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# IN DEFENCE OF THE DOCTRINE OF FORUM NON CONVENIENS

Dan Jerker B. Svantesson\*

*This article examines the doctrine of forum non conveniens as applied in Hong Kong, Australia, the US and Sweden, and considers the criticism that has been raised against the doctrine. The author argues that some of this criticism is valid, some of it is valid only in relation to some countries' application of the doctrine, and some of the criticism is unfounded. The author concludes that the test applied in Hong Kong and most other common law jurisdictions – the clearly or distinctly more appropriate forum test – is the better option. The author goes on to make a number of other recommendations regarding the application of the doctrine, including the suggestion that the doctrine would benefit from being implemented in legislation.*

## Introduction

In the High Court hearing of the Australian Internet defamation case between Dow Jones & Company Inc and Joseph Gutnick, Justice Kirby noted that:

“It seems to me ... that [the issue of *forum non conveniens*] is the place in which the Internet problem is going to be solved in the world. Countries are going to say, ‘Of course we’ve got jurisdiction. The damage happened here or some other – we can serve here but it is much more convenient that this matter be litigated in another place.’”<sup>1</sup>

While this quote exemplifies the great potential that the common law tradition sees in the courts' discretionary power to decline jurisdiction, the doctrine of *forum non conveniens* has also been widely criticised. This article examines the criticism that has been raised against the doctrine of *forum non conveniens* and illustrates that some of the criticism that has been raised is valid, some of the raised criticism is valid only in relation to some countries' application of the doctrine of *forum non conveniens*, and some of the criticism

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<sup>1</sup> *Dow Jones & Company Inc v Gutnick* (High Court of Australia, 28 May 2002), at points 1484–1487 in transcript of judgment.

is unfounded, or based on either ignorance or misunderstandings of how the doctrine is in fact applied.<sup>2</sup>

The criticism comes mainly from commentators with a civil law background, and a good summary of the criticism raised against the doctrine of *forum non conveniens* is provided in Hu Zhenjie's "Forum non conveniens: An unjustified doctrine",<sup>3</sup> which will constitute the basis for the examination of the merits of, and problems with, the doctrine of *forum non conveniens*. However, it is useful to first examine how, and by which courts, this controversial doctrine is being applied.

### Mainly, but not only, a Common Law Doctrine

Generally speaking, there is a fairly large difference in how civil and common law countries deal with the issue of declining to exercise jurisdiction. While the common law countries clearly subscribe to the doctrine of *forum non conveniens*, the discretionary powers of the courts in civil law countries are often more limited. However, as is discussed below, some civil law countries also apply versions of this, originally Scottish,<sup>4</sup> doctrine.

#### Hong Kong SAR

In the majority of common law states, such as in the Hong Kong SAR and in the UK, the doctrine of *forum non conveniens* is interpreted to place focus on the search for the *clearly or distinctly more appropriate forum*.<sup>5</sup> In considering whether or not to decline jurisdiction, Hong Kong courts will ordinarily<sup>6</sup> apply a three-step model, originating from the two-step test of the *Spiliada* case.<sup>7</sup> A much-cited<sup>8</sup> case, *Ahiguna Meranti (Cargo Owners) v Adhiguna*

<sup>2</sup> For a discussion of possible reasons for the suspicion against the doctrine, found amongst many people within the civil law tradition, see Kennett, W., *Forum Shopping in Harrods* (previously on [www.nottingham.ac.uk](http://www.nottingham.ac.uk), now on file with author).

<sup>3</sup> Hu Zhenjie, "Forum non conveniens: An unjustified doctrine" (2001) 48 Northern Ireland Law Reports 143.

<sup>4</sup> Frank Vischer, *General Course on Private International Law*, (1992) 232 Recueil des cours 219.

<sup>5</sup> *Spiliada Maritime Corp v Casulex Ltd* [1987] 1 AC 460, p 477. The fact that Hong Kong courts subscribe to this, the current English interpretation, was confirmed in *Royal Garden Resort Public Co Ltd v The Mitsubishi Trust and Banking Corporation and Others* [2000] HKCFI 51.

<sup>6</sup> There are examples of recent cases in which the court has focused exclusively on the two-step test of the *Spiliada* case, rather than on the three-step test of *Ahiguna Meranti (Cargo Owners) v Adhiguna Havapan (Owners)*. See eg *LG Electronics Hong Kong Ltd v Bank of Taiwan* [2002] HKEC 629.

<sup>7</sup> *Spiliada Maritime Corporation v Casulex Ltd* [1987] AC 460.

<sup>8</sup> See, eg *United Phosphorus Ltd v China Merchants Shipping & Enterprises Co Ltd* [2000] HKCA 70; *Ngan Chiu Yung (alias Steve Ngan) v Jean Fredderic Brion and Conti Lines N V*, unrep, Court of First Instance Action No 79 of 2002 (Court of First Instance, 3 June 2002); *Royal Garden Resort Public Co Ltd v The Mitsubishi Trust and Banking Corporation and Others* [2000] HKCFI 51; *The Lanka Muditha* [1991] 1 HKLR 741; *The "Kapitan Shvetsov"* [1998] 1 Lloyd's Rep 199.

*Harapan (Owners)* outlines how the courts of Hong Kong address *forum non conveniens*:

"The court has now to answer a single question namely: 'Is there some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice' ... [W]e still think it convenient for the purposes of analysis to view the problem at three separate stages namely:

- (I) Is it shown that Hong Kong is not only not the natural or appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong? The evidential burden is here upon the applicant. The emphasis is upon 'appropriate' rather than 'convenient' because this is not simply a matter of practical convenience. The purpose is to identify the forum 'with which the action has the most real and substantial connection' ... Failure by the applicant at this stage is normally fatal.
- (II) If the answer to (I) is yes, will a trial at this other forum deprive the plaintiff of any 'legitimate personal or juridical advantages'? The evidential burden here lies upon the plaintiff.
- (III) If the answer to (II) is yes, a court has to balance the advantages of (I) against the disadvantages of (II) ... Deprivation of one or more personal or juridical advantages will not necessarily be fatal to the applicant provided that the court is satisfied that notwithstanding such loss 'substantial justice will be done in the available appropriate forum'. The court must try to be objective. Proof of this, which can fairly be called the ultimate burden of persuasion, rests upon the applicant for the stay. By these means he establishes that on balance the other forum is more suitable 'for the interests of all the parties and the ends of justice'. This may be another way of saying that the plaintiffs' choice of forum has been shown to be so inappropriate as to deserve the pejorative description of 'forum-shopping' and to be restrained accordingly."<sup>9</sup>

It is essential to observe the fact that the initial burden of proof is placed on the applicant. That means that where a plaintiff is seeking to rely on one

<sup>9</sup> *Ahiguna Meranti (Cargo Owners) v Ahiguna Harapan (Owners)* [1987] HKLR 904, pp 907-908. Page references omitted. Although the *Meranti* case was expressly overruled by the *Red Sea* case (*Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190), that would seem to only be related to the issue of choice of law. Consequently, what was said in the *Meranti* in relation to *forum non conveniens* remains good law, and the *Meranti* case is, as illustrated above, still frequently referred to in the context of *forum non conveniens*.

