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The promotion of access to justice through the constitutional development of the doctrine of *forum non conveniens*

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by

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Summary

South African jurisdictional principles governing cross-border litigation have seen minor development in recent years, and as such remains feudal and anachronistic. This study proposes to employ a qualitative research method to undertake a comparative legal analysis of the workings of the common law doctrine of forum non conveniens and the application thereof in conjunction with South African jurisdictional principles. It is essential that South African courts are equipped with the necessary jurisdictional powers to assume and exercise jurisdiction in appropriate cases concerning cross-border civil litigation. The enduring theme will be access to justice to all parties and striking a balance between opposing litigants as far as financial resources and legal expertise are concerned – that will ensure a fair trial.

The anticipated outcome of the aforementioned research is to propose a way forward centred around constitutional reform in respect of the adaptation and application of the doctrine of forum non conveniens in a manner that is consistent with the constitutional right to access to the courts, which simultaneously also promotes the spirit, purpose and objects of the Bill of Rights and the principle of transformative constitutionalism, the right of access to courts as well as reform of outmoded South African jurisdictional provisions.

To produce sustainable and viable solutions a comparative analysis of the application of principles of private international law and proposed reform of the doctrine in comparable jurisdictions is be undertaken, as well as an enquiry into the effect of associated international agreements and instruments applicable to these jurisdictions that may have an impact on or insight into the way forward.

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Chapter 1: Introduction

It is now 35 years since Lord Geoff's seminal judgment in *Spiliada Maritime Corporation v Cansulex Ltd*,[1] considered the *locus classicus* for the modern iteration of the doctrine of *forum non conveniens*. The doctrine appeared for the first time in South African law in the judgment of *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris*,[2] and sporadically in other judgments[3] in the years following. The recent judgment of *Bid Industrial Holdings (Pty) Ltd v Strang & Another (Minister of Justice and Constitutional Development, Third Party)*[4] has brought to the fore the discussion of the place of the doctrine of *forum non conveniens* in modern South African law.[5]

Globalisation, the birth of multinational corporations and the sharp increase in international trade has led to the increase in cross-border litigation. South African jurisdictional principles governing cross-border litigation have seen minor development in recent years, and as such remains feudal and anachronistic. In this study a qualitative research methodology has been applied to undertake a comparative legal analysis of the workings of the common law doctrine of *forum non conveniens* and the application thereof in conjunction with South African jurisdictional principles governing cross-border litigation.

It is essential that South African courts are equipped with the necessary jurisdictional powers to assume and exercise jurisdiction effectively and efficiently in cross-border cases. The enduring theme of this dissertation will be access to justice to all parties while striking a balance between opposing litigants as far as financial resources, legal expertise and diverging legal systems in cross-border litigation are concerned, and what constitutes substantive fairness under these circumstances.

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1 *Spiliada Maritime Corporation v Cansulex Ltd* [1986] All ER 843 (*Spiliada*).

2 *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) (*Thalassini*).

3 *Dias Compania Naviera SA v MV AL Kaziemah & Others* 1994 (1) SA 570 (D) (*Dias Compania*); *Great River Shipping Inc v Sunnyface Marine Ltd* 1992 (4) SA 313 (C) (*Great River Shipping*); *M T Tigr Bouygues Offshore SA & Another v Owners of the M T Tigr and Another* 1998 (4) SA 740 (C) (*Tigr*); *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* (2013) 4 All SA 509 (SCA) (*Caesarstone)*; *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) (*Multi-Links*).

4 *Bid Industrial Holdings (Pty) Ltd v Strang & Another (Minister of Justice and Constitutional Development, Third Party*) 2008 (3) SA 355 (SCA) (*Bid Industrial Holdings*).

5 C Forsyth *Private international law: The modern Roman-Dutch law including the jurisdiction of the High Courts* (2012) 187.

1.1. Problem statement

The lack of legal development and judicial discourse on the matter of South African cross-border jurisdictional principles has had a significant impact on access to justice for those who need it most. For example, establishing jurisdiction in personal injury claims brought forward by vulnerable South African claimants, notably in the case of class actions, is a challenge when the defendant is an international company with former, little or no presence in South Africa.[6]

The same problem has surfaced in other jurisdictions in Africa, a prime example being where Nigerian claimants were forced to pursue legal action against international conglomerates in the United Kingdom (UK),[7] The Netherlands[8] or even the United States of America (US).[9]

1.2. Motivational statement

The anticipated outcome of the aforementioned research is to propose a way forward that centres around constitutional development in respect of the adaptation and application of the doctrine of *forum non conveniens* in a manner that is consistent with the constitutional right to access to the courts,[10] which simultaneously also promotes the spirit, purpose and objects of the Bill of Rights.

In order to produce sustainable and viable solutions, a comparative analysis of the application of principles of private international law will be undertaken in comparable jurisdictions and reform of the doctrine of *forum non conveniens* will be proposed.

