for a doctrine such as *forum non conveniens* to deal with specific cases where, although according to the rules jurisdiction exists, it should not, because of the lack of strong connection with the jurisdiction, be exercised.

This difficulty has led some to suggest a merger of the principles to one enquiry rather than a two-stage process.[12] I concede the merit of such a suggestion but do not explore it in detail here. Others have

11 As Karayanni says, the rules of jurisdiction might reflect an emphasis on territoriality that is much less acceptable in the discipline today: 'Deeper reflection on the function of the *forum non conveniens* doctrine, whether as a vehicle for the proper allocation of public resources or as a cordon against forum shopping, suggests that there is something flawed with jurisdictional rules. Why have these rules afforded jurisdictional competency in the first place when the case is one where judicial resources will be spent on an unconnected dispute and in a case in which the plaintiff is engaging in outright forum shopping? . . . The answer to this peculiar phenomenon seems to lie in the flawed nature of the rules of most common law countries for determining jurisdictional competence, at least as far as personal jurisdiction is concerned. These rules are still dependent on a territorial nexus of one sort or another (e.g. presence, conclusion of a contract, commission of a tort) . . . As jurisdictional theory has moved from identifying in the territorial connection something central to the jurisdictional enquiry to stressing the fairness of jurisdictional competence, these territorial nexuses seemed to be outmoded. But since most common law jurisdictions have chosen to keep these territorial connections as guiding indications for acquiring jurisdiction, it seemed necessary to supplement the enquiry with an additional one to determine if jurisdiction is of a proper nature. In essence, the nexus of competency was built on a territorial basis, but the jurisdictional enquiry wanted to build on a fairness assessment': above n. 4 at 342–3.

12 Margaret Stewart, 'Forum Non Conveniens: A Doctrine in Search of a Role' (1986) 74 *California Law Review* 1259; David Robertson, 'The Federal Doctrine of Forum Non Conveniens: An Object Lesson in Uncontrolled Discretion' (1994) 29 *Texas International Law Journal* 353 at 378; 'Forum Non Conveniens: A Rather Fantastic Fiction' (1987) 103 *Law Quarterly Review* 398; A. Ehrenzweig, 'The Transient Rule of Personal Jurisdiction: The Power "Myth" and Forum Conveniens' (1956) 65 *Yale Law Journal* 289; Alex Albright, 'In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens' (1992) 71 *Texas Law Review* 351 at 353, and Judge Learned Hand (*Latimer* v *S/A Industries* 175 F. 2d 184 (2nd Cir, 1949). Karayanni claims the rules for determining jurisdiction in most common law countries are an anachronism, inappropriately reflecting the law's past reverence for territorialism, at the expense of a more sophisticated approach: Karayanni, above n. 4 at 342–3.

suggested that the principles of jurisdiction should be re-drawn, with possible models being the recent European model[13] or some other approach.[14] For the purposes of this paper, I will take the existing grounds of jurisdiction as a given, and not argue that they are too broad or too narrow, and my discussion of the *forum non conveniens* doctrine will take place in that context.

III. Development of the *Forum Non Conveniens* Doctrine in Great Britain

This stay order came to be recognized by Lord Kinnear in *Sim* v *Robinow* in the following terms:

> The plea 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 interests of all the parties and for the ends of justice.[15]

Perhaps the starting point in terms of modern development is the 1936 decision in *St Pierre* v *South American Stores (Gath and Chaves) Ltd*,[16] where Scott LJ held that a mere balance of convenience did not justify a stay of proceedings. A stay required evidence that (a) the continuance of the action would work an injustice because it would be vexatious or oppressive to the defendant or an abuse of process; and (b) the stay must not cause an injustice to the plaintiff.[17] At this time the court maintained that it was not applying the doctrine of *forum non conveniens*, which had Scottish origins, but was considering the general power of courts to stay proceedings that were properly brought within it. However, dissatisfaction began to appear with the approach in *St Pierre*, with Lordships in *The Atlantic Star* stating that the requirements of 'vexatiousness' or 'oppression' should be applied (more) liberally[18] in order to promote greater comity between nations and avoid parochialism.[19] The previous test was criticized on the basis that it promoted forum shopping.[20]

13 Council Regulation No. 864/2001.
14 Keyes, above n. 9 at 254–67.
15 (1892) 19 R 665 at 668.
16 [1936] 1 KB 382 at 398.
17 The defendant would need to prove both matters.
18 *Atlantic Star* v *Bona Spec* [1974] AC 436, Lord Reid, Lord Wilberforce and Lord Kilbrandon.
19 For example, Lord Reid referred to comments of Lord Denning MR in [1973] QB 364 at 381 that 'no one who comes to these courts asking for justice should come in vain . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner . . . You may call this "forum shopping" if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.' Lord Reid then added that 'that seems to recall the good old days, the passing of which many regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races . . . I think that the time is ripe for a re-examination of the rather insular doctrine to which I have referred.'
20 *Atlantic* Star, above n. 18 at 454, Lord Reid.

The test was re-formulated in 1978 to one asking whether there was another forum where justice could be done at substantially less inconvenience or expense, and whether the stay would deprive the plaintiff of a legitimate personal or juridical advantage if an English court heard the matter.[21] The oppressive or vexatious test fell out of favour. By 1984, English courts came to accept that the positions of English law and Scottish law on this issue were the same; in other words, the doctrine of *forum non conveniens* was accepted into English law.[22]

Further refinements occurred in *Spiliada Maritime Corporation* v *Cansulex Ltd*,[23] where the current common law approach was laid out. Lord Goff, with whom all other Lords concurred, laid out fundamental principles, including that a stay would only be granted on the basis of *forum non conveniens* if the court is satisfied that there is some other available forum having competent jurisdiction which is the appropriate forum. If the court is so satisfied, the plaintiff would then have to demonstrate why the interests of the parties and/or the ends of justice required the trial to be held in the original forum.[24] Several factors were relevant in assessing the stay application, including which place had the most 'real and substantial connection' to the action, the availability of witnesses, the governing law, the places where the parties live or carry on business, or the fact that the plaintiff will not obtain justice in the foreign jurisdiction.[25] The mere fact that the award of damages might be lower in the foreign jurisdiction is not

21 *MacShannon* v *Rockware Glass Ltd* [1978] AC 795.

22 *The Abidin Daver* [1984] AC 398 at 411.

23 [1987] AC 460.

24 For example, a limitation period had expired in the other possible forum, and there were good reasons based on past practice why the plaintiff did not think they needed to worry about that limitation period: *Tehrani* v *Secretary of State for the Home Department* [2007] 1 AC 521, HL; or that the plaintiff would be entitled to legal aid funding if the (chosen) British forum heard the matter, but would not be so entitled if the foreign forum heard the matter: *Connolly* v *R.T.Z. Corporation Plc and Another* [1998] AC 854, HL; or that the foreign forum lacked the infrastructure needed in order that the rule of law could be upheld: *Alberta Inc* v *Katanga Mining Ltd and Others* [2009] 1 BCLC 189, QB.

25 Above n. 23 at 476–8. These developments have been criticized on the basis that they replace an easy to apply test with a difficult balancing exercise: see A.G. Slater, 'Forum Non Conveniens: A View From the Shop Floor' (1988) 104 *Law Quarterly Review* 554 at 569. It should be noted that these issues can arise in two separate situations: either where the jurisdiction of the English courts is invoked as of right, for example the defendant was present or remains present in the jurisdiction and was properly served; in such cases the defendant may raise *forum non conveniens* as a defence; on the other hand, where the plaintiff seeks the leave necessary to effect service pursuant to Order 11 of the Rules of the Supreme Court, the plaintiff will need to establish that England is a *forum conveniens*. Similar principles are applied in the cases, though in the former case, the (initial) burden of proof is on the defendant, while in the latter case, the burden is on the plaintiff. In this respect, the court in *Spiliada* overruled past practice whereby a stricter approach was taken to *forum non conveniens* actions than *forum conveniens* actions: *St Pierre*, above n. 16 at 398.

sufficient of itself to show that the chosen forum is more appropriate.[26]

The decisions show that the nature of the factor giving the forum court jurisdiction is also relevant; for example, where assertion of jurisdiction depends on the fact that the tort was committed in the jurisdiction, the court has found that the forum court is *prima facie* the natural forum for the dispute to be heard,[27] whereas if the assertion of jurisdiction depends merely on the fact that the proper law is the law of the forum, it seems that the court is more willing to grant a stay on the basis that the assertion of jurisdiction is 'exorbitant'.[28]

These principles were re-affirmed in the most recent House of Lords decision of *Lubbe and Cape Plc*.[29] The case involved a number of plaintiffs suing the defendant, an English incorporated company, in respect of mining operations of its subsidiary companies in South Africa. It was alleged that the plaintiffs suffered asbestos-related illnesses as a result of these operations. The House of Lords noted that much of the documentation surrounding the extent to which the defendant had control and management, or knowledge of, the South African operations of its subsidiaries would be found in its offices in England; on the other hand, the 3,000-plus plaintiffs were in South Africa, and aspects of their condition could more conveniently be investigated in that country. Evidence differed as to the extent to which a South African law firm might be prepared to take on, and might have the resources to run, such a large case against the defendant, but the court concluded that, on the balance of the evidence, it was likely that no South African firm would take on such a large case, particularly on a contingency fee basis which was the only realistic basis on which the claim could be run. As a result, the court refused to stay the continuation of the English proceedings, rejecting the defendant's plea.

In so deciding, the House of Lords specifically rejected arguments about public interest or public policy. It decided that issues such as the expense and inconvenience to the administration of justice and other 'public policy' arguments were not relevant; relevant issues were confined to the interests of the parties in the particular case and the ends of justice in that particular matter. Courts were not equipped to make

26 *Spiliada*, above n. 23 at 482, Lord Goff; *Agbaje* v *Agbaje* [2009] All ER (D) 130, para. 51: 'The problem is . . . that whether the result is unjust may depend upon which end of the telescope one is using to find the answer. Injustice seen here for one side may be reflected by injustice as seen there for the other side' (Ward LJ, with whom Jackson LJ agreed).

27 *Berezovsky* v *Michaels and Others*; *Glouchkov* v *Michaels and Others* [2002] 2 All ER 986, HL.

28 *Amin Rasheed Shipping Corp* v *Kuwait Insurance Co* [1984] AC 50 at 65–6, HL; *Novus Aviation Ltd* v *Onus Air Tasimacilik AS* [2009] All ER (D) 275 (para. 53).

29 [2000] UKHL 41.

any broader enquiries.[30] In effect, this was a rejection of the American approach to such applications, as will be seen.