of the discretionary Order 11 grounds for jurisdiction, it has to show that Hong Kong is the *clearly or distinctly more appropriate forum*,<sup>10</sup> and when a defendant is seeking to have a proceeding stayed, it has to illustrate that another specific<sup>11</sup> forum is the *clearly or distinctly more appropriate forum*. In the latter case, the defendant's initial burden in proving that there is a clearly more appropriate forum has been said to be twofold: "first, it has to demonstrate that Hong Kong is not the appropriate forum and second, it has to demonstrate that there is a distinctly more appropriate forum".<sup>12</sup> Several factors are of concern in this context, including the extent of the parties' physical or business presence,<sup>13</sup> the location of witnesses,<sup>14</sup> the location of relevant documentation<sup>15</sup> and the applicable law.<sup>16</sup> Furthermore, the basis upon which the court's jurisdiction rests is also relevant. As far as the stay of proceedings based on jurisdiction as of right (ie presence or submission) is concerned, the Court in *Royal Garden Resort Public Co. Ltd. v The Mitsubishi Trust and Banking Corporation and Others* noted that "[t]he decisions in both Hong Kong and England show that the Court will not lightly disturb jurisdiction so established 'unless the balance of factors is strongly in favour of the defendant'".<sup>17</sup> However, in *News Link Consultants Ltd v Air China & Others* the Court stated that:

"While proper regard must be paid to the fact that jurisdiction is founded as of right, it is the connecting factors that determine if the Hong Kong court or the other forum is clearly more appropriate. Thus, if the

<sup>10</sup> See n 7 above, pp 480–481.

<sup>11</sup> In *The "Kapitan Shvetsov"* [1998] 1 Lloyd's Rep 199, for example, the Court noted that a Thai court clearly was the natural forum, but since neither of the parties wished for the dispute to be settled there, the dispute was in relation to whether the Hong Kong court should stay its proceeding in favour of a Singaporean court.

<sup>12</sup> *LG Electronics Hong Kong Ltd v Bank of Taiwan* [2002] HKEC 629, para 8.

<sup>13</sup> See eg *Rambas Marketing Co LLC v Chow Kam Fai* [2001] HKEC 875 and *News Link Consultants Ltd v Air China & Others* [2005] HKEC 815.

<sup>14</sup> *Ibid.*

<sup>15</sup> In *News Link Consultants Ltd v Air China & Others* [2005] HKEC 815 the court quite uncritically noted that: "The location of documents also point in favour of Beijing" (at para 87). However, the court in *Rambas Marketing Co LLC v Chow Kam Fai* [2001] HKEC 875 took a more sophisticated approach: "It may well be that most if not all of the relevant documents are in Nevada but that is not the end of the analysis. It is, I think, necessary to see how this fact affects the critical question of whether the courts of Nevada are clearly and distinctly more appropriate than the Hong Kong courts for the trial of the action. In other words, is there an appreciable risk that relevant documents would somehow be unavailable in a trial in Hong Kong as opposed to a trial in Nevada?"

<sup>16</sup> While the relevance of the applicable law is acknowledged in most cases (see eg *Rambas Marketing Co LLC v Chow Kam Fai* [2001] HKEC 875), it is to be noted that the court in *LG Electronics Hong Kong Ltd v Bank of Taiwan* [2002] HKEC 629 stated that: "the applicable law being Taiwan law [does] not address the question of Hong Kong not being the appropriate forum" (at para 10).

<sup>17</sup> *Royal Garden Resort Public Co. Ltd. v The Mitsubishi Trust and Banking Corporation and Others* [2000] HKCFI 51, making reference to *The "Kapitan Shvetsov"* [1998] 1 Lloyd's Rep 199, pp 215–216 and *Spliada Maritime Corp v Casulex Ltd* [1987] 1 AC 460, p 476.

connecting factors clearly point to the latter as the more appropriate forum for the trial, the 'as of right' point, however weighty that may be, will not tilt the balance back in favour of the Hong Kong court."<sup>18</sup>

On the other hand, the Court also stated that: "If no particular forum can be described as the natural forum, the Hong Kong court should refuse a stay when the action has been commenced as of right."<sup>19</sup>

If it is concluded that there is, in fact, another more appropriate forum, it is for the plaintiff to show that it will be deprived of "legitimate personal or juridical advantages" if the stay is granted. While it is clear that the second step of the *Meranti* test does not require the court to compare itself with a foreign court,<sup>20</sup> the question of whether the plaintiff will be deprived of "personal or juridical advantages", if a stay is granted, may force the court to evaluate the performance of a foreign legal system. Several applications to stay proceedings based on the doctrine of *forum non conveniens*, brought in Hong Kong courts, have focused on whether the plaintiff would be deprived of "personal or juridical advantages" if a stay was granted in favour of a court of the People's Republic of China. In *Bayer Polymers Co Ltd v Industrial and Commercial Bank of China, Hong Kong Branch* [2000] 1 HKC 805, the Court refused to stay the proceedings in favour of a mainland court, at least partly, due to concerns about the plaintiff's prospect of receiving substantial justice there. However, in some more recent cases, the courts have found there to be no reason to doubt the fairness, impartiality and independence of mainland courts.<sup>21</sup>

Furthermore, it is to be noted that not all "personal or juridical advantages" enjoy the same protection under the *forum non conveniens* test. For example, in *Ngan Chiu Yung (alias Steve Ngan) v Jean Fredderic Brion and Conti Lines NV*, Muttrie J stated that "I am not sure that the advantage which the plaintiff has managed to gain by serving the Writ on 1st defendant as he passed through Hong Kong is entirely a legitimate advantage."<sup>22</sup> He went on to quote Lord Goff's statement in *Connelly v R.T.Z. Corp'n Plc*:<sup>23</sup>

"In a case where the plaintiff has [founded jurisdiction on what may be described as an extravagant basis] for example by serving proceedings on

<sup>18</sup> *News Link Consultants Ltd v Air China & Others* [2005] HKEC 815, at para 66.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Amin Rasheed Corp v Kuwait Insurance* [1984] 1 AC 50, p 67E-F (per Lord Diplock).

<sup>21</sup> *Xinjiang Xingmei Oil Pipeline Company Ltd v China Petroleum & Chemical Corporation* [2005] HKCFI 63 and *News Link Consultants Ltd v Air China & Others* [2005] HKEC 815.

<sup>22</sup> *Ngan Chiu Yung (alias Steve Ngan) v Jean Fredderic Brion and Conti Lines N V*, unrep, Court of First Instance Action No 79 of 2002 (Court of First Instance, 3 June 2002).

<sup>23</sup> *Connelly v. R.T.Z. Corp'n Plc* [1998] AC 854.

an individual defendant while on a brief visit to this country, the court may not be prepared to assist him by refusing a stay to enable him to keep the benefit of an advantage available to him in this country.”<sup>24</sup>

In addition, case law has illustrated that undertakings offered by the parties may be given weight in the court’s decision whether or not to decline jurisdiction.<sup>25</sup>

Attention must also be given to the third step of the *Meranti* test, as this step distinguishes it from the *Spiliada* test. In a case where the existence of a more appropriate forum has been established, and it has been demonstrated that the plaintiff will be deprived of “legitimate personal or juridical advantages” if the stay is granted, it is for the defendant to show that notwithstanding the plaintiff’s loss, “substantial justice will be done in the available appropriate forum”. In this sense, the Hong Kong approach, as expressed in *Meranti*, is more plaintiff-friendly than the *Spiliada* test.