Ancillary to this an inquiry into the effect of associated international agreements and instruments applicable to these jurisdictions that may have an impact on or provide insight into the way forward will be undertaken.[11]

The investigation will centre around the Scottish doctrine of *forum non* conveniens, and whether it can be further incorporated into South African law in a manner that advances sustainable and equitable legal development, while also simultaneously

6 *Lubbe v Cape Plc* (2000) UKHL 41.
7 *Okpabi and Others v Royal Dutch Shell Plc and Another* (2018) EWCA Civ 191.
8 *Akpan v Royal Dutch Shell Plc* C/09/337050/HA ZA 09-1580.
9 *Kiobel v Royal Dutch Petroleum Co* (2013) 569 US 108 (*Kiobel*).
10 Sec 34 of the Constitution of the Republic of South Africa, 1996 (Constitution).
11 A Arzandeh 'Should the *Spiliada* test be revised?' (2014) 10 *Journal of Private International Law* 89.

promoting the principle of transformative constitutionalism, the right of access to courts as well as reform of outmoded South African jurisdictional provisions governing cross-border litigation. The hope is that this study may result in a meaningful contribution to the discourse on the development of the jurisdictional principles of South African law, in an endeavour to promote access to justice for all in Southern Africa, as well as further afield.

1.3. Research questions

The research proposes to answer the following questions:

1.3.1 What is the origin of the doctrine of *forum non conveniens*?

1.3.2 How has the doctrine of *forum non conveniens* developed into what is known as the *Spiliada* test?

1.3.3 How does the *Spiliada* iteration of the doctrine of *forum non conveniens* compare to *forum non conveniens* in other Anglo-common law[12] jurisdictions?

1.3.4 Can the doctrine of *forum non conveniens* be developed in accordance with section 39(2) of the Constitution to improve access to justice under the current jurisdictional rules of South Africa, in a manner that improves access to effective and substantive justice?

1.4. Chapter synopsis

1.4.1. Chapter one

Chapter one contains a brief introduction to the motivation for the undertaken research, as well as the problem that the research attempts to address, as well as the research questions that form the centre of the research.

1.4.2. Chapter two

[12] Within the area of private international law, it is common for the phrase “Anglo-common law” to be used to refer to the global family of laws based on English common-law, especially within the jurisdictions of South Africa, Australia, New Zealand and the United Kingdom, where the legal development of English common-law within these jurisdictions took place without the influence of American laws. As such scholars within these jurisdictions use the term “Anglo-common law” when referring to these laws within the framework of their jurisdiction’s international private laws. In the same context, “Anglo-American common law” refers to the global family of laws based of English common-law, which has been adopted and developed within the United States.

Chapter two lays out the oft-disputed origin of the doctrine of *forum non conveniens* in Scotland.

1.4.3. Chapter three

In chapter three the inception and development of *forum non conveniens* in the United Kingdom will be explored, as well as the effect of the Brussels regime on the application of the doctrine of *forum non conveniens* within the EU, with specific focus on the United Kingdom.

1.4.4. Chapter four

Chapter four is a comparative study on jurisdictional principles in general and the doctrine of *forum non conveniens* specifically, between civil law systems and select Anglo-common law systems.

1.4.5. Chapter five

Chapter five covers the adoption and development of *forum non conveniens* in South Africa.

1.4.6. Chapter Six

Chapter six critically evaluates the shortcomings of the modern application of the doctrine of *forum non conveniens*.

1.4.7. Chapter seven

Chapter seven proposes development of *forum non conveniens*, in order for the doctrine to be applied more effectively and justly in South Africa.

Chapter 2: The history of the doctrine of *forum non conveniens*

2.1. Pre-seventeenth century

Prior to the seventeenth century there was no indication of jurisdictional doctrines akin to that of *forum non conveniens*, or an earlier form of discretionary stay of proceedings.[13] Historically, Scottish courts assumed jurisdiction in two cases, namely, under jurisdiction *ratione rei gestae* and jurisdiction *ratione domicilii*.[14] These are well known common law

[13] A Arzandeh 'The origins of the Scottish *forum non conveniens* doctrine' (2017) 13 *Journal of Private International Law* 1 14.

[14] Arzandeh (n 13) 14. Based on the rule of *actor sequitur forum rei*.

principles for establishing jurisdiction, either by following the place the property is situated, in this case Scotland, or by following the domicile of the defendant or the place where the cause of action had arisen. Both jurisdiction *ratione rei gestae* and *ratione domicilii* required a strong connection between Scotland and either the domicile of the defendant or the cause of action before the courts would entertain proceedings. It is argued that these circumstances were highly unlikely to give rise to a discretionary stay of proceedings practice prior to the seventeenth century.[15]

2.2. Seventeenth and eighteenth centuries

The origins of the doctrine of *forum non conveniens* in Scots law is somewhat murky and a topic of contestation for many academics. Scots law is a mixture of common and civil law, and the doctrine can be traced to neither. The viewpoint held by the majority is that the doctrine originated from the plea of *forum non competens*.[16] *Forum non competens* can be traced back as far as 1610 in the case of *Vernor v Elvies*,[17] which is considered the first detectable development of a discretionary staying-of-proceedings practice.[18] This position is supported by the cases of *Clements v Macaulay*[19] and *Longworth v Hope*,[20] wherein the Scottish courts named its discretionary powers to stay proceedings as the *forum non competens*.