IV. Australian Position

There is evidence of initial adherence to the 'vexatious' or 'oppressive' tests,[31] but the High Court considered the matter in depth in the *Oceanic Sun Line Special Shipping Co Inc* v *Fay*,[32] a decision made after the *Spiliada* case. Unfortunately, three different approaches were taken in the case, making it unsatisfactory from a precedent point of view. It is necessary to consider these views in more detail.

i. Brennan J

Brennan J disagreed with the liberalization of the test which culminated in the *Spiliada* decision. He did not favour a test based on a balancing exercise or what the interests of justice required, because he said it would inevitably lead to considering the substantive law that would be applied in each court if the matter were heard there.[33] It was impossible, he said, for our courts to compare justice according to different laws in order to say which satisfied the ends of justice. He said the new English approach would be

> [i]nconsistent with what we have hitherto understood to be the function and the duty of courts; the function of enforcing rights and liabilities according to the law of the forum . . . and the duty to exercise jurisdiction which is regularly invoked unless the invocation of the jurisdiction is oppressive, vexatious or otherwise an abuse of process . . ..[34] If we are confident of the quality of justice administered in Australian courts, there is no reason why we should defer to other fora.[35]

Brennan J was in favour of applying the vexatious, oppressive and/or abuse of process test.

ii. Deane and Gaudron JJ

Deane J prefaced his views on *forum non conveniens* with a re-assertion of the view that a party who has regularly invoked the jurisdiction of a competent court had a *prima facie* right to insist upon its exercise. The ability to stay proceedings should thus be exercised

30 This is similar to the position reached by Mason CJ, Deane, Dawson and Gaudron JJ in *Voth* v *Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 561.

31 *Maritime Insurance Co Ltd* v *Geelong Harbour Trust Commissioners* (1908) 6 CLR 194; *Rutt* v *Metropolitan Underwriters (Australasia) Pty Ltd* [1929] SASR 426; *Telford Panel and Engineering Works Pty Ltd* v *Elder Smith Goldsborough Mort Ltd* [1969] VR 193.

32 (1988) 165 CLR 197.

33 This was at a time when, at least in matters of tort (which *Oceanic* involved), the law of the forum was applied as part of double actionability: see *Koop* v *Bebb* (1951) 84 CLR 629; *Anderson* v *Eric Anderson Radio and TV Pty Ltd* (1965) 114 CLR 20.

34 Above n. 32 at 238.

35 *Ibid.* at 240.

with extreme caution, where to continue with the matter in the chosen forum was so inappropriate that it would produce injustice, oppression or vexation of the defendant.[36] It was not a more general enquiry as to whether there was a more appropriate forum, or what the overall administration of justice might require. Deane J expressed agreement with the liberal views expressed in *The Atlantic Star* that oppression or vexation need not involve moral delinquency on the plaintiff's part.[37]

He concluded that a 'clearly inappropriate forum' test should be applied, to be met by the defendant, rather than a 'more appropriate forum' test. Usually the defendant would have to show the availability of another forum to whose jurisdiction they were amenable and which would entertain the claim. The continuation of proceedings in a clearly inappropriate forum would be oppressive or vexatious to the defendant.[38] Deane J stated that the factors referred to in *Spiliada* would be relevant in applying the doctrine he favoured.[39] Deane J argued that his view was able to be reconciled with the 'frivolous and vexatious' test while the *Spiliada* approach was not,[40] and that the High Court decision in *Maritime Insurance Co* (which had accepted the vexatious approach) was of long standing.[41] He believed that there were policy arguments both in favour of the *Spiliada* approach in terms of convenience of the parties and international comity, but also against in terms of increased uncertainty over where to litigate.[42]

In terms of the facts, Deane J weighed up factors relevant both to Greece and New South Wales, concluding that Greece was the 'most appropriate forum' in relation to a particular issue.[43]

Gaudron J adopted a similar approach to Deane J.[44] In considering the changes made to English law culminating in *Spiliada*, Gaudron J claimed that those developments might be explicable in terms of underlying changes to English governance, including membership of the (now) European Union, so that Australia should be careful in automatically adopting the changes made to the law in England.[45]

36 *Ibid.* at 244.
37 *Ibid.* at 247.
38 *Ibid.* at 248. Deane J made it clear that he did not accept the *Spiliada* 'more appropriate forum' test—'the mere fact that a tribunal in some other country would be a more appropriate forum for the particular proceeding does not necessarily mean that the local court is a clearly inappropriate one' (*ibid.* at 248).
39 *Ibid.* at 251.
40 *Ibid.* at 252.
41 *Ibid.* at 253.
42 *Ibid.* at 253–4.
43 *Ibid.* at 256.
44 She expressly adopted the 'clearly inappropriate forum' test (*ibid.* at 266).
45 Above n. 32 at 263.

iii. Wilson and Toohey JJ

These judges would have applied the *Spiliada* approach in Australia. In their view, English developments could not be explained in terms of that country's entry into the European Union:

> Rather, this century has witnessed such a transformation in communications and travel, coupled with a greater importance attaching to considerations of international comity as the nations of the world become more closely related to each other, as to render the *St Pierre* principle, fashioned as it was in the nineteenth century, inappropriate to modern conditions . . . The *St Pierre* principle places such a tight rein on the discretion of a court as to render it unable to deal justly with the problem of forum shopping.[46]

Their Honours applied the 'real and substantial connection' test to determine the more appropriate forum for the issues to be resolved,[47] leading them to dissent in the actual result by favouring a stay of proceedings in the case.

These divisions were also apparent in the other leading Australian case, *Voth* v *Manildra Flour Mills Pty Ltd*.[48] There five members of the High Court[49] accepted the approach of Deane and Gaudron JJ in *Oceanic Sun*, by approving of and applying the 'clearly inappropriate forum' test to *forum non conveniens* applications.[50] The joint reasons rejected the narrow traditional 'vexatious or oppressive' test, applied in *St Pierre* and by Brennan J in *Oceanic Sun*, because it could achieve extreme results where a chosen forum might have little or no connection with the parties and be an expensive place in which to litigate, but which nevertheless did not meet the definition of 'oppressive' or 'vexatious'—in other words, the test was too strict.

They also considered and rejected the *Spiliada* approach. While admitting that there was much to be said for it in terms of the balance of convenience, it could also lead to uncertainty in that often more than one jurisdiction might have claims to be 'more appropriate'. The joint reasons noted that the 'clearly inappropriate forum' test they favoured '[f]ocuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on

46 *Ibid.* at 212.
47 *Ibid.* at 217.
48 (1990) 171 CLR 538.
49 Mason CJ, Deane, Dawson and Gaudron JJ in a joint judgment, with Brennan J agreeing with the 'clearly inappropriate forum' test (*ibid.* at 572) and abandoning his view in *Oceanic*. Toohey J (dissenting) adhered to his position in *Oceanic*, that the 'more appropriate forum' test should be applied.
50 As the court found in *Spiliada*, the court found in *Voth* that a similar approach would be taken to cases where the defendant was served within the jurisdiction, and sought to have its exercise stayed as a matter of discretion, and cases where the plaintiff sought leave to effect service outside the jurisdiction. However, the onus of proof would be on the defendant in the former case and the plaintiff in the latter case.

the need to make a comparative judgment between the two forums'.[51]

The joint reasons concede that considerations relating to the suitability of the alternative forum are relevant to the examination of the appropriateness or inappropriateness of the selected forum, and the availability of relief in the foreign forum is a relevant factor in deciding whether or not the local forum is clearly inappropriate.

One of the aspects of the *Spiliada* approach drew criticism in the joint reasons. This was the comment by Lord Goff that in applying the 'more appropriate forum' test, the fact that the plaintiff would not obtain 'justice' in the foreign jurisdiction was a relevant factor. The joint reasons found that there were '[p]owerful policy considerations which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case'.[52]

The joint reasons concluded that the court was not in a position to evaluate the justice or relative merits of the substantive laws of the available fora. However, in applying the 'clearly inappropriate forum' test, the relevant connecting factors and legitimate personal or juridical advantage of which the court spoke in *Spiliada* were relevant.[53] They claimed that there would be little practical difference between the application of the 'clearly inappropriate forum' test and 'more appropriate forum' test.[54]

The joint reasons rejected arguments that they should adopt the *Spiliada* approach to improve consistency in approach in the common law world, or among a large number of countries. They accepted that if the *Spiliada* principle had commanded general acceptance, that would be a relevant factor in their decision. They then specifically referred to Canada and the US as applying different approaches to *Spiliada*. Hence, there was no international consensus on the approach to be applied.[55] The joint reasons also confirmed that the same approach should be taken to stay applications as to applications for leave to serve process outside the jurisdiction.[56] Further, they conceded it was possible that the Australian court might declare itself to

51 Above n. 48 at 558.

52 *Ibid.* at 559.

53 *Ibid.* at 565.

54 *Ibid.* at 558; again this is open to question, with Richard Garnett finding that in subsequent cases where the *Voth* test was applied, overwhelmingly the application for stay was refused. As he concludes: 'any test which professes almost to ignore one half of the equation (the foreign forum) in inter-jurisdictional conflicts is unlikely to yield the same results as one which takes into account, on a relatively equal basis, the claims of both jurisdictions': Richard Garnett, 'Stay of Proceedings in Australia: A Clearly Inappropriate Test?' (1999) 23 *Melbourne University Law Review* 30 at 36.

55 Above n. 48 at 560–1.

56 *Ibid.* at 563; and that in applying the 'clearly inappropriate forum' test, identification of the substantive law to be applied was an important factor, but not determinative of itself (*ibid.* at 566). Where the relevant court rules refer to a court's ability to stay proceedings on the basis that the court 'is an inappropriate

be a clearly inappropriate forum, although there was no other appropriate forum, and hence the plaintiff would be left without any possibility of a remedy.[57]

The High Court confirmed that the question of which law would apply to resolve the dispute was an important factor in considering *forum non conveniens* applications. It should not, however, be considered to the exclusion of all other factors.[58] This is consistent with the increasing willingness of the courts in Australia and elsewhere to apply foreign law.[59] Consistently with this approach, the court has taken into account, in assessing *forum non conveniens* applications, the fact that mandatory laws of the forum might apply to the dispute.[60]

In some subsequent decisions where more than one proceeding is commenced in more than one jurisdiction in relation to identical or substantially identical issues, the Australian courts have applied the question of whether the Australian proceedings are vexatious or oppressive.[61] The majority held that it was *prima facie* vexatious or oppressive to commence such proceedings if an action is already pending in relation to the same matters in issue.

one', the court has said that the same concepts and considerations inform, and in the same way, the test of 'inappropriate forum' in that context as those informing the 'clearly inappropriate forum' according to *Voth*: *Regie Nationale Renault* v *Zhang* (2002) 210 CLR 491 at 503, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; over the dissents of Kirby J who believed that where there was a difference between legislation and the common law, it was a mistake to presume the difference was unintended or mistaken (above n. 48 at 544), and Callinan J: 'the word "inappropriate" must have been deliberately chosen by the rule makers . . . had they intended a test of vexation and oppression then they could and should have said so' (above n. 48 at 565).