While the *Meranti* test is widely recognised in Hong Kong decisions, the Court in *Rambas Marketing Co LLC v Chow Kam Fai* [2001] HKEC 875 appears to be of the view that there, in fact, is a fourth step to consider. Having outlined the three-step model established in *Meranti*, the Court stated that:

“There is of course the final stage of the court being satisfied in the overall circumstances and justice of the case whether it would be right to stay the action. It is, at this stage, that the court will consider factors such as the conduct of the parties. For example, the applicant may have led the other party to believe that it was willing to litigate in Hong Kong or had taken steps to submit to the jurisdiction here so that it has waived the right to apply for a stay or that this would be unconscionable in the circumstances.”<sup>26</sup>

Finally it should be observed that “[t]he decision whether to stay Hong Kong proceedings in favour of a foreign forum is a matter of discretion, with which an appellate court will be reluctant to interfere in the absence of errors of principle.”<sup>27</sup> The same is true in relation to a trial judge’s discretion to

<sup>24</sup> *Ibid.*, p 873. The bracketed insert is Muttrie J’s.

<sup>25</sup> See eg *The Lanka Muditha* [1991] 1 HKLR 741.

<sup>26</sup> *Rambas Marketing Co LLC v Chow Kam Fai* [2001] HKEC 875.

<sup>27</sup> Philip Smart, “Private International Law” in Smart & Halkyard (eds), *Trade and Investment Law in Hong Kong* (Hong Kong: Butterworths, 1995), p 471, referring to *The Po* [1991] 2 Lloyd’s Rep 206, *The Lanka Muditha* [1991] 1 HKLR 741 and *Mak v Patrizzi* (1991) Civil App 103 of 1991, CA. See also: *Deak Perera Far East Ltd v R Leslie Deak* [1988] 2 HKLR 95, *The “Magnum”* 1 [1989] 47, at 49, *United Phosphorus Ltd v China Merchants Shipping & Enterprises Co Ltd* [2000] HKCA 70 and *LG Electronics Hong Kong Ltd v Bank of Taiwan* [2002] HKEC 629, at para 8.



grant leave to serve outside Hong Kong.<sup>28</sup> Having noted that an appellate court “cannot interfere [with the trial judge’s discretion] simply because its members consider that they would, if themselves sitting at first instance, have reached a different conclusion,”<sup>29</sup> Lord Brandon of Oakbrook sets out three circumstances under which an appellate court is entitled to intervene in the trial judge’s discretion:

“(1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) where his decision is plainly wrong.”<sup>30</sup>

#### *Australia*

Not all common law jurisdictions follow this traditional approach. Through a series of cases, Australia, for example, has established its own interpretation of *forum non conveniens* – if the Australian court finds itself to be a “clearly inappropriate forum”, it will decline jurisdiction.<sup>31</sup> This restrictive approach has been criticised both by academics and the courts. In his (now slightly dated) article Richard Garnett points out that:

“Of the 51 cases decided since *Voth* [*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538], orders for a stay of proceedings have been issued in only 10 – or approximately 19 per cent – of the cases. However, it is suggested that a closer examination of the circumstances present in those cases is required before any clear conclusions can be drawn.”<sup>32</sup>

After closely examining the mentioned cases Garnett concludes that, in a way, both the optimists and the sceptics, of the “clearly inappropriate test” have been correct.

“While it was argued ... that only in a relatively small number of cases would a different result have been achieved by application of the *Spiliada* principle, it could be argued that this is because, to a certain extent, the

<sup>28</sup> See eg *Spiliada Maritime Corp v Casulex Ltd* [1987] 1 AC 460, at 463.

<sup>29</sup> *The Abidin Daver* [1984] AC 398, at 420.

<sup>30</sup> *Ibid.*

<sup>31</sup> For an informative description of the process through which this became the Australian interpretation, see Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (Sydney: Butterworths, 2002), 7th ed, pp 124–128.

<sup>32</sup> Richard Garnett, *Stay of proceedings in Australia: A “clearly inappropriate” test?* (1999) 23 Melbourne University Law Review 31.

High Court has chosen to amend or replace the *Voth* test in contexts where it was felt to be unworkable, notably in cases involving pending proceedings and exclusive jurisdiction clauses.”<sup>33</sup>

Finally Garnett suggests that there are reasons to believe that, in the near future, the High Court might decide to depart completely from the “clearly inappropriate test” as stated in *Voth*.<sup>34</sup> In this last respect, Garnett has been wrong so far. However, in the recent High Court case, *Regie National des Usines Renault SA v Zhang*,<sup>35</sup> there was disagreement as to the status of the “clearly inappropriate forum” test. The majority of the judges (five) upheld the test, while two judges argued that since legislation enacted after the “clearly inappropriate forum” test was established by case law only provides for an “inappropriate forum” test, the “clearly inappropriate forum” test had been abandoned. It is submitted that the opinion of the dissenting judges is preferable, in that they argued that it could not be assumed that no significance should be attached to the fact that the legislators did not include the word “clearly”. On the contrary, that must have been a conscious decision.<sup>36</sup>

The majority of the judges in *Zhang*, however, seem to have followed the same line of reasoning as the Supreme Court of Victoria did in the *Gutnick* case; Hedigan J was of the opinion that the phrase “not a convenient forum” used in the Victorian legislation<sup>37</sup> “does no more or less than, in an English-literal form, convey the meaning and substance of the concept of *forum non conveniens*”.<sup>38</sup> The question of the correct interpretation of the doctrine of *forum non conveniens* was not subject to any real discussion in the High Court’s judgment in the *Gutnick* case. The majority of the court merely reaffirmed the “clearly inappropriate forum test” and it would thus seem unlikely that that test will be departed from in the foreseeable future.<sup>39</sup>

In summarising the factors that are relevant when determining whether a forum is “clearly inappropriate”, Nygh and Davies provide the following list (“the factors are to be balanced against each other and none is conclusive by itself”<sup>40</sup>):

<sup>33</sup> *Ibid.*, p 63.

<sup>34</sup> *Ibid.*, pp 63–64.

<sup>35</sup> *Regie National des Usines Renault SA v Zhang* [2002] HCA 10.

<sup>36</sup> Compare to Doyle CJ’s reasoning in *Fenbury Ltd (in liq) v Hong Kong and Shanghai Banking Corp Ltd* [1996] SASC 5957, para 7: “That suggests that a wider reach was not intended, but in the end one must come back to the terms of the Rule itself.”

<sup>37</sup> *General Rules of Procedure in Civil Proceedings* (Vic) 1996 7.05(2)(b).

<sup>38</sup> *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 104.

<sup>39</sup> *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, para 9.

<sup>40</sup> Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (Sydney: Butterworths, 2002), 7th ed, p 129.

- “(a) Any significant connection between the forum selected and the subject matter of the action and/or the parties, such as: the domiciles of the parties, their places of business and the place where the relevant transaction occurred or the subject matter of the suit is situated.
- (b) Any legitimate and substantial juridical advantage to the plaintiff, such as: greater recovery, more favourable limitation period, better ancillary procedures, or assets within the jurisdiction against which any judgment can be enforced.
- (c) The availability of an alternative forum and whether it will give the plaintiff adequate relief.
- (d) Whether the law of the forum will supply the substantive law to be applied in the resolution of the subject case.”<sup>41</sup>

This list, however, predates the *Zhang* decision as well as the High Court's *Gutnick* decision. It is also interesting to note that in examining the question of *forum non conveniens* in the *Gutnick* case, Hedigan J seems to have taken the following factors into account in coming to his conclusion that “the State of Victoria is both the appropriate forum and convenient forum for the disposition of the litigation commenced by the plaintiff”<sup>42,43</sup>

- the part of the allegedly defamatory article sued upon by the plaintiff exclusively deals with activities performed in Victoria – that Mr Gutnick “in the State of Victoria, dealt financially with a money-lauderer”<sup>44</sup>;
- all documentation and evidence relating to the part of the article sued upon would be found in Victoria<sup>45</sup>;
- contrary to, for example the United States of America, Australia does not apply the single publication rule, but “the long-established principle of libel law that each publication [is] a separate tort”<sup>46</sup>;
- the burden of proof in relation to the *forum non conveniens* test lies on the defendant “where the rules of court permit service without leave”<sup>47</sup>;
- it had not been sufficiently shown in the view of Hedigan J that the defendant would be “deprived of a defence [the so-called *Polly Peck*

<sup>41</sup> *Ibid.* Footnotes omitted.

<sup>42</sup> See n 38 above, para 130.

<sup>43</sup> This list has previously been published in Dan Svantesson, “The *Gutnick v Dow Jones* decision – Which questions were answered and which were not?”, (2002) 4 Internet Law Bulletin 73.

<sup>44</sup> See n 38 above, para 105.

<sup>45</sup> See n 38 above, para 129.

<sup>46</sup> See n 38 above, para 109.

<sup>47</sup> See n 38 above, para 101.

defence<sup>48]</sup> which they would have in the United States of America<sup>49</sup> if the case was to be decided in Victoria. Neither was it clear that the defendant “would be disadvantaged by trial in Victoria in respect of a defence of qualified privilege<sup>50</sup> and in any case it appeared as likely that the plaintiff loses juridical advantages if he sues in the United States of America as it is likely that the defendant loses juridical advantages if the case is heard in Victoria<sup>51</sup>;

- Victorian law was said to be applicable to the dispute “wherever the case is tried<sup>52</sup>;
- Mr Gutnick's business headquarters are in Victoria<sup>53</sup>;
- Mr Gutnick is a Victorian citizen and resident<sup>54</sup>;
- Mr Gutnick's family resides in Victoria<sup>55</sup>;
- the allegedly defamatory article was published in Victoria<sup>56</sup>;
- Mr Gutnick sues only in respect of publications within Victoria<sup>57</sup>;
- Mr Gutnick declines suit anywhere else.<sup>58</sup> Hedigan J noted that this undertaking “destroys at a stroke the defendant's claim that New Jersey is to be the preferred jurisdiction because of its capacity to award worldwide global damages.”<sup>59</sup> A claim that anyway was not “established as a matter of the law<sup>60</sup> according to Hedigan J;
- Mr Gutnick has his social and business life in Victoria<sup>61</sup>;
- Mr Gutnick sued to vindicate his Victorian reputation<sup>62</sup>; and
- the inconvenience of the defendant coming to Victoria to defend the action could not be as great as the inconvenience of the plaintiff being compelled to go to the US to assert his rights.<sup>63</sup>

As Hedigan J several times<sup>64</sup> pointed to the objective of the *forum non conveniens* test being to ensure that the case is tried “in a jurisdiction suitably

48 For information about the *Polly Peck* defence see eg Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998), pp 107–111. (In relation to the *Polly Peck* defence it might be relevant to note the fact that the part sued upon by Mr Gutnick can be separated geographically from the rest of the article).

49 See n 38 above, para 113.

50 See n 38 above, para 116.

51 See n 38 above, para 127.

52 *Ibid.*

53 See n 38 above, para 124.

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 See n 38 above, para 127.

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

63 See n 38 above, para 35.

64 See n 38 above. See eg paras 100 and 103.

[sic] for the interest of all parties and for the ends of justice",<sup>65</sup> it must be assumed that this general objective also was a factor taken into consideration in addition to the ones mentioned above.

#### *United States of America*

Courts in the US apply yet another version of the doctrine, and the US approach has been the object of robust and well-founded criticism.<sup>66</sup> The application of the *forum non conveniens* test is varied somewhat between US states, but the "trend is leaning towards compliance with the federal standard",<sup>67</sup> and focus will consequently be placed on the federal standard. The doctrine of *forum non conveniens*, which may be invoked by either the court or on a party's motion, "permits a court to decline to exercise its jurisdiction if the court finds that it is a 'seriously inconvenient' forum and the interests of the parties and the public will be best served by remitting the plaintiff to another, more convenient, forum that is available."<sup>68</sup>

Just as in other common law states, a US court will not lightly disturb a plaintiff's choice of forum.<sup>69</sup> However, this plaintiff-friendly approach is reserved for US plaintiffs only, as it has been said that a foreign plaintiff cannot claim that a US court is the most convenient forum for him/her.<sup>70</sup>

The Court in *Gulf Oil Corp v Gilbert*<sup>71</sup> identified both private and public factors to be balanced in a motion to have the proceedings stayed based on *forum non conveniens*. These factors are summarised by Del Duca and Zaphiriou:

"The private factors included: relative ease of access to sources of proof, availability and cost of obtaining witnesses, possibility of view of the premises, and all other practical problems that make a trial easy, expeditious, and inexpensive. The public factors included: administrative difficulties from court congestion; local interest in having localized controversies decided at home; interest in applying familiar law; avoidance of unnecessary problems in conflicts of laws or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty."<sup>72</sup>

<sup>65</sup> See n 38 above, para 100.

<sup>66</sup> See primarily: Martin Davis, "Time to Change the Federal Forum Non Conveniens Analysis" (2002) 77 *Tulane Law Review* 309.

<sup>67</sup> James Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995), p 406.

<sup>68</sup> *Ibid.*, p 402. Emphasis added.

<sup>69</sup> *Ibid.*, p 402 making reference to *Gulf Oil Corp v Gilbert*, 330 US 501, 508 (1947).

<sup>70</sup> *Ibid.*, p 404, making reference to *Piper Aircraft Co v Reyno*, 454 US 235 (1981).

<sup>71</sup> *Gulf Oil Corp v Gilbert*, 330 US 501 (1947).

<sup>72</sup> See n 67 above, p 403. Footnotes omitted; the peculiar use of commas and semicolons as in original.

Finally, it must be noted that where the court is exercising general jurisdiction, there would appear to be little point in asking the court to decline this jurisdiction based on *forum non conveniens*:

"This is so because general jurisdiction conceptually, if not necessarily in actual fact, assumes a substantial, a close and not just casual, relationship to the forum (as the *forum* sees it) so that, virtually by definition (and in the absence of other factors, such as location of evidence), the forum cannot be seriously inconvenient for the defendant."<sup>73</sup>

In summary, the US *forum non conveniens* test begins with a consideration of whether an adequate alternative forum exists, and if such a forum exists, the court will move on to examine the private and public factors outlined above.<sup>74</sup>

#### Sweden

As was hinted at above, versions of the doctrine of *forum non conveniens* can also be found in some jurisdictions following the civil law tradition. Indeed, as also was indicated above, the doctrine originates in Scottish law.