57 Above n. 48 at 558; this point was reiterated recently by the New South Wales Court of Appeal in *Garsec Pty Ltd* v *His Majesty The Sultan of Brunei* [2008] NSWCA 211; however, Spigelman CJ found the fact that the Australian forum was practically the only forum in which relief was available was 'generally entitled to significant weight' (*ibid.* at 686). In her empirical work, Mary Keyes found, of the cases studied, that of seven cases in which there was no alternative forum available or proven, a stay on *forum non conveniens* grounds was refused in each case; while where the defendant identified an alternative forum, the court granted the stay in 25 per cent of cases studied: Keyes, above n. 9 at 173.

58 Above n. 48 at 566; in her empirical study Mary Keyes found that identification of the substantive law was statistically significant in determining *forum non conveniens* applications: Keyes, above n. 9 at 170.

59 *Regie Nationale Renault* v *Zhang* (2002) 210 CLR 491 at 508.

60 *Akai* v *People's Insurance Co* (1996) 188 CLR 418, although in that case the court in so doing controversially overrode a jurisdiction agreement made by the parties.

61 *CSR Ltd* v *Cigna Insurance Ltd* (1997) 189 CLR 345; *Henry* v *Henry* (1996) 185 CLR 571. The court claimed in *CSR* that in such cases the 'clearly inappropriate forum' test is not to be used (at 400). Similar principles apply in the case of anti-suit injunctions as *forum non conveniens* applications: Reid Mortensen, 'Duty Free Forum Shopping: Disputing Venue in the Pacific' (2001) 32 *Victoria University of Wellington Law Review* 673.

Members of the High Court applied the 'oppressive/vexatious' test in *Regie Nationale Renault* v *Zhang*[62] while also quoting *Voth*.[63] In *Zhang*, the court also suggested that questions of public policy might be relevant to *forum non conveniens* applications.[64]

The High Court has confirmed that, in cases where the cross-vesting scheme is relevant, different principles apply:[65]

> In the context of the cross-vesting Act, one is not concerned with the problem of a court, with a prima facie duty to exercise a jurisdiction that has been regularly invoked, asking whether it is justified in refusing to perform that duty. Rather, the court is required by statute to ensure that cases are heard in the forum dictated by the interests of justice . . . There is a statutory requirement to exercise the power of transfer whenever it appears that it is in the interests of justice that it should be exercised. It is not necessary that it should appear that the first court is a 'clearly inappropriate' forum. It is both necessary and sufficient that, in the interests of justice, the second court is more appropriate.[66]

The court confirmed that a weighing of considerations of cost, expense and inconvenience, required by the cross-vesting legislation, was a familiar task for courts.[67] In that case, a majority decided that the proceedings, commenced in New South Wales, should be transferred to South Australia. Relevant factors included the question of the applicable law; it reflected the legitimate expectations of the parties and the policy reflected in the cross-vesting legislation, and the witnesses would be mainly drawn from South Australia. Callinan J noted of the litigation in that case that it involved the

> sort of litigation which will inevitably be provoked whenever a legislature, by ambitious long-arm legislation, or a court by too expansive a view of its own powers, or the powers of another court of the same polity, encourages or assists plaintiffs to pursue claims in a non-natural forum.[68]

62 *Zhang*, above n. 59 at 521, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; see also *Dow Jones and Co Inc* v *Gutnick* (2002) 210 CLR 575.
63 Kirby J in dissent would have applied the *Spiliada* approach (*Zhang*, above n. 59 at 524). Callinan J stated that oppression/vexation should not be applied to the test (*ibid.* at 564), and that at least on these facts dealing with a state's civil procedure rules, the 'more appropriate forum' test should be applied.
64 'To the extent that the first limb of [the rule in *Phillips* v *Eyre*] was intended to operate as a technique of forum control, we should frankly recognise that the question is about public policy' (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) (*Zhang*, above n. 59 at 515). The joint reasons stated that if a question were to arise about whether public policy considerations direct that an action not be maintained in Australia, the question should be resolved as a preliminary issue on an application for a permanent stay.
65 *BHP Billiton Ltd* v *Schultz* (2004) 221 CLR 400.
66 *Ibid.* at 421, Gleeson CJ, McHugh and Heydon JJ (dissenting in the actual result).
67 *Ibid.* at 423, Gleeson CJ, McHugh and Heydon JJ.
68 *Ibid.* at 494.

V. American Authorities

The basis of jurisdiction was originally personal service within the jurisdiction,[69] to be supplemented by a minimum contacts approach in *International Shoe Co* v *Washington*.[70] In other words, the courts of a jurisdiction could assert jurisdiction over a dispute if there were some minimum contacts between the dispute and the jurisdiction such that the assertion of jurisdiction did not offend traditional notions of fair play or substantive justice.[71] A reasonableness standard has been added in international cases.[72] This trend is quite similar to the Canadian position, where presence within the jurisdiction has been supplemented by a 'real and substantial connection' test in relation to jurisdiction questions.[73]

Though there is some evidence of the application of *forum non conveniens* principles in early cases,[74] the current doctrine is often sourced to an influential article written by a lawyer in 1929,[75] which was adopted by the US Supreme Court in 1947 in its *Gulf Oil* v *Gilbert*[76] decision.

There a Virginian resident sued in a New York court a Pennsylvania corporation operating in Virginia, claiming negligence in relation to a

69 *Pennoyer* v *Neff* 95 US 714 (1877).

70 326 US 310 (1945); as applied in cases such as *Asahi Metal Industry Co* v *Superior Court of California* 480 US 102 (1987) where relevant factors were stated to include the burden on the defendant, interests of the forum state, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interests of the states in furthering substantive social policies.

71 See now the Third Restatement of Foreign Relations Law, which in respect of disputes with international aspects provides for a range of factors to be considered when an American court is asked to exercise jurisdiction, including the link of the activity to the territory of the regulatory state, connections between the state and those the regulation is designed to protect, the kind of activity to be regulated, existence of justified expectations that might be protected or hurt by the regulation, importance of the regulation to the international political, legal or economic system, the extent to which the regulation is consistent with the traditions of the international system, the extent to which another state may have an interest in regulation of the activity, and the likelihood of conflict with regulation of another state: Restatement (Third) of the Foreign Relations Law of the United States (1987).

72 *Asahi*, above n. 70.

73 *Morguard Investments Ltd* v *De Savoye* [1990] 3 SCR 1077; s. 10 of the Uniform Court Jurisdiction and Proceedings Transfer Act; see Tanya Monestier, 'A "Real and Substantial Mess": The Law of Jurisdiction in Canada' (2008) 33 *Queen's Law Journal* 179.

74 See for example *Willendson* v *Forsoket* 29 F. Cas 1283 at 1284 (D. Pa. 1801) (No. 17,682); however, generally the *judex tenetur impertiri judicium suum* approach was favoured in early cases, that a court with jurisdiction over a case was bound to decide it: see for example Chief Justice Marshall in *Cohens* v *Virginia* 19 US (6 Wheat.) 264 at 404 (1821).

75 Paxton Blair, 'The Doctrine of Forum Non Conveniens in Anglo-American Law' (1929) 29 *Columbia Law Review* 1.

76 *Gulf Oil Corp* v *Gilbert* 330 US 501 (1947); most states have adopted this approach to *forum non conveniens* but not all: David Robertson and Paula Speck, 'Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions' (1990) 68 *Texas Law Review* 937 at 950–1.

fire in the plaintiff's Virginian premises. The defendant sought a stay of the proceedings on the basis of *forum non conveniens*, and eventually the Supreme Court found that a stay should have been given. The court started with the position that unless the balance was strongly in favour of the defendant, a plaintiff's choice of forum should not be disturbed lightly. It provided a list of factors relevant to the decision:

(a) private interests of the litigants: relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining the attendance of willing witnesses; the possibility of view of premises if appropriate; the enforceability of any judgment obtained; and all other practical problems that would make trial of a case easy, expeditious and inexpensive;
(b) public interest factors such as the administrative difficulties associated with congested court centres and the existence of jury duty might suggest that it not be imposed on a community with little relation to the litigation; there is good reason to hold a trial in the view of those to whom the case most closely touches, and a local interest in having localized controversies at home; the applicable law was also a relevant factor.[77]

The plaintiff's choice of forum should rarely be disturbed, but the plaintiff could not vex, harass or oppress the defendant with a choice not necessary to the case. There is an aspect of proportionality applied when considering the plaintiff's convenience as against the extent to which proceedings in the forum of choice would oppress or vex the defendant.[78]

In 1948, the US Code was introduced, relevantly providing in section 1404(a) of Title 28 for the transfer of proceedings from one American court to another, for the convenience of the parties and witnesses, and the interests of justice. This provision has been widely used, and has had the practical effect that the common law rules of *forum non conveniens* now only apply in the US to international cases.[79] It is sometimes said that the introduction of this Code helped

77 The majority also found that the doctrine is only considered where jurisdiction to hear the matter exists, a principle overturned recently in *Sinochem International Co* v *Malaysia International Shipping Corp* 127 S Ct 1184 (2007); see J. Stanton Hill, 'Towards Global Convenience, Fairness and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts' (2008) 41 *Vanderbilt Journal of Transnational Law* 1177.

78 *Gulf Oil*, above n. 76 at 508–9.

79 It is easier to obtain a transfer pursuant to the Code than a stay pursuant to *forum non conveniens*: *Norwood* v *Kirkpatrick* 349 US 29 (1955).

further liberalize the American courts' attitude to *forum non conveniens* in international cases.[80]

In subsequent cases, it has been confirmed that the doctrine would favour a stay where trial in the plaintiff's chosen forum would impose a heavy burden on the defendant or the court, and where the plaintiff cannot provide any specific reasons of convenience supporting their choice. However, the mere fact that the law in the other forum is less favourable to the plaintiff is not relevant.[81] In some cases, the fact that the plaintiff would receive a much reduced damages award if forced to litigate overseas has been taken into account,[82] but generally courts have insisted that something more is required, such as the influence of the military on the alternative forum,[83] or that the alternative forum would provide no remedy at all.[84]

Perhaps as a result of these legislative amendments, the next *forum non conveniens* case that reached the US Supreme Court was *Piper Aircraft Co* v *Reyno*. There Scottish plaintiffs sued defendants resident in Ohio and Pennsylvania arising from a plane crash in Scotland. The plaintiffs were alleging negligence in aspects of the construction of the plane. The court clarified that it was not appropriate to refuse a *forum non conveniens* application merely because the law applicable in the alternative forum was less generous to the plaintiff, unless the remedy was clearly inadequate or unsatisfactory. It confirmed that the principles relating to *forum non conveniens* were different from the requirements of section 1404, and more difficult to prove. While, consistently with *Gulf Oil*, the availability of an alternative forum was a relevant factor and the plaintiff's choice of forum was to be given respect, this 'respect' was of lesser importance when the plaintiff was a non-resident of the jurisdiction chosen. The court seemed to shift from an abuse of process approach to a balance of convenience or most suitable forum approach, compared with *Gulf Oil*. Despite

80 David Robertson, 'Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"' (1987) 103 *Law Quarterly Review* 398 at 404.

81 *Piper Aircraft Co* v *Reyno* (1981) 454 US 235; the court also noted in this case that the presumption in favour of the plaintiff had less weight when the plaintiff was a non-United States resident, and that *forum non conveniens* stays were subject to different principles than transfers between federal courts pursuant to 28 USC 1404(a), and principles applicable to transfers in such cases (including whether the applicable law changed) were not relevant in *forum non conveniens* applications; cf Robertson, above n. 80 at 417, who argues that the principles are virtually identical. The principles were applied also in *American Dredging Company* v *Miller* (1994) 510 US 443 and *Sinochemical International Co* v *Malaysia International Shipping Corp* 127 S Ct 1184 (2007). In the latter case, the court confirmed that an action could be dismissed on *forum non conveniens* grounds without considering whether *prima facie* jurisdiction exists.

82 *Lehman* v *Humphrey Cayman Ltd* 713 F. 2d 339 at 346 (8th Cir, 1983); *Irish National Insurance Co* v *Aer Lingus Teoranta* 739 F. 2d 90 (2nd Cir, 1984).

83 *Dawson* v *Compagnie des Bauxites de Guinée* 746 F. 2d 1466 (3rd Cir), aff'g 593 F. Supp 20 (D. Del 1984).

84 *Piper Aircraft Co* v *Reyno* 454 US 235 at 254 (1981).

trenchant criticism,[85] these continue to be the principles applied in *forum non conveniens* applications in the US.[86]

VI. Critique of Australian Approach

There are, with respect, many difficulties with the current Australian position in this area. I highlight the most important deficiencies, in my view, below.

i. Confusion as to Whether the 'Vexatious or Oppressive' Test is Still Applicable or Not

A reading of the Australian cases does not provide a clear answer to the question of whether the 'vexatious or oppressive' test for declining jurisdiction is still applicable or not. While, as indicated, the cases prior to *Oceanic* applied this test, and Brennan J in *Oceanic* continued to apply the test, Wilson and Toohey JJ in that case rejected the test. Deane J did not reject it, but connected it with his test of 'clearly inappropriate forum'—that proceedings continued in a clearly inappropriate forum would be oppressive or vexatious.

However, in *Voth* the joint reasons clearly present a different position, contrasting the 'clearly inappropriate forum' test with the 'traditional' test, by which they clearly are referring to the 'vexatious or oppressive' test. We know this because the joint reasons contain the following statement:

> The content of the 'clearly inappropriate forum' test is more expansive than the traditional test applied by Brennan J. The former test, unlike the latter, recognises that in some situations the continuation of an action in the selected forum, though not amounting to vexation or oppression or an abuse of process, will amount to injustice . . . the clearly inappropriate test is to be preferred to the traditional test.[87]

At this stage, it seemed that the 'vexatious or oppressive' test had been discarded by the High Court. However, in later cases involving proceedings in more than one jurisdiction, the court has again used

85 The Supreme Court of Washington refused to apply this aspect of the *Piper Aircraft* decision, claiming it 'raised concerns about xenophobia': *Myers* v *Boeing Co* 794 P. 2d 1272 at 1281 (Wash. 1990); see also Peter Carney, 'International Forum Non Conveniens: Section 1404.5: A Proposal in the Interest of Sovereignty, Comity and Individual Justice' (1996) 45 *American University Law Review* 415; Allan Stein, 'Forum Non Conveniens and the Redundancy of Court-Access Doctrine' (1985) 133 *University of Pennsylvania Law Review* 781; Martin Davies, 'Time to Change the Federal Forum Non Conveniens Analysis' (2003) 77 *Tulane Law Review* 309.

86 *American Dredging Co* v *Miller* 510 US 443 (1994); *Sinochem International Co* v *Malaysia International Shipping Corp* 127 S Ct 1184 (2007); stays are often granted on conditions, e.g. regarding submission to a foreign jurisdiction: John Bies, 'Conditioning Forum Non Conveniens' (2000) 67 *University of Chicago Law Review* 490.

87 *Voth*, above n. 48 at 556–7, Mason CJ, Deane, Dawson and Gaudron JJ.

the test of 'vexatious or oppressive'.[88] Further, in one case where this was the situation, *CSR Ltd* v *Cigna Insurance Australia Ltd*, the court said that in such cases the 'vexatious or oppressive' test, rather than the 'clearly inappropriate forum' test, should apply. This is contrary to the decision of Deane J in *Oceanic*, on which *Voth* was based, who said that proceedings in a clearly inappropriate forum would be oppressive or vexatious. He was able to reconcile his test with the 'traditional' test, while the joint reasons in *CSR* dismantle the 'clearly inappropriate forum' test from that context. The joint reasons in *CSR* do not provide reasons why, in that particular situation involving multiple proceedings in multiple jurisdictions, the 'clearly inappropriate forum' test is not satisfactory or even relevant. It is submitted that it would be an acceptable application of the 'clearly inappropriate forum' test to say that if proceedings on identical or substantially identical matters had already been commenced elsewhere, this fact may make a local forum clearly inappropriate. Instead, further complication has been introduced by arguably re-grafting the 'old' test on.

While some have argued that these cases must be developed as an express exception to the 'clearly inappropriate forum' test,[89] unfortunately since then the court has applied the 'vexatious or oppressive test' to cases not involving proceedings in more than one jurisdiction,[90] over the objections of dissentients.[91]

This has occurred in spite of the fact that in *Voth* the court adopted and applied the 'clearly inappropriate forum' test and did not ask whether the proceedings challenged were vexatious or oppressive. In fact the joint reasons specifically rejected the 'traditional' test—'since the traditional test is apt to produce such an extreme result, the "clearly inappropriate test" is to be preferred'.[92] Their comments at the previous page clearly show that when they refer to the 'traditional' test they are referring to the 'vexatious or oppressive' test:

> The content of the 'clearly inappropriate forum' test is more expansive than the traditional test applied by Brennan J. The former test, unlike the latter, recognises that in some situations the continuation of an action in the selected forum, though not amounting to vexation or oppression or an abuse of process in the strict sense, will amount to injustice . . .[93]

In justifying this approach of applying the 'vexatious/oppressive' test to such cases, the High Court in *CSR Ltd* v *Cigna Insurance Australia*

88 *CSR*, above n. 61 at 391, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; *Zhang*, above n. 59 at 521, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. It is possible that the words now have a different meaning than they did in the 'old' test but if this is the intention, it surely would have been preferable to use different words to avoid confusion.

89 Garnett, above n. 54 at 60.

90 *Zhang*, above n. 59 at 521, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

91 *Ibid*. Kirby J (at 524) and Callinan J (at 564).

92 *Ibid*. at 557.

93 *Ibid*. at 556.

Ltd quoted the joint reasons in *Voth* that the 'traditional power to stay proceedings . . . is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process'.[94] However, one problem with using this justification is that, two pages later, the joint reasons in *Voth* reject this 'traditional' approach in favour of the 'clearly inappropriate forum' test.[95] Perhaps the clearest evidence of the difference between the 'clearly inappropriate forum' test and the 'vexatious/oppressive' approach is that in the joint reasons there is a heading 'Comparison Between the Clearly Inappropriate Test and the Traditional Test',[96] as well as Brennan J's judgment in *Voth* where he expressly abandons his adoption of the 'vexatious/oppressive' test in favour of the 'clearly inappropriate forum' test.[97]

Further, in the *CSR* case the court was faced with parallel proceedings in different jurisdictions, where the issues partly differed. The court said that in such cases:

> The question is not whether the Australian court is a clearly inappropriate forum for the litigation of the issues involved in the Australian proceedings. Rather the question must be whether . . . the Australian proceedings are vexatious or oppressive in the *Voth* sense of those terms, namely that they are productive of serious and unjustified trouble and harassment, or seriously and unfairly burdensome, prejudicial or damaging.[98]

In *Henry* v *Henry*, where the court again sought to apply the 'clearly inappropriate forum' test, the joint reasons included these comments:

> If the orders of the foreign court will be recognised in Australia, it will be relevant to consider whether any orders may need to be enforced in other countries, and if so, the relative ease with which that can be done. As well, it will be relevant to consider which forum can provide more effectively for complete resolution of the matters involved in the parties' controversy . . . It will also be relevant to consider the connection of the parties and their marriage with each of the jurisdictions and to have regard to the issues on which relief might depend in those jurisdictions . . . It will be relevant to consider whether, having regard to their resources and their understanding of language, the parties are able to participate in the respective proceedings on an equal footing.[99]

94 *CSR*, above n. 61 at 391, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, quoting *Voth*, above n. 48 at 554. These comments were quoted in the joint reasons in *Zhang*, above n. 59 at 502.

95 *Voth*, above n. 48 at 556.

96 *Ibid.* at 556.

97 'As I think it is more important that a test be authoritatively settled than that I adhere to the test I prefer, and as any such test is judge-made law, I add my acceptance of the test proposed by the majority' (*ibid.* at 572). Brennan J also clearly believed the tests were different.

98 *CSR*, above n. 61 at 400–1.

99 *Henry*, above n. 61 at 592–3, Dawson, Gaudron, McHugh and Gummow JJ.

This reasoning arguably shows the difficulties with the 'clearly inappropriate forum' test and its focus on the jurisdiction chosen. The above passage suggests that a comparison must be undertaken, at least where proceedings are pending in more than one jurisdiction, of the relative claims of each jurisdiction. This is clearly a process more consonant with the 'more appropriate forum' test than the 'clearly inappropriate forum' test.[100]

It is submitted that the High Court in *Voth* was correct in rejecting the 'oppressive and vexatious' test as too strict in determining *forum non conveniens* questions, for the reasons it gave in that case, and for the reasons given by the British judges. Such concepts, as well as escaping easy definition as the judges have pointed out, set the bar for a stay at too high a level, allowing the possibility[101] of forum shopping and showing undue preference for the plaintiff's chosen forum. To the extent that they have pejorative overtones in relation to a plaintiff's choice, they are inappropriate—it may simply be that there is a 'better' forum in the sense of a better fit with the parties and issues involved in the case, without the need to cast aspersions on the plaintiff's choice. The test implies a presumption of the correctness of the plaintiff's choice, a presumption open to question and not applied in all such cases, as will be seen. The difficulty is that it has not consistently applied its own decision in *Voth* since then, with evidence of this concept creeping back into discussion about *forum non conveniens*. It is suggested that the High Court should re-affirm its rejection of the 'oppressive or vexatious' test.

ii. Are the Spiliada *Factors Relevant to the 'Clearly Inappropriate Forum' Test?*

The joint reasons in *Voth* contend that in the application of the 'clearly inappropriate forum' test, the discussion by Lord Goff in *Spiliada* of relevant connecting factors and a legitimate personal or juridical advantage were valuable[102] and should be utilized. It is submitted that this claim is highly contentious.

Earlier in the judgment, the joint reasons stated (correctly, with respect) that its preferred test focused on the advantages and disadvantages arising from a continuation of the proceedings in the

100 The point is also made by Garnett, above n. 54 at 53–4. Mary Keyes calls it 'incompatible with the fundamental basis of the forum non conveniens principle': Keyes, above n. 9 at 115.