The Swedish approach to *forum non conveniens* is neatly summarised by Bogdan:

"It is uncertain whether, and to what extent, Swedish law recognizes the concept of *forum non conveniens*. However, to the extent that Swedish jurisdiction is determined by mere application, by way of analogy, of the internal forum rules ... the courts have a substantial margin of discretion which can be used for the same purposes as the doctrine of *forum non conveniens*."<sup>75</sup>

Seeing also how the application of the doctrine of *forum non conveniens* varies between different common law states, it would not appear to be wrong to view the discretion enjoyed by the Swedish courts as an application of the doctrine of *forum non conveniens*. The fact that this discretion is excluded in convention-regulated situations does not constitute any reason not to come to this conclusion. However, at the same time it must, of course, be acknowledged that it would seem like the Swedish application of the doctrine of *forum non conveniens* is somewhat more loosely constructed. Indeed, there is very

<sup>73</sup> Peter Hay, "Flexibility Versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law", 226 *Recueil des cours* (1991), p 331.

<sup>74</sup> Ronald A. Brand, "Comparative *Forum Non Conveniens* and the Hague Convention on Jurisdiction and Judgments", 37 *Texas International Law Journal* 467, p 481.

<sup>75</sup> See n 67 above, pp 373–374. Footnote omitted.

limited guidance in judicial practice to illustrate when a Swedish court would decline jurisdiction under the doctrine. Bogdan suggests that “[w]hen the case’s connection with Sweden is very weak, Swedish courts may deviate from the exact wording of the internal forum rules in order to avoid Swedish jurisdiction.”<sup>76</sup> Such deviation should ordinarily only occur upon the application of the defendant.<sup>77</sup>

In conclusion, although the application of the *forum non conveniens* doctrine varies, it aims at the same goal everywhere – preventing jurisdiction where jurisdiction is possible under the law, but not desirable from some other perspective. We can now examine the criticism that has been directed at the doctrine.

### “How can Judges take away what the Lawmakers have Given to the Plaintiff?”<sup>78</sup>

Criticism has been raised based on the view that it is inappropriate for “a single judge or a few judges [to] ignore, by dismissing an action, some of the jurisdictional rules, made by the legislature whose members are elected by the citizens of a state and represent them”.<sup>79</sup> In the same sentence it is noted that “the doctrine of *forum non conveniens* lacks a statutory source”.<sup>80</sup> First, it could be said that, the courts are exercising their discretion with the legislature’s approval. If the legislatures, and indeed by the nature of democracy – the people – found the courts’ discretionary powers inappropriate, they could stop this practice. Secondly, while it is true that the doctrine of *forum non conveniens* lacks statutory backing in, for example, Sweden, it is to be observed that, for example, in Australia, the doctrine does in fact enjoy statutory backing.<sup>81</sup> Finally, it may also be relevant to note that some grounds for jurisdiction are also discretionary in some common law states.<sup>82</sup> Thus it would be inaccurate, in relation to those grounds for jurisdiction, to say that the lawmakers have given any specific rights to the plaintiffs.

<sup>76</sup> See n 67 above, p 374. As noted there is little case law to illustrate this point, but Bogdan refers, for example, to: NJA 1962 s 354 and NJA 1966 s 450.

<sup>77</sup> See n 67 above, p 374.

<sup>78</sup> See n 3 above, p 153.

<sup>79</sup> See n 3 above, pp 153–154.

<sup>80</sup> *Ibid.*

<sup>81</sup> See, eg *Supreme Court Rules 1970* (NSW), Pt 10.6A. It is particularly interesting to note that the instruments providing statutory backing for the doctrine of *forum non conveniens*, are the same as the ones outlining the courts powers to claim jurisdiction in the first place – consequently, the doctrine enjoys the same statutory backing as the jurisdictional rules themselves do.

<sup>82</sup> For example, jurisdiction based on Order 11 grounds in Hong Kong, and the different court rules in Australia.

### Too Much Discretion

A variation of the criticism discussed above, is that it has been said that the trial courts are given too much discretion.<sup>83</sup> Hu Zhenjie states that:

“In international litigation, it is very easy for the defendant to claim that the trial of his case in a certain forum is ‘oppressive’ or ‘vexatious’ to him ... If the defendant is not sued in his home forum, he may argue that the plaintiff wants to vex or oppress him by issuing in a distant foreign court, about whose culture, procedural and language he has little knowledge. He may further argue that the forum is not well placed for the trial of the case or it is not impartial. In these circumstances, the judges may be quite easily convinced that the requirement of abuse of process is met.”<sup>84</sup>

As is clear from the country-specific chapters above, this statement is simply not backed by reality. Case law clearly demonstrates that it is far from “easy” for a defendant to successfully invoke the doctrine of *forum non conveniens*.<sup>85</sup>

Hu Zhenjie directs even harder critique against the more widely-used application of the doctrine – the search for a more appropriate forum:

“The latter test is even worse. It is hardly possible for courts to search for the most suitable forum for the trial of an action in the international context. In the first place, since an international case always involves more than one country, the courts of each of those countries may enjoy some conveniences and, at the same time, have to tolerate some inconveniences to hear the case. The parties are in the same situation if they are resident in different countries. Evidence and witnesses may also be scattered in different countries. In the second place, the determination of jurisdiction is the first step of litigation. It should be decided first. Without the adjudication of the substance of a case, it is impossible for the judges to decide which forum is ‘most suitable’. This is different from the determination of the closest connection for the choice-of-law purpose. That decision comes at a later stage of the proceedings. At that stage, it may be quite clear that the dispute has closer connection with a certain jurisdiction. Possibly, different courts might draw different conclusions from the same or similar set of facts. This would not cause so serious a problem: It does not matter

<sup>83</sup> See n 3 above, p 155.

<sup>84</sup> *Ibid.*

<sup>85</sup> See, eg *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 and *Investasia Ltd and Another v Kodansha Co Ltd and another* [1999] HKCFI 499.



so much that a trial court decide with which jurisdiction a dispute has the closest connection, because a certain applicable law will always be available."<sup>86</sup>

While it is true that international disputes by their very nature necessarily are connected to more than one forum, it cannot be said that it is impossible to reach the conclusion that one forum has a closer connection to the dispute than another. Only if the relevant evidence and witnesses are perfectly equally distributed in the possible forums, the relevant events occurred equally much in the possible forums and so on, would it be impossible to say that all possible forums are equally convenient – in practice that would be extremely rare. Furthermore, the doctrine of *forum non conveniens* may work perfectly well even in the unlikely event of a situation in which it is impossible to say that one forum is more appropriate than any other. A court will often only decline jurisdiction if there is another (*clearly*) *more appropriate forum* (or as is the case in Australia, if the Australian court is a clearly inappropriate forum). Consequently, a court would not decline jurisdiction if other forums were equally, but not more, appropriate.

The assertion that the question of jurisdiction is to be determined first is largely true, but does not reveal the full truth. For example, in a contractual dispute, an Australian or Hong Kong court may claim jurisdiction if the proper law of the contract is the law of Australia, respectively Hong Kong. Consequently, in such a situation, the applicable law must necessarily be identified for the determination of the jurisdictional question. In addition, it should be remembered that the applicable law is a factor, taken into account in the decision of the issue of *forum non conveniens*. Consequently, the choice of law must be dealt with, at the latest, at the same time as the question of *forum non conveniens*. Finally, it must be noted from case law relating to the doctrine of *forum non conveniens*, that it is not only possible, but the usual practice, to decide whether or not to decline jurisdiction without deciding the substantive case.