101 The extent to which it is a reality depends on factors such as the choice of law rules used, the court's attitude to substance and procedure, public policy and renvoi. Some of these issues remain unsettled in Australia at the present time and the extent to which the High Court's re-use of the 'vexatious or oppressive' test will in fact promote forum shopping depends on its approach to these other factors.

102 *Voth*, above n. 48 at 564–5.

chosen forum rather than the need to make a comparative judgment between the two fora.[103]

Yet *Spiliada* calls for a balancing exercise which necessitates making a comparative judgment—which jurisdiction has the closer connection to the dispute, the parties, the evidence etc., as well as any legitimate personal or juridical advantages to the plaintiff in litigating in the forum. The word 'advantage' clearly is a relative one, calling for a comparison between at least two things. It seems unreal to claim that this process does not involve a comparative judgment when clearly it does, and not surprisingly, these claims have been criticized by leading commentators.[104]

It is submitted to be unduly narrow to focus, as *Voth* does, only on the inappropriateness or otherwise of the chosen forum. Richard Garnett criticizes the *Voth* approach as myopic, focusing only on the appropriateness of the local forum, while ignoring the claims of a foreign forum:[105]

> The High Court may well decide to depart from *Voth* completely in the near future, due to a realisation that its principles are too rigid and narrow to deal with the variety of situations that can arise in transnational disputes. In particular, it may be argued that a test which states that interjurisdictional disputes should be resolved only by focusing upon the appropriateness of the local forum is excessively myopic. Surely the claim of a foreign jurisdiction to trial of a matter is entitled to recognition which is at least equal to that of the forum and any decision on the place of litigation which fails to accord this will serve only to foster a lack of respect and disharmony between courts . . . Domestic courts can no longer see themselves as only having a responsibility to develop the law of a particular country. Now, with the expansion of international trade and commerce, they must act as part of an integrated global network of adjudication. It is submitted that the adoption of the more appropriate forum test in Australia would better accord with this objective.

The author agrees with these comments, and they give the lie to any claim that the *Spiliada* balancing factors are somehow to be used in the application of the 'clearly inappropriate forum' test.

103 *Ibid.* at 558; this feature is also noted by Richard Garnett: 'the clearly inappropriate forum test focuses *only* [emphasis added] upon the suitability of the local jurisdiction': Garnett, above n. 54 at 34; and by Mary Keyes, '*Voth* . . . makes it plain that the principle of *forum non conveniens* should not involve a comparative evaluation' (Keyes, above n. 9 at 107).

104 As Mary Keyes says, 'it is difficult to see why Deane J [in *Oceanic*] thought that factors relevant to a balancing exercise concerned with identifying connections to a number of forums, with a view to determining on balance which forum is more appropriate, could be relevant to deciding whether the local forum is clearly inappropriate': Keyes, above n. 9 at 104. She concludes that there are major differences between the test the High Court claims it is applying and what it is actually doing in *forum non conveniens* cases, finding the manner of the High Court's approach 'alarming' (*ibid.* at 138).

105 Garnett, above n. 54 at 64.

Given this unsatisfactory test, it is not surprising that in subsequent cases a different approach has been taken. In *Henry* v *Henry*, the court clearly engaged in a comparison of the appropriateness of two possible fora—in its own words:

> it will be relevant to consider which forum can provide more effectively for complete resolution of the matters involved in the parties' controversy . . . It will be relevant to consider the connection of the parties and their marriage to each of the jurisdictions and to have regard to the issues on which relief might depend in those jurisdictions.[106]

The High Court at least acknowledged the apparent contradiction between its comments and that of *Voth*, with a footnote of the judgment stating: 'note, however, the statement in *Voth* to the effect that Australian courts should not concern themselves with an assessment of the comparative procedural or other claims of the foreign forum'.[107]

No attempt is made to reconcile the apparently contradictory positions, and this may be because it is not possible to do so. The High Court must be given credit for expressly acknowledging the inconsistency, but arguably should now act to address it by discarding the 'clearly inappropriate' test in *Voth*. Arguments that a different test applies when there are proceedings on foot elsewhere are not convincing—such a situation could be dealt with through *lis alibi pendens*, and it is not clear at the level of principle why a different legal test is necessary to considering stays, depending on whether proceedings have or have not been commenced elsewhere. It is submitted that it is possible to develop one test to deal with both possibilities—for example, to apply a test of 'more appropriate forum', recognizing that the fact that proceedings have in fact been commenced elsewhere is evidence of the existence of a more appropriate forum.

iii. The 'Clearly Inappropriate Forum' Test Could Work Injustice

Let's consider some real life factual examples that perhaps highlight the potential of the 'clearly inappropriate forum' test to work injustice in practice. Take, for example, the facts in *Abdullahi* v *Pfizer Inc*,[108] where the Nigerian plaintiffs claimed they suffered injuries in Nigeria due to drug trials carried out by the defendant (a US resident company) in Nigeria. The evidence suggested that the Nigerian courts were affected by corruption, inefficiency, delay and understaffing, and that they had no interest in the outcome of the case. Let's assume now that Pfizer was an Australian resident, and the action was commenced in Australia. It is submitted that it would be wrong for an Australian court, in assessing any *forum non conveniens* application, not to take

106 *Henry*, above n. 61 at 592.
107 *Ibid*.
108 77 F. App'x 48 (2nd Cir, 2003).

into account the situation of the prime alternative forum, namely Nigeria, with its attendant difficulties described above. Yet this is what the clearly inappropriate forum, with its focus on the chosen forum rather than a consideration of any alternative fora, would require.[109]

The same thing may be observed in the *Lubbe*[110] litigation, where plaintiffs were allegedly injured in South Africa arising from business carried on by a British parent company. Action was commenced in Britain. In resolving the *forum non conveniens* application, the court considered the reality that no South African law firm would have the resources to undertake the litigation, given the large number of plaintiffs, their lack of funding, and the lack of legal aid type funding. Again, the 'clearly inappropriate forum' test would not take these matters into account if the action were commenced in Australia against an Australian parent company, involving the same circumstances. It is submitted that this would lead to an incomplete inquiry with potentially disastrous results for the plaintiffs involved.

It is interesting that Keyes' empirical study, admittedly from a limited base, found that of the cases studied, where there was no alternative forum available, the court on every occasion found the Australian forum to be not 'clearly inappropriate', while when an alternative forum was identified, the stay was granted in 25 per cent of cases.[111] This actual pattern is surely more consistent with the *Spiliada* approach, which considers the availability of an alternative forum as relevant to a stay application, than the *Voth* approach, which states that such a factor is not relevant. While wary of the dangers of generalizing from a small sample size, this might suggest that although the *Voth* test does not call for a comparison of fora or assessment of the relative merits of each, the judges are in effect conducting this *Spiliada*-like comparison (such a comparison being on the record in *Henry* and *Akai*, perhaps implicitly in other cases) with a view to having the matter heard (somewhere), but they do so in spite of the *Voth* test rather than as a faithful application of it. This suggests that the test is in need of reform.

iv. Links With Australia May Well be Tenuous

Given that it is more difficult for a defendant to show that the chosen Australian forum is 'clearly inappropriate' than it is for them to show that there is another 'more appropriate forum', it is not surprising that the results have been that matters are heard in Australian courts although there is only a tenuous link with Australia. Examples include

109 Richard Garnett has also made the point: 'while the availability of an alternative forum and whether it would give the plaintiff adequate relief will be relevant to determining whether the local forum is clearly inappropriate, it [is] possible (according to the majority) that an Australian forum could conceivably be found to be "clearly inappropriate" even if no other forum [is] available to the plaintiff': Garnett, above n. 54 at 34–5.

110 *Lubbe and Cape Plc* [2000] UKHL 41.

111 Keyes, above n. 9 at 173.

Al-Ru Farm Pty Ltd v *Hedleys Humpers Ltd*,[112] where a local plaintiff was held to be able to sue a foreign shipper of goods; although the facts on which the cause of action was based occurred in England, it was likely that English law would apply, and almost all witnesses were based in England. The only apparent factor connecting the matter with Australia was that the goods were now here.

Further, in *Phosphate Co-operative Company of Australia Ltd* v *SGS Supervision Services Inc*,[113] an Australian importer of goods was able to sue for negligence in Australia a Canadian company for inspection of a ship that would have brought the goods to Australia. Canadian law would likely apply to the situation, and most of the significant evidence would come from there. In *WFM Motors Pty Ltd* v *Maydwell*,[114] the case involved a guarantee made in Hong Kong and to which Hong Kong law would likely apply. The court refused a stay from the matter continuing in a New South Wales court because the issues involved were 'very simple'.

One would have to doubt the extent to which Australia should be interested in the above litigation. All of them involved the application of foreign law, and most of the facts on which the claims were based were overseas, as was relevant evidence. Some might suggest that the courts were unduly concerned to assist an Australian plaintiff by allowing them a forum to sue here, despite the lack of any other real connection to this jurisdiction.

v. Comity

It is trite to observe that one of the objectives of the rules of private international law is to achieve, as far as possible, the goal of comity among different nations.[115] The High Court itself has confirmed that:

> Considerations of comity and restraint, to which reference has so often been made in cases concerning service out of the jurisdiction, will often be of greatest relevance in considering questions of *forum non conveniens*.[116]

If comity is such an important factor in *forum non conveniens*, it is submitted that logic would suggest that the 'more appropriate forum' test is more consistent with comity than the 'clearly inappropriate

112 [1991] SASC 2721.
113 [1993] FCA 151.
114 Unreported, Supreme Court of New South Wales, 23 April 1993, Bryson J.
115 Comity has been defined as 'neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws': *Hilton* v *Guyot* 159 US 113 at 163–4 (1895).
116 *Agar*, above n. 10 at 571, Gaudron, McHugh, Gummow and Hayne JJ.

forum' test.[117] The 'more appropriate forum' test, by design, considers the claims of another jurisdiction to hear and determine a matter, while the 'clearly inappropriate forum' test, at least on its face, ignores the foreign jurisdiction and concentrates on the merits of the local forum. Lord Diplock in *The 'Abidin Daver'*, in reflecting on British developments including the liberalization evident in *MacShannon* v *Rockware Glass*, stated that 'judicial chauvinism has been replaced by judicial comity'.[118] Kirby J in *Regie Nationale Renault* v *Zhang* claimed the *Spiliada* approach was 'harmonious with the rules of public international law as well as with comity'.[119] Thus the principle of comity provides another reason why the current test used by the High Court of Australia should be discarded.

vi. Mismatch Between Statutory Court Rules and Common Law Rules

Further complexity arises because the rules of some Australian courts provide expressly for the power of courts to stay proceedings and set aside process on grounds similar to the common law doctrine of *forum non conveniens*. For example, the Victorian rule allows a stay where the state is not a 'convenient forum'.[120] The New South Wales rule allows a stay where the state is an 'inappropriate forum'.[121] Where the proceedings involve merely interstate elements and the cross-vesting provisions apply, the test for transfer is whether the other court is 'more appropriate'.[122]

117 Garnett says the current test 'fosters a lack of respect and disharmony between courts': Garnett, above n. 54 at 64. Reid Mortensen dismisses the High Court's current approach as 'notoriously parochial': 'Troublesome and Obscure: The Renewal of Renvoi in Australia' (2006) 2(1) *Journal of Private International Law* 1 at 26. He concluded that the *Voth* test was not 'adequately shaped' to deal with jurisdiction questions ('Duty Free Forum Shopping: Disputing Venue in the Pacific' (2001) 32 *Victoria University of Wellington Law Review* 673 at 678; 'Comity and Jurisdictional Restraint in Vanuatu' (2002) 33 *Victoria University of Wellington Law Review* 95).

118 [1984] AC 398 at 411.

119 *Zhang*, above n. 59 at 524.

120 Rule 7.05, Supreme Court (General Civil Procedure) Rules 2005 (Vic); the Northern Territory rule also refers to 'convenience': Rule 7.05, Supreme Court Rules (NT); in the Australian Capital Territory rules, there is provision for a Territory court to hear a matter transferred from elsewhere only if it is 'convenient': Regulation 3307, Court Procedure Rules 2006 (ACT).

121 Rule 8.2, Uniform Civil Procedure Rules 2005 (NSW).

122 Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) s. 5(1) and (2); see *Bankinvest AG* v *Seabrook* (1988) 14 NSWLR 711 at 728 where the court found that this implied a *Spiliada* approach. Relevant factors include the applicable law, forensic procedures in each jurisdiction, connections to the forum chosen, the balance of convenience to the parties and the court system generally: *Dawson* v *Baker* (1994) 120 ACTR 11 at 25. Refer for commentary to Keyes, above n. 9 at 245–8. See also the Service and Execution of Process Act 1992 (Cth) which allows stays where a court is satisfied that another court is 'appropriate' (s. 20(3)). Dicta of Gummow J in *BHP Billiton Limited* v *Schultz* considering both the cross-vesting scheme and the Service and Execution of Process Act 1992 (Cth) suggest that in both cases the plaintiff's choice is to be accorded no particular weight, and that the emphasis is on identifying the more appropriate forum: above n. 65 at 438–9.

While the precise tests differ across jurisdictions, it is clear that no jurisdiction has legislated for the application of the 'clearly inappropriate forum' test that the High Court applied in *Voth*. While the claim has been made that there is no substantive difference between the 'inappropriate forum' test and the 'clearly inappropriate forum' test,[123] other judges in *Zhang* dissented on this point, in terms with which the author agrees:

> Where a rule-maker, validly acting under statutory power, has spoken, the law appears in that text, not in prior judicial utterances. To the extent that there is a difference between the text and those utterances, it is a rudimentary mistake for the decision maker to start from the presumption that the difference is unintended or mistaken: indeed to start the task of expounding the applicable law anywhere else than in the text.[124]

It is submitted with respect that in the face of such a matrix of different provisions, the High Court could do either of two things:

(a) it should explain why there are good reasons for the continued application of its common law interpretation of *forum non conveniens* (in effect now confined largely to international cases) despite the different provisions in various rules of court as interpreted. This might be because it is argued that an interstate transfer of proceedings is easier and such an order less likely to be outcome-determinative than a stay on Australian proceedings in an international case, although the state provisions can also apply to proceedings with international elements.

The alternative, and to the author at least, the preferred, approach would be:

(b) to adapt the common law test of *forum non conveniens* to something more consistent with its statutory form, focusing on which is the more appropriate forum, and in so doing considering the issue of convenience in relative terms. The alternative a majority of the High Court has chosen, in effect to deny that there is a difference between the two, is, as has been pointed out, a very difficult argument to run when the words in the relevant statutes are considered.

Of course, there is significant precedent for developments in statutory law to cause a change in the direction of common law principles in

123 *Zhang*, above n. 59 at 503, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

124 *Ibid*. at 544, Kirby J; similarly Callinan J: 'the word "inappropriate" which appears in the relevant rule should not be burdened with the encrustations of "oppressiveness" and "vexatiousness" that have been attached to it in cases in which courts have decided an issue of forum non conveniens' (*ibid*. at 563–4).

many fields of law.[125] In the context of private international law, one is the Australian common law's earlier position that limitation periods were a question of procedure for the law of the forum,[126] later contradicted by statutory provision that limitation periods are substantive.[127] This position was then reflected in a changed common law position to the issue a short time later.[128]

VII. Critique of 'More Appropriate Forum' Standard

i. Generally

There has been substantial criticism of the 'more appropriate forum' standard, the broad approach taken in the UK and US (although, as has been pointed out, there are substantial differences between the approach of these two jurisdictions). Critics argue that the test is too uncertain, given the broad range of factors to be considered. They claim that the decision that a trial judge makes on the question of *forum non conveniens* is often outcome-determinative, because a plaintiff denied access to an American court often then drops their action, for one reason or another.[129] It is claimed the 'vexatious/ oppressive' test is easier to apply than a 'more appropriate forum' standard.[130] The comments of the US Supreme Court that a relevant factor in assessing a *forum non conveniens* application is the residency status of the plaintiff, specifically that it is more likely that an action by a foreign plaintiff will be stayed than that of a local plaintiff,[131] has attracted criticism that the principle is discriminatory,[132]

125 Two recent examples include the High Court decisions in *Commonwealth* v *Mewett* (1997) 191 CLR 471 (common law Crown immunities abolished by the Constitution) and *Lange* v *Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564 where the High Court found the common law of defamation needed to yield to the requirements of a statute (the Constitution in that case).

126 *McKain* v *R W Millar and Co (South Australia) Pty Ltd* (1991) 174 CLR 1.

127 Choice of Law (Limitation Periods) Act 1993 (NSW); Choice of Law (Limitation Periods) Act 1993 (Vic); Choice of Law (Limitation Periods) Act 1996 (Qld); Limitation of Actions Act 1936 (SA); Choice of Law (Limitation Periods) Act 1994 (WA); Limitation Act 1985 (ACT); Choice of Law (Limitation Periods) Act 1994 (NT).

128 *John Pfeiffer Pty Ltd* v *Rogerson* (2000) 203 CLR 503.

129 Robertson, above n. 80, after surveying lawyers acting for plaintiffs who lost out on a *forum non conveniens* application, found that almost half of the personal injuries cases and 27 per cent of the commercial cases were subsequently dropped.

130 Slater, above n. 25 at 569.

131 *Piper Aircraft*, above n. 81.

132 Alan Reed, 'To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages' (2001) 29 *Georgia Journal of International and Comparative Law* 31 at 60.

parochial[133] or racist.[134] It is said that by adopting such an approach, the American courts are 'implicitly condoning corporate malpractice, negligence and harmful conduct'.[135] The vast range of factors that a court can consider in relation to such applications might mean that there is inconsistency in application, standards and emphasis,[136] or what Stein describes as a 'crazy quilt of ad hoc, capricious and inconsistent decisions'.[137]

It is often suggested that American resident defendants are too easily able to avoid legal proceedings against them in the US by pleading *forum non conveniens*.[138] Exhibit A for this argument is often the *Union Carbide* case,[139] where lethal gas leaked from Union Carbide premises in India, killing more than 2,500 citizens. Many actions were commenced in US courts against Union Carbide's American parent company. This company resisted these actions by arguing *forum non conveniens*. The Indian legal system is notoriously slow, and it was unlikely that the plaintiffs would practically have been able to bring successful proceedings in an Indian court. The Indian Government in this case actually appeared at the *forum non conveniens* stage, arguing that an American court should hear the matter. However, the court claimed the connections with America were few, and outweighed by the Indian interest in applying Indian law and principles to an incident that occurred in that country. Almost all of the plaintiffs lived there, and almost all of the evidence (physical and through witnesses) was also located there. Indian law would apply to the claims. Galanter claims that the victims have still not received any remedy, 15 years after the events.[140] This leads some to suggest that

133 At least, as applied: Walter Heiser, 'Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions' (2005) 51 *Wayne Law Review* 1161 at 1189.

134 Peter Prince, 'Bhopal, Bougainville and Tedi: Why Australia's Forum Non Conveniens Approach is Better' (1998) 47 *International and Comparative Law Quarterly* 573 at 573.

135 Reed, above n. 132 at 60. He suggests that American multinationals gravitate to underdeveloped countries without regulatory infrastructure to 'deal with the dumping of harmful products' (*ibid.* at 63).

136 Elizabeth Lear, 'Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power' (2006) 91 *Iowa Law Review* 1147 at 1156; Davies, above n. 85 at 351; Robertson, above n. 129 at 414.

137 Stein, above n. 85 at 785.

138 Reed, above n. 132; Leah Nico, 'From Local to Global: Reform of Forum Non Conveniens Needed to Ensure Justice in the Era of Globalisation' (2005) 11 *South Western Journal of Law and Trade in the Americas* 345.

139 809 F. 2d 195 (2nd Cir, 1987).

140 Mark Galanter, 'Law's Elusive Promise: Learning from Bhopal' in Michael Likosky (ed.), *Transnational Legal Processes* (Butterworths: London, 2002) 172. He quotes the Chief Justice of India who, speaking weeks after the gas leak, said: 'These cases must be pursued in the US. It is the only hope these unfortunate people have.'

before granting the stay, the court must be convinced that a realistically adequate alternative forum is available.[141]

ii. The Factors Taken into Account

It has also been argued that the results of *forum non conveniens* applications are unpredictable, with up to 25 different factors being considered and weighed up, for example in the US. Decisions are difficult to reconcile.[142] Many have pointed out that some of the factors on which the court relied in *Piper*, particularly the public factors associated with witnesses and evidence, reflect a different era, and that with advances in technology and evidence law now, these factors should (at the very least) not play the important role they once did.[143] The High Court acknowledged the force of this argument in *Agar* v *Hyde*:

> Contemporary developments in communications and transport make the degree of inconvenience and annoyance to which a foreign defendant would be put, if brought into the courts of this jurisdiction, of a qualitatively different order to that which existed in 1885.[144]

Similarly, public interest factors such as court congestion which the court noted in *Gulf Oil* should not be taken into account. If the court is to conduct a comparative evaluation of fora which I favour, it would be difficult for it to assess the 'relative' congestion of the two courts chosen. Given great variation in the choice of law rules applied by different countries of the world, the forum used to resolve the dispute

141 Finity Jernigan, 'Forum Non Conveniens: Whose Convenience and Justice?' (2008) 86 *Texas Law Review* 1079 at 1080. In making this point, Jernigan cites the case of *Abdullahi* v *Pfizer Inc*, above n. 108, where the case involved a meningitis, measles and cholera epidemic in Nigeria where Pfizer was testing drugs on Nigerian residents. Nigerian plaintiffs sued Pfizer in New York but Pfizer successfully had the action stayed on *forum non conveniens* grounds. It was argued in this case that the Nigerian court system was not sufficiently independent and corruption-free to hear the matter. Jernigan reports that this assertion was backed by a US State Department report containing findings that Nigeria was not an adequate alternative forum. The Nigerian courts had disclaimed an interest in hearing the case, but the stay was nevertheless granted.