Further, the statement relating to the choice of law appears to overlook the actual importance of which law is applied in adjudicating the dispute. Indeed, as noted by Kirby J in the *Gutnick* case, the issue of choice of law is often the underlying concern in the dispute:

“The respondent was entitled to regard the law of defamation in Victoria as more favourable to his interests than the law in the United States. The latter is greatly influenced by the jurisprudence of the First Amendment

<sup>86</sup> See n 3 above, pp 155–156.

to the Constitution of that country. That jurisprudence is more favourable to the appellant. The jockeying over the issues in this appeal is thus not concerned only with large questions of law. For the parties, the stakes are more basic and more urgent.<sup>87</sup>

As a matter of fact, it seems reasonable to suggest that, while forum-shopping (as the name indicates) primarily appears to be concerned with the choice of forum, the underlying motivation is frequently, but of course not always,<sup>88</sup> a desire to have a certain law applied in the adjudication of the dispute.<sup>89</sup>

However, on one perspective, trial judges are given too much discretion. An appellate court can often only overrule the inferior court's discretionary decision if it finds that the latter's decision represents an "abuse of discretion"<sup>90</sup> or "error of principle".<sup>91</sup> This is not satisfactory in relation to a central and decisive question such as the doctrine of *forum non conveniens*. It should be possible to appeal also the trial judge's discretionary exercise of *forum non conveniens*. An argument that could be raised against allowing such appeals is, of course, the risk of an increase in appeals. Appeals against the trial judge's discretionary exercise of *forum non conveniens* could in themselves be used as "delay tactics" (even to the extent of being oppressive and vexatious). However, the risk of this becoming a problem should not be overestimated. The reality is that a range of legal issues are decided in a more or less discretionary manner and the issue of *forum non conveniens* is not all that different.

### Lack of Uniformity

The doctrine of *forum non conveniens* has further been criticised for the lack of uniformity in its application.<sup>92</sup> While the differences in how the doctrine is

<sup>87</sup> *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, para 74.

<sup>88</sup> Parties frequently insist on a certain forum adjudicating the dispute, for example, due to that forum's more favourable limitation period and so on.

<sup>89</sup> As noted by Vischer: "Forum shopping is commonly linked with 'law shopping through forum shopping'. The fact that the choice of the forum includes the choice of a national conflicts system and thus, indirectly, the choice of the applicable law, is generally regarded as the greatest incentive ... It is [however] doubtful whether the conflicts issue is at all the most important incentive for the choice of forum. Very often other consideration, such as procedural advantages or the legal climate of the forum State, may carry greater persuasion." (Frank Vischer, *General Course on Private International Law*, (1992) 232 *Recueil des*, p 225). Be that as it may, the applicable law is, as stated above, frequently an incentive for the choice of forum.

<sup>90</sup> US definition as found in Hu Zhenjie, "Forum non conveniens: An unjustified doctrine" (2001) 48 *Northern Ireland Law Reports* 143, p 150 (referring to *Gulf Oil Corp v Gilbert*, 330 US 501, 508 (1947)).

<sup>91</sup> See n 87 above, para 160 (*per Kirby J*).

<sup>92</sup> See n 3 above, p 154.

applied are undeniable, the fact that there is no one single doctrine can hardly be a sufficient reason for its abolition. In the field of law, there is no lack of examples of doctrines that are given different interpretations in different states (eg the doctrine of *ordre public*).

It could also be noted that this sort of differences in interpretation is not limited to doctrines. Privacy legislation worldwide aims at protecting "personal information" or "personal data". Yet, these terms are given a variety of interpretations. Indeed, it would seem somewhat overly optimistic to assume that a complete acceptance of one particular interpretation will prevail in relation to any one legal doctrine or term, worldwide.

### Delays the Process

The doctrine of *forum non conveniens* has been criticised for being time-consuming, and thereby economically wasteful.<sup>93</sup> It is undeniably true that each added issue in a court proceeding will prolong the trial and thereby increase its costs (both for the parties and society). At the same time, the importance of deciding the forum question cannot be emphasised enough – the forum issue determines which choice of law rules will be applied, the choice of law rules identifies the applicable law, and the applicable law decides the dispute. In many cases it could thus be said that the case itself is decided the moment the forum issue has been dealt with. Of course, many (not to say most) lawyers are aware of this, and as discussed above, the very reason for challenging, or suing in, a particular forum is frequently the awareness of the determinative nature of the forum question. As is clear from, for example, the *Meranti*<sup>94</sup>, the courts are well aware of this:

"Cargo underwriters, the underlying plaintiffs, have caused the present proceedings to be issued in Hong Kong to obtain the benefits of the Hong Kong limitation upon a ship owner's liability arising under s 503 of the Merchant Shipping Act 1894 ('M.S.A.') extended to Hong Kong by s 509. Adopting the language of Lord Simon in *The Atlantic Star*: they have chosen the forum in which they think their case 'can be most favourably presented'.<sup>95</sup>

With this in mind, it is submitted that the importance of the forum question (even when determined in a two-step model, such as in the countries

<sup>93</sup> See n 3 above, p 157.

<sup>94</sup> *Ahiguna Meranti (Cargo Owners) v Ahiguna Harapan (Owners)* [1987] HKLR 904.

<sup>95</sup> *Ibid.*, p 909.

applying the doctrine of *forum non conveniens*) justifies the time and costs it incurs. It should also be remembered that if the forum is challenged on weak grounds, and merely to delay the proceedings, the issue should be relatively easily and quickly dispatched by the courts.

### “Case-Shopping” Used to Ease the Courts’ Workload

Hu Zhenjie also brings attention to the practice of applying the *forum non conveniens* doctrine to dismiss cases in order to deal with the, often overwhelming, workload placed on the courts.<sup>96</sup> The article discusses this practice in an American context, and it would seem to be a problem that is exclusive to the US. Hu Zhenjie notes that:

“The factor of docket-clearing is itself not appropriate. The courts’ business is to do justice. How can they refuse to do so for the sole reason of ‘being busy’? ... Moreover, if all relevant courts refuse to hear a case for the reason of docket congestion, what will happen? The simple and reasonable solution for the problem is to appoint more judges if the judges are really too ‘busy’, and not to claim international jurisdiction too widely.”<sup>97</sup>

To the extent that this practice occurs, it must be viewed as a perversion and an obvious misuse of the doctrine of *forum non conveniens*, and should consequently be strongly condemned. On the other hand, where the forum state has no interest in adjudicating the dispute at hand and has no connection to the dispute, the court may very well, legitimately, wish to reject the case.

### “Case-shopping” Used to Protect Domestic Interests

As was illustrated above, the US application of the doctrine is rather different from how other jurisdictions apply it. A different set of considerations is taken into account, but perhaps more importantly, the doctrine is being applied in what can best be described as a discriminatory manner. Particularly in a world with daily international contacts, it cannot be acceptable that foreign plaintiffs are prejudiced on an arbitrary level. While the plaintiff’s

<sup>96</sup> See n 3 above, pp 157–158. See also *Lubbe and Others v Cape plc* [2000] 4 All ER 268.

<sup>97</sup> See n 3 above, p 158. Footnotes omitted.

connection to the forum is also a factor in other states applying the doctrine of *forum non conveniens*, a neutral and non-discriminatory test is, it would seem, applied.