142 David Robertson, 'The Federal Doctrine of Forum Non Conveniens: An Object Lesson in Uncontrolled Discretion' (1994) 29 *Texas International Law Journal* 353 at 359; Hans Baade, 'Foreign Oil Disaster Litigation Prospects in the United States and the Mid-Atlantic Settlement Formula' (1989) 7 *Journal of Energy and Natural Resources Law* 125 at 140.

143 See for example Davies, above n. 85; Jacqueline Duval-Major, 'One Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff' (1992) 77 *Cornell Law Review* 650; Emily Derr, 'Striking a Better Public–Private Balance in Forum Non Conveniens' (2008) 93 *Cornell Law Review* 820 at 828; see also *Calavo Growers of California* v *Belgium* 632 F. 2d 963 at 969 (2nd Cir, 1980) (Newman J), and *Fitzgerald* v *Texaco Inc* 521 F. 2d 448 at 456 (Oakes J, dissenting). For example, Rule 44.1 of the Federal Rules of Civil Procedure allows the court to consider a range of materials in establishing the content of foreign law: see further Judge Milton Pollack, 'Proof of Foreign Law' (1978) 26 *American Journal of Comparative Law* 470; Judge Roger Miner, 'The Reception of Foreign Law in the US Federal Courts' (1995) 43 *American Journal of Comparative Law* 581.

144 *Agar*, above n. 10 at 571.

can make a great difference to the result achieved, particularly in those jurisdictions which place greater emphasis on the *lex fori* as the substantive law, interpret 'procedure' broadly, apply a wide view of 'public policy' as an exception to the proper law etc. The rights and responsibilities of the parties should not vary according to a single judge's assessment of whether the local courts are 'too' congested or not.

Lord Goff stated in *Spiliada* that in the application of the 'more appropriate forum' test, the fact that the plaintiff would not obtain 'justice' in the foreign jurisdiction was relevant. The High Court in *Voth* disagreed with this approach, concluding that there were powerful policy considerations why Australian courts should not pass judgment on the ability of another country to accord justice to the plaintiff.[145] Lord Diplock made a similar comment, in the context of a different country's procedural laws, referring to the

> [i]nvidious task of making a comparison of the relative efficiency of the civil law and common law procedures for the determination of disputed facts. In my opinion, it would have been wholly wrong for an English court, with quite inadequate experience of how it works in practice in a particular country, to condemn as inferior to that of our own country a system of procedure for the trial of issues of fact that has long been adopted by a large number of both developed and developing countries in the modern world.[146]

In this respect, I would agree with the High Court's comments. This has been a live debate in private international law, underlying much of the jurisprudence on the substance/procedure distinction, the choice of law rule in cases of international torts, and questions of public policy as an exception to the recognition of foreign law. Jurists have referred to the tendency in some cases for courts, particularly British courts, to believe that their brand of 'justice' was superior to that of others.[147] Lord Denning's famous dicta inviting forum shoppers to come to England, where their claims would be heard, for the 'quality of the goods and the speed of service'[148] comes to mind.

Lord Goff's suggestion of considering whether the plaintiff could get justice in the foreign jurisdiction begs the question—how is one to measure what 'justice' is? Is the yardstick to be what British law

145 *Voth*, above n. 48 at 559.
146 Above n. 28 at 67.
147 Lord Reid in *The Atlantic Star* [1974] AC 436, stating that Lord Denning's comments reflect the 'good old days' when British inhabitants felt an innate superiority over those who belonged to other races; Kirby J in *Pfeiffer* noted that the previous 'dominant position of Britain in the world also led to the temptation, not always resisted, to consider that British laws were superior to those of other lands' (above n. 128 at 547); see also Lord Wilberforce in *Chaplin* v *Boys* [1971] AC 356 at 392; *Tolofson* v *Jensen* [1994] 3 SCR 1022; and in the context of the substance/procedure distinction, Dixon CJ in *Maxwell* v *Murphy* (1957) 96 CLR 261 at 267 and Deane J in *Breavington* v *Godleman* (1988) 169 CLR 41 at 125.
148 [1973] QB 364 at 381.

would require? Is it a different standard? Of course, there is no commonly acceptable version of 'justice'; it is in the eye of the beholder. The risk with such a factor is that it could mask the forum court's preference for its own law to be applied in order to achieve 'justice', though it is conceded that its ability to enforce forum bias has been greatly constrained since the *Spiliada* decision by changes in choice of law rules and a redrawing of the substance/procedure divide. As Justice Cardozo famously stated, 'we are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home'.[149]

So, while the author essentially favours the multi-factor approach adopted in the UK and the US,[150] it is submitted that the list of relevant factors should not include an assessment of the relative merits of the likely outcome in another jurisdiction (provided the reality on the facts is that there is access to an independent and impartial tribunal). The ease of access to evidence/witnesses should not be given the significance it formerly had as a factor, due to technological advances. Nor should process issues such as docket congestion be relevant to such cases.

VIII. The Link Between Jurisdiction and Choice of Law

i. Acknowledgement of the Link

It is contended that the link between jurisdiction and choice of law issues needs to be more fully acknowledged. There has been some acknowledgement of this in the decisions, with the High Court conceding in its recent *forum non conveniens* jurisprudence that in the application of the 'clearly inappropriate forum' test, the question of the relevant law to be applied was an important, albeit not conclusive, factor.[151] The British decision in *Spiliada*, which has been applied ever since in that country and in other countries, included the question of the governing law as a relevant question in assessing *forum non conveniens* applications, as does the American *Piper Aircraft* decision, and the High Court admitted in *Voth* that the application of the Australian test would include the *Spiliada* factors.

Some academics have also argued for a recognition of the relationship between the two doctrines. In writing of the *Oceanic* case,

149 *Loucks* v *Standard Oil Co of New York* 120 NE 198 at 201 (1918).

150 Again, acknowledging that while the approach in these two jurisdictions is in some respects similar, in other respects there are substantial differences.

151 Justice Brennan also thought that the choice of law question was highly relevant to the *forum non conveniens* question: *Shaffer* v *Heitner* 433 US 186 at 225 (1978).

Adrian Briggs also links the two,[152] and suggests elsewhere that we should not consider separately questions of jurisdiction and choice of law.[153] Mortensen, in a critique of the High Court's adoption of the renvoi doctrine, concludes on the choice of law issue that:

> The key point is that, if the foreign court's decision deserves deference to the point that other local policies must comprehensively give way to it, then it is better that the claim be heard in the foreign court itself.[154]

While there has been limited acceptance of the link in the US, some lament the current weakness of the link,[155] identification of the proper law being just one factor in the American courts' typical[156] approach to questions of *forum non conveniens*. The comments of Spencer here are prescient:

> For a state to be able to dictate, through its laws, the substantive outcome of a suit suggests that the state has an interest in the matter sufficient to permit its laws to govern rather than those of another state. On what basis then can a jurisdictional doctrine dictate that this same state is not empowered to adjudicate the very dispute to which its law applies?[157]

Some advocate that a stronger link be drawn, in effect arguing that *forum non conveniens* decisions are/should be seen as choice of law decisions in disguise.[158] Others argue, alternatively, that choice of

152 'All in all the case reveals a noticeable level of preference for adjudication in, and according to, the domestic law of an Australian court': Adrian Briggs, 'Forum Non Conveniens in Australia' (1989) 105 *Law Quarterly Review* 200.

153 Adrian Briggs, 'In Praise and Defence of Renvoi' (1998) 47 *International and Comparative Law Quarterly* 877 at 878: 'even today we still look at choice of law and on jurisdiction as if each was self-contained and neither was coloured by the other', 'choice of law [is] a stepping stone to determining jurisdiction, not the other way around' (*ibid.* at 883).

154 Mortensen, above n. 117 at 25.

155 'The affinity between personal jurisdiction analysis and choice of law analysis—which gives great consideration to a state's interest in having its laws applied to a dispute—is one that the Supreme Court unfortunately has never endorsed': A. Benjamin Spencer, 'Jurisdiction to Adjudicate: A Revised Analysis' (2006) 73 *University of Chicago Law Review* 617 at 658; Russell Weintraub lamented that 'some of the most unfortunate statements in the jurisdictional decisions of the Supreme Court are those denying a relationship between jurisdiction and choice of law': 'Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change' (1984) 63 *Oregon Law Review* 485 at 525; Jernigan, above n. 141 at 1098.

156 Given that there is no one accepted *forum non conveniens* approach in the United States; while most states adopt an approach mapped out by the Supreme Court in *Piper* and other cases, it is not universal.

157 Spencer, above n. 155 at 659.

158 Stein, above n. 137 at 822; Paul Speck, 'Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul' (1987) 18 *Journal of Maritime Law and Commerce* 185 at 207.

law should be seen as an indicator of the appropriateness of a particular jurisdiction.[159]

ii. Interest Analysis is Relevant to Choice of Law; It is Also Relevant in Assessing **Forum Non Conveniens** *Applications*

One of the fundamental developments in American conflicts jurisprudence in recent times has been the acceptance of interest analysis.[160] In simple terms, the idea is that in judging which law should apply to a particular situation, the interest that a particular jurisdiction might have in the application of its law to the situation is relevant, and where more than one jurisdiction is interested, the strength of the interest, perhaps determined by 'connecting factors', is measured and determines the law chosen. In this analysis, the strength of the interest can be measured by the use of a range of connecting factors, familiar to anyone with a passing interest in torts conflicts jurisprudence, for example, in both the US[161] and the UK.[162] In other words, the existence of such connecting factors is not important merely as a box-ticking exercise, but as a manifestation of the interests that are relevant to the question of the proper law to be applied.[163] This connections approach is also evident in the rules applicable to choice of law in contract,[164] and in respect of trusts.[165]

159 Briggs, above n. 153 at 883. Briggs also finds that rules of jurisdiction should not be considered separately from rules on choice of law.

160 Brainerd Currie, 'Survival of Actions: Adjudication Versus Automation in the Conflict of Laws' (1957) 10 *Stanford Law Review* 205; *Selected Essays in the Conflict of Laws* (1963); Harold Korn, 'The Choice of Law Revolution: A Critique' (1983) 83 *Columbia Law Review* 772; Russell Weintraub, 'An Approach to Choice of Law That Focuses on Consequences' (1993) 56 *Alberta Law Review* 701.

161 For example, *Babcock* v *Jackson* (1963) 191 NE 2d 279; Restatement (Second) Conflict of Laws (1971) s. 145 to which a majority of states adhere.