In this critique of the US approach, Hu Zhenjie discusses the possible underlying reasons for the American application:

“US courts have in fact been manipulating the doctrine to dismiss the actions which they ‘do not want brought’ in them and to prevent the application of the plaintiff-favouring rules to foreign plaintiffs. The most important actions that the Americans do not want to be brought in their courts are international tort actions brought by foreign victims against their own corporations. That is because these corporations may have to be subject to punitive damages which foreign corporations and citizens must face in the US courts. Therefore, the plaintiff-favouring rules of liability and damages are applied exclusively to the local plaintiffs.”<sup>98</sup>

Hu Zhenjie continues by noting that the combination of wide jurisdictional claims and the discriminatory application of the doctrine of *forum non conveniens* ensures that foreign defendants easily can be brought before US courts, and judged in accordance with the “plaintiff-friendly” laws, while US defendants are protected against suits from foreign plaintiffs. Whether this analysis is correct or not,<sup>99</sup> the US approach is discriminatory and should be brought in line with the other states’ neutral application. Finally, it is submitted that this approach takes the states policy considerations too far, and negatively affects the fulfilment of the parties’ legitimate expectations.

### Discretion to Uphold Choice of Forum Clauses Nominating a Foreign Forum

It is neither strange nor uncommon for the courts to be able to exercise discretion as to whether or not to uphold a choice of forum clause nominating a foreign forum. However, such discretion is ordinarily focused on whether or not the choice of forum clause violates any mandatory rules, or whether or not the choice of forum clause is contrary to public policy. It could be seen as troubling to find that, in addition to those two well-founded considerations,

<sup>98</sup> See n 3 above, pp 159–160.

<sup>99</sup> For example, it should also be mentioned that not all proceedings are generally deemed more plaintiff friendly in the US. Defamation proceedings are widely considered to be very defendant-friendly in the US.

a common law court can also disregard a valid choice of forum clause based on the doctrine of *forum non conveniens*.

In, for example, *Sport-Billy Productions E. Deyble and Another v DHL International Ltd*,<sup>100</sup> the defendant sought to have the proceedings in a Hong Kong court stayed based on the existence of a choice of forum clause giving exclusive jurisdiction to the courts of Switzerland, and in the alternative, on the ground that Switzerland is the natural and convenient forum. While the validity of the choice of forum clause was extensively discussed, it is here sufficient to note that the Court was satisfied that the choice of forum clause was, indeed, valid.<sup>101</sup> One might have thought that having reached that conclusion, the Court would see no reason to consider the question of *forum non conveniens*. Instead the Court applied the doctrine of *forum non conveniens* to examine whether or not a Swiss court would be an appropriate forum:

“As I have decided that the jurisdiction clause is valid, the burden is placed upon the plaintiffs to establish that Switzerland is not the proper forum. Having regard to the jurisdiction cause, the court in considering the doctrine of *forum non conveniens*, will only stay the proceedings [to be taking place in Switzerland?] if the plaintiffs can show on strong grounds that another forum is more appropriate.”<sup>102</sup>

In a sense, what the court is doing is trying the validity of choice of forum clause twice – first, whether it is valid as of substance, and then, whether it is valid in nominating a convenient forum. Indeed, the fact that a choice of forum clause is valid, not in breach of any mandatory rules and in conformity with public policy, is consequently merely “a *prima facie* case for a stay in order that the parties should be held to the terms of the contract”<sup>103</sup> in common law countries.

Fortunately, existing case law illustrate that, only in the most unusual circumstances, would a court choose to disregard a choice of forum clause nominating a foreign forum, based on the doctrine of *forum non conveniens*. One example where the Court did act in the described manner was in *Carvalho v Hull Blyth (Angola) Ltd*.<sup>104</sup> In that case, the contract nominated a court in Angola (at the time of contracting, the so-called Portuguese Overseas Territory of Angola). However, at the time of the dispute, Angola had become independent, and the character of the nominated forum had changed

<sup>100</sup> *Sport-Billy Productions E. Deyble and Another v DHL International Ltd* [1987] HKLR 729.

<sup>101</sup> *Ibid.*, p 734.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> *Carvalho v Hull Blyth (Angola) Ltd* [1979] 3 All ER 280.

dramatically. This sort of cases is obviously rare. Nevertheless, great care must be taken as, if misused, this approach can be both exorbitant and parochial, and may be seen as taking "flexibility" too far, as well as being prone to abuse.

### Conditional Exercise of *Forum Non Conveniens*

The decision not to exercise the doctrine of *forum non conveniens* is sometimes affected by the parties' undertakings – the exercise of the discretion is conditional. This practice has been criticised,<sup>105</sup> and good arguments have been raised illustrating the problems associated with this practice. In the *Meranti*, Hunter JA noted that:

"We seriously question how far comity will be promoted by, and how far a foreign tribunal will tamely accept the consequences of, a Hong Kong court:

- (i) telling the foreign forum that it is a more suitable forum so long as we in Hong Kong retain the right to meet specific deficiencies by exercising some supplemental jurisdiction;
- (ii) attempting to impose procedural requirements upon the foreign forum to improve it in our own image, e.g. discovery or cross-examination;
- (iii) attempting to impose substantive restrictions upon the conduct of the case in that forum which may run counter to its civil inquisitorial system, without clear evidence that such restrictions would be binding upon and acceptable to both the court and the parties in such forum;
- (iv) going beyond accepting wholly unilateral undertakings from a party as to a particular aspect of the conduct of the litigation in the foreign forum, where such party is clearly *dominus litis*<sup>106</sup> in the matter e.g. limitation in English law, and where such position would clearly be recognized and accepted by the court in such forum." [In this context the court specifically discussed transfer of security and time bars.]<sup>107</sup>

In relation to the "splitting of the judicial process" Hunter JA also observed that "[i]f it is necessary to tinker with or supplement procedures in

<sup>105</sup> See, n 66 above, p 319. Also Hu Zhenjie presents some arguments to this effect (See n 3 above, p 164).

<sup>106</sup> "[T]he party to a proceeding which is conducted by a procurator on his behalf." Peter Nygh and Peter Butt, *Butterworths Concise Australian Legal Dictionary* (Sydney, Butterworths, 1998).

<sup>107</sup> *Ahiguna Meranti (Cargo Owners) v Ahiguna Harapan (Owners)* [1987] HKLR 904, at 918.

the other forum, it is hard to seek [sic] how it could be 'clearly and distinctly more appropriate' notwithstanding the loss of one or more advantages".<sup>108</sup> Further, he noted that if conditions are attached to the exercise of *forum non conveniens*, the result is that two different and possibly conflicting legal systems are imposed upon the parties, and this could encourage forum shopping. The example was given that "[t]wo locations may be available to the plaintiff – Hong Kong and another. The other may be the more natural forum, but Hong Kong may have procedural advantages. If this process be right, the plaintiff could at once sue in Hong Kong, and attempt to preserve those advantages as the price of a stay".<sup>109</sup>

Having noted all these difficulties, Hunter JA also provides some sensible suggestions as to how the system could be improved. First, "a court should only accept undertakings, which are so clear and precise that an alleged breach would give rise to a straight forward question of fact, so that on proof of this that court would feel free to impose the serious penalty associated with contempt."<sup>110</sup> Hunter JA continues: "the most effective means of enforcing the purpose behind the undertaking would be to insist upon a parallel undertaking in damages fortified by security so that in the event of breach, the court would have both the power and the means of awarding damages."<sup>111</sup>

If a court follows the procedure suggested by Hunter JA, the practice of conditional exercise of the doctrine of *forum non conveniens* should be seen as an asset rather than a problem. For example, the fact that a defendant is willing to undertake to submit to the jurisdiction of a foreign court can be seen as a reasonable ground for asserting that the defendant's motion for a stay is sincere. Further, a plaintiff's undertaking not to sue elsewhere can be an equally strong indication that he/she has a sincere desire to have the dispute settled exclusively in the forum in which he/she initiated the proceedings.<sup>112</sup>

### **Forum Non Conveniens – Clearly Inappropriate for International Conventions**

While the Article that incorporated the doctrine of *forum non conveniens* into the proposed Hague Convention has been removed, it is still interesting to discuss the doctrine's suitability for future international instruments.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, p 919.