162 The United Kingdom approach, exemplified in the Private International Law (Miscellaneous Provisions) Act 1995 (UK), is known as a proper law approach but considers a range of factors similar to those enumerated in the American Restatement, albeit as perhaps leading to an exception to the general rule that the *lex loci delicti* should apply in torts cases, rather than the American position where there is no starting presumption. The new Council Regulation 864/2007 also provides for this kind of flexibility, with the *prima facie* rule being that the law of the place of the wrong applies, subject to a consideration of connecting factors: Rome Regulation on the Law Applicable to Non-Contractual Obligations (Rome II).

163 Spencer, above n. 155 at 645. Spencer laments that 'the affinity between jurisdiction analysis and choice of law analysis—which gives greater consideration to a state's interest in having its laws applied to a dispute—is one that the Supreme Court has unfortunately never endorsed' (*ibid.* at 658); Harry Litman, 'Considerations of Choice of Law in the Doctrine of Forum Non Conveniens' (1986) 74 *California Law Review* 565; Luther McDougall III, 'Judicial Jurisdiction: From a Contacts to an Interest Analysis' (1982) 35 *Vanderbilt Law Review* 1; Spencer Waller, 'A Unified Theory of Transnational Procedure' (1993) 26 *Cornell International Law Journal* 101.

164 Rome Convention on the Law Applicable to Contractual Obligations (1980) (Rome I).

165 Hague Convention on the Law Applicable to Trusts and on their Recognition (1984).

While interest analysis has not been accepted per se in relation to jurisdiction questions, as it has in relation to choice of law questions, others have noted that the issues are (or should be recognized as) clearly related.[166] There are some examples of its use in relation to jurisdiction (including questions of assertion of jurisdiction as well as decline of jurisdiction otherwise available). These include:

(a) *McGee* v *International Life Insurance Co*,[167] where the Supreme Court relied on California's 'manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims' in deciding a *forum non conveniens* application;
(b) *World-Wide Volkswagen Corp* v *Woodson*,[168] where the court mentioned the interest of the interstate judicial system in obtaining efficient resolution of controversies, and the interest of several states in furthering their substantial social policies;
(c) In *Holmes* v *Syntex Laboratories, Inc*,[169] the California Supreme Court noted the state's regulatory interest 'in regulating the foreign marketing of defective products developed here' to assert jurisdiction;
(d) In *Mullane* the court referred to 'the interest of each state in providing means to close trusts that exist by grace of its laws . . . is so insistent and rooted in custom as to establish . . . the right of its courts to determine the interests of all claimants';[170]
(e) In *Calder* v *Jones*, the court found that a California court had jurisdiction to hear, and should hear, a defamation action brought by a California resident because the effects of the acts would be felt in the state;[171]
(f) In *Keeton* v *Hustler Magazine Inc*, the court considered whether New Hampshire had a 'legitimate interest in holding the respondent answerable on a claim related to their activities';[172]
(g) In *Laker Airways Ltd* v *Pan American World Airways*,[173] a case concerning a British company's allegations that American defendants had violated American antitrust laws, the court rejected a *forum non conveniens* application by the defendants on the basis that the enforcement of the American antitrust law was one 'in which this nation has the highest interest';

166 Spencer, above n. 155 at 635; Lonny Hoffmann and Keith Rowley, 'Forum Non Conveniens in Federal Statutory Cases' (2000) 49 *Emory Law Journal* 1137 at 1142; Davies, above n. 85 at 377. Stein claims that concepts of 'convenience' and 'reasonableness' often mask substantive choices about governmental interests and suggests that this be made explicit: Stein, above n. 137 at 836–40.
167 355 US 220 at 223 (1957).
168 (1980) 444 US 286.
169 156 Cal. App 3d 372 at 391, 202 Cal. Rptr 773 at 788 (1984).
170 339 US 313.
171 465 US 783 (1984).
172 465 US 770 (1984).
173 568 F. Supp 811 (DCC, 1983).

(h) In *Asahi Metal Industry Co* v *Superior Court*, the Supreme Court stated in relation to a question of jurisdiction that relevant interests to be weighed up included the interests of the forum state, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, the shared interest of states in furthering fundamental social policies, and the federal government's foreign relation policies;[174]

(i) In *Lueck* v *Sundstrand Corp*, a case involving New Zealand plaintiffs suing an Arizona-based defendant in a US court in relation to an accident that occurred in New Zealand, the court noted that 'the citizens of Arizona [had] an interest in the manufacturing of defective products by corporations located in their forum . . . [but] the interest in New Zealand regarding this suit is extremely high . . . The crash involved a New Zealand airline carrying New Zealand passengers . . . Because the local interest in this lawsuit is comparatively low, the citizens of Arizona should not be forced to bear the burden of this dispute';[175]

(j) In *Re Factor VIII or IX Concentrate Blood Products Litigation*, the court noted that California had an interest in the litigation because some of the defendants were headquartered there and some of the facts on which the claim was based occurred there;[176]

(k) In *Harrison* v *Wyeth Laboratories*, the court found that the English interest in regulating drugs in England and protecting its citizens from injury outweighed Pennsylvania's interest in regulating the conduct of corporations based in that state.[177]

There is some evidence of this thinking, at least in dicta, in the High Court of Australia decision in *Zhang*. The court, in discussing the old *Phillips* v *Eyre* rule, declared that the first limb went to jurisdiction only:

> public policy reservations of their nature (the first limb in *Phillips*, now recognised as jurisdictional only) cannot be constrained in closed categories; rather, the modern tendency is to frame them with closer attention to the respective governmental interests involved[178] . . . to the extent that the first limb of that rule was intended to operate as a technique of forum control, we should frankly recognise that the question is about public policy . . . It is sufficient to say that, should a

174 480 US 102 (1987).

175 236 F. 3d 1137 at 1140–2 (9th Cir, 2001).

176 United States Court of Appeal (7th Cir, 2007); a recent example is *King* v *Brega and Others* (United States Court of Appeal, 11th Circuit, 2009) where *forum non conveniens* applied to a case brought by a large number of European courts against Cessna, an American company, based on an accident that occurred in Italy. Among a range of factors considered, the court noted the interest that Italy had in resolving the case due to the incidence of the relevant events in that jurisdiction.

177 510 F. Supp 1 (ED Pa, 1980), aff'd 676 F. 2d 685 (3rd Cir, 1982).

178 *Zhang*, above n. 59 at 512–13.

> question arise as to whether public policy considerations direct that an action not be maintained in Australia, that question is appropriately resolved as a preliminary issue on an application for a permanent stay of proceedings.[179]

Further, where the courts consider connecting factors in order to establish jurisdiction or consider whether it should be exercised, these connecting factors are really a mask for questioning the extent to which a jurisdiction is 'interested' in a particular dispute.

At the risk of generalizing, the trend across many areas of choice of law has been away from an arguably simplistic focus on the law of the forum, the law of the place of the wrong, or other choice of law as a mechanistic application, to a more sophisticated analysis whereby the strength of connection to a range of jurisdictions is considered, in recognition of the reality that many of these cases involve links with more than one jurisdiction, such that a mechanistic approach might not be sufficient to deal with the myriad of possible situations. That this has been the case can be shown in the choice of law rules for torts, for example, where the original approach in the US, focusing on the law of the place of the wrong, has been replaced by a multi-factored approach,[180] and to some extent in Great Britain, where the original approach which favoured consideration of the law of the forum and the law of the place of the wrong was replaced by a multi-faceted approach with a rule followed by a flexible exception embracing a range of connecting factors.[181] McDougall notes the same thing:

> A close examination of the developments in these areas reveals that jurisdictional doctrines and choice-of-law theories have evolved in a parallel fashion. Justice Story's territorial principles, which served as the foundation for the *Pennoyer* jurisdictional approach, heavily influenced choice of law thinking for decades . . . At about the same time that the Supreme Court began talking about minimum contacts rather than power over persons and property in jurisdictional cases, some state courts were beginning to consider contacts rather than vested rights in their resolution of choice of law controversies . . . Commentators soon noted that contacts are relevant only to the extent that they indicate the interests and policies at stake in a controversy.[182]

179 *Ibid.* at 515.

180 This is evidenced by the shift in the approach of the Restatement (First) Conflict of Laws (1934) where the law of the place of the wrong was favoured, to the approach of the Restatement (Second) Conflict of Laws (1971) where a multi-faceted approach was taken.

181 Consider the development of the law from *Phillips* v *Eyre* (1870) LR 6 QB 1 through *Boys* v *Chaplin* [1971] AC 356 to the Private International Law (Miscellaneous Provisions) Act 1995 (UK) to Council Regulation No. 864/2007 (Rome II on the Law Applicable to Non-Contractual Obligations).

182 McDougall, above n. 163 at 5.

Further, we see in the evolution of the American law an initial focus on territorialism in relation to jurisdiction, giving way to a more complex theory taking into account a range of factors.[183]

It is submitted then, on the assumption that choice of law and jurisdiction questions are linked and there should be consistency, that the approach to *forum non conveniens* that considers the relative merits of alternative jurisdictions in terms of the strength of their connections to the dispute as a proxy for the interests involved is a better approach than one which considers the appropriateness or otherwise of the chosen forum.

In the Australian context, it is not considered to be a coincidence that the High Court of Australia has refused to embrace a connecting factor approach to choice of law questions in tort, unlike other jurisdictions, and has refused to embrace the *Spiliada* connecting factor approach to *forum non conveniens* applications. The choice of law rules of other jurisdictions have taken this development, in recognition that a mechanistic approach favouring the law of the forum/law of the place of the wrong, and an approach whereby the plaintiff's choice of forum is respected unless it is vexatious or oppressive (without considering the relative merits of alternatives or connecting factors to alternative jurisdictions) are not sufficiently sophisticated to deal with the kinds of multi-jurisdictional situations that come before our courts.

IX. Conclusion

The High Court must abandon the 'clearly inappropriate forum' test as a basis for declining jurisdiction. Reference to notions of oppression, vexatiousness or abuse of process likewise are not helpful. The court's current jurisprudence in this area is internally contradictory, becoming more complex through the use of exceptions, and there is evidence that despite what the High Court has said, in effect, if not in form, courts have adopted the *Spiliada* approach. The current approach does not sufficiently value comity among legal systems, and can be criticized for its parochial nature. The court should, as has occurred in the UK and US, adopt a 'more appropriate forum' test, allowing it to conduct a comparative evaluation of the merits of possible alternative fora. This would virtually equate the common law approach in this area with the approach favoured in various Acts of Parliament to questions of stays, a desirable consolidation of legal principle.

The court should consider in assessing such applications the extent to which each possible jurisdiction in which the case might be heard is interested in the dispute. Connecting factors, such as the residence of the parties, the law to be applied, the extent to which any non-

183 This point is explored by Allan Stein, above n. 137 at 803–4.

residents conduct business or activity in the jurisdiction, whether there is in fact (practically) an alternative forum are relevant and important considerations. Questions concerning the availability of witnesses and evidence should be of secondary importance given technological advances and changes in rules of evidence. The chosen court should not conduct a qualitative evaluation of the result likely to be achieved in any foreign jurisdiction, provided that jurisdiction has an accessible legal system that accepts the rule of law and an independent judiciary.