<sup>111</sup> *Ibid.*

<sup>112</sup> This line of reasoning is exemplified in *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 and *Investasia Ltd and Another v Kodansha Co Ltd and another* [1999] HKCFI 499.



It has been suggested that the doctrine of *forum non conveniens* is ill-suited for international instruments, such as the previously proposed *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*. One of the reasons provided for this assertion is that, while widely adopted in common law countries, the doctrine has gained a rather limited level of acceptance on the international arena. Another concern, or perhaps a consequence of the first, is that its inclusion in the proposed convention would cause problems, particularly in civil law countries not used to the doctrine. A third reason relates to the very structure of the proposed instrument:

“The tendency of the Special Commission is to adopt a double convention establishing a list of ‘good’ bases for jurisdiction and forbidding the use of ‘bad’ bases, i.e., the exorbitant grounds for jurisdiction. Thus, the doctrine of *forum non conveniens* has no role to play in the future Convention.”<sup>113</sup>

Despite these well-founded arguments against the doctrine of *forum non conveniens* being included in international instruments, it is submitted that the work carried out on the previously proposed Hague Convention, mentioned above, illustrates that sensible solutions can be found.

### **Forum Non Conveniens Superfluous if Jurisdictional Rules are Reasonable**

It has been suggested that, as long as the jurisdictional rules only provide for reasonable claims of jurisdiction, the doctrine of *forum non conveniens* is superfluous. However, for such a conclusion to be valid, great care must be taken in the drafting of the jurisdictional rules. It must be remembered that technological and social development may affect the application, and scope, of the jurisdictional rules. Even if the scope of the jurisdictional rules was made to be appropriate for today's situation, they may be exorbitant in the future and a safeguard like the doctrine of *forum non conveniens* would seem highly desirable in most cases. Against this background, it would seem that the common law system's application of the doctrine of *forum non conveniens* places it in a favourable position as compared to the civil law countries that often provide for jurisdictional claims virtually as wide as the common law systems, while not providing for as wide discretion to stay the proceedings.

<sup>113</sup> See n 3 above, p 167. Footnotes omitted.

This is not to say that the first step should not be to seek to give the jurisdictional rules an appropriately limited application. On the contrary, that is, indeed, the most natural way of avoiding exorbitant jurisdictional claims. Indeed, in some limited situations, the jurisdictional rules can be drafted in such a manner, and on such a level of generalisation, that there is no need for the safety net provided by the doctrine of *forum non conveniens*.

### The Doctrine is Easily Circumvented

At least in relation to defamation cases, it could be argued that the doctrine of *forum non conveniens* is easily circumvented (ie not abuse resistant enough). At first glance, the current trend of suing only in relation to local damages would appear to negate the value of the doctrine. For example the courts in the *Gutnick*<sup>114</sup> case, the *Harrods*<sup>115</sup> case and the *Investasia*<sup>116</sup> case found no reason to decline jurisdiction, since the plaintiffs' actions related only to harm suffered within the respective states, which court could be more suitable to determine a dispute relating exclusively to damages suffered within state X, than the court of state X? This line of reasoning certainly has a logical appeal, and could be said to be a simple trick by the plaintiff to circumvent the doctrine of *forum non conveniens*. However, the plaintiff does so at the expense of only being awarded damages for harm done within the state where the court is located. Consequently, even though the doctrine of *forum non conveniens* might not protect a foreign defendant from being sued in a certain forum, it might have the effect of preventing the plaintiff from seeking worldwide damages in that forum. Thus, the doctrine may successfully ensure that only the part of the proceeding that has a natural connection to the forum is heard by the court.

### The Doctrine has Lost its Meaning in Modern Society

It could be argued that the doctrine of *forum non conveniens* has lost its meaning in modern society. With the ease of travel and the technical possibilities available it may no longer be very inconvenient to defend in a foreign forum:

<sup>114</sup> *Dow Jones & Company Inc v Gutnick* [2002] HCA 56.

<sup>115</sup> *Harrods Ltd v Dow Jones & Company Inc* [2003] EWHC 1162 (QB).

<sup>116</sup> *Investasia Ltd and Another v Kodansha Co Ltd and another* [1999] HKCFI 499.

"[I]t should no longer be possible for a defendant seeking a forum non conveniens dismissal simply to argue that it would be expensive and inconvenient to transport willing witnesses from some distant country to a courthouse in the United States. In order to discharge its onus of persuading the court to dismiss the plaintiff's complaint, the defendant should be required to show why the taking of evidence from those witnesses by video link or videotaped deposition would be impermissible under the Federal Rules of Civil Procedure and, or in the alternative, technically or legally impossible under the conditions prevailing in the foreign country."<sup>117</sup>

This is a good point, and the court procedure must take notice of technical advancements, as long as the use of technologies does not interfere with the parties' rights.

### Concluding Remarks

This article has clearly illustrated that the application of the doctrine of *forum non conveniens* varies between different jurisdictions. Nevertheless, on a general level, this doctrine provides flexibility where it is needed, it may be used to serve the forum states policy objectives, and it is rather resistant to abuse. At the same time, it is undeniably true that the doctrine of *forum non conveniens* cannot be said to be simple in its application, and the doctrine certainly reduces the efficiency of the private international law system. However, it is submitted that despite these trade offs, the doctrine of *forum non conveniens* constitutes an important part of private international law, and that Kirby J was right in highlighting the potential importance of the doctrine of *forum non conveniens* in today's global society.

Based on the discussion above, at least nine observations can be made. First, it is submitted that the test applied, for example, in Hong Kong – the *clearly or distinctly more appropriate forum* test – is the better option of the clearly articulated *forum non conveniens* tests. Second, it is desirable that the doctrine of *forum non conveniens* be clearly defined in legislation. Such an exercise would be a suitable point in time to seek to harmonise the different states' interpretation of the doctrine. Perhaps it would even be desirable for a model code to be developed on an international level, which domestic solutions could be based on. Third, the US practice of declining jurisdiction in order to limit the courts' workload should be abandoned. Fourth, the doctrine of *forum non conveniens* should be applied in the same manner regardless

<sup>117</sup> See n 66 above, p 384.

of the domicile or nationality of the parties. Fifth, as was made clear by Hunter JA in the *Meranti*, conditional stays should only be granted where the undertakings are clear, and possibly backed up by the taking of security. Sixth, if the doctrine of *forum non conveniens* is to be incorporated in an international instrument, it must be clearly defined to ensure consistency in its application. Seventh, the first step must necessarily be to seek to make the jurisdictional rules as good as possible. The better the jurisdictional rule, the more limited the need for the doctrine of *forum non conveniens*. Eighth, provided that the rights of the parties are not affected, the potential use of technical solutions in the court process must be a factor to be taken into account in evaluating the convenience of a certain forum. Finally, the doctrine of *forum non conveniens* is often criticised and rarely applauded in civil law countries. It is, however, submitted that civil law systems must recognise that their rules of jurisdiction often provide for as wide claims as the equivalent rules in common law states. Under such circumstances, it would seem problematic not to have a sensibly wide discretion to decline jurisdiction.