In *Vernor* the Court was seised with a dispute between two Englishmen, who were not present in Scotland with the intention to stay, regarding a debt that was due outside of Scotland. The Court held that it would only adjudicate the case if the debt had been due in Scotland. The case report is very old, quite short and the language use ambiguous.[21] However, on face value it seemed that the Court was concerned with determining the existence of jurisdiction, and not its exercise, which does not concur with the doctrine of *forum non conveniens*.[22] This is also apparent in the case of *Douglas v*

15 Arzandeh (n 13) 16.
16 C Schulze '*Forum non conveniens* in comparative private international law' (2001) 118 *South African Law Journal* 812 813; EL Barrett 'The doctrine of *forum non conveniens*' (1947) 35 *California Law Review* 380 386.
17 *Vernor v Elvies* (1610) 6 Dict of Dec 4788 (*Vernor*).
18 Arzandeh (n 13) 11.
19 *Clements v Macaulay* (1866) 4 M 583.
20 *Longworth v Hope* (1865) 3 M 1049.
21 Arzandeh (n 13) 11.
22 Arzandeh (n 13) 11.

Cunningham,[23] which concerned a dispute between Scottish parties relating to an English bond over Scotsh goods. The Court held that the Scottish court was *forum competens* because the goods that formed the centre of the dispute were located in Scotland. As in *Vernor*, there is nothing to suggest that the defendants requested a stay of proceedings of existing jurisdiction but rather questioned the *existence* of said jurisdiction.[24] In *Anderson v Hodgson and Ormiston*[25] the plaintiff owed a debt to the defendants. The defendants had previously obtained an order to prevent the plaintiff from dissipating assets, which the plaintiff challenged. The defendants alleged that the court seised was not *forum competens*, which failed due to one of the defendants being Scottish, which rendered the Scottish court *forum competens* by reason of the defendant's birthplace. At no stage did the defendants request a stay of proceedings.

These cases serve to illustrate that in the seventeenth and eighteenth centuries where *forum non competens* was applied, jurisdictional challenges pertained at the *existence* of jurisdiction and not the *exercise* thereof and, therefore, the doctrine of *forum non competens* was not applied in the context of staying proceedings.

Arzandeh attributes the academic belief that the plea of *forum non competence* as the ascendent of *forum non conveniens* to a shared linguistic link, that is conceptually divergent.[26]

2.3 Alternate origin

If one cannot conceptually trace the doctrine of *forum non conveniens* back to the plea of *forum non competens*, from where did it originate? Although the genesis of the doctrine remains largely obscure,[27] Arzendah postulates two possibilities of inception: the evolution of Scots jurisdictional rules from the eighteenth century; or the possibility that courts misunderstood earlier case law, and that this error somehow led to the creation of the discretionary stay of proceedings within Scots law.[28]

23 *Douglas v Cunningham* (1639) 6 6 Dict of Dec 4816.
24 Arzandeh (n 13) 12.
25 *Anderson v Hodgson and Ormiston* (1747) 6 Dict of Dec 4813.
26 Arzandeh (n 13) 14.
27 Barrett (n 16) 386.
28 Arzandeh (n 13) 16.

2.3.1. The evolution of jurisdictional rules from the eighteenth century onwards

The most radical change in Scots jurisdictional rules during the eighteenth century was the introduction of the Roman-Dutch principle of arrest *ad fundandam jurisdictionem*. According to Roman-Dutch law, a person domiciled within the jurisdiction of the court was entitled to the arrest of a stranger's property within the state to found jurisdiction.[29] This was first seen in *Young v Arnold*[30] in the late seventeenth century, but only found prominence in the mid-eighteenth century for founding jurisdiction in cross-border disputes.[31] Arzandeh characterises the practice of arrest to found jurisdiction as 'exorbitant'[32] as it allowed the arrest of the defendant's property in Scotland, irrespective of the defendant's presence in Scotland and the value of the property arrested. The value of the arrested property need not correspond with the value of the claim.[33] This principle increased the risk of Scottish courts entertaining claims with little or no connection with the Scottish forum, purely due to the presence of the defendant's property within the forum. This development continued into the nineteenth century, where it became common practice for Scottish courts to entertain such claims.[34]

Despite the increase in the mid-eighteenth century in the number of cases dealing with the arrest of property to found jurisdiction,[35] there is no evidence of a mechanism for discretionary stay of proceedings being developed to address the floodgate of litigation that followed. This could possibly be due to the fact that Roman-Dutch law, from which the Scottish borrowed the principle of arrest *ad fundandam jurisdictionem*, did not have a similar mechanism to mitigate *in personam* jurisdiction in cases with no connection to the forum.[36] Following this thread through the legal history of the Scottish courts, it appears that there was no version of the doctrine of *forum non conveniens* before the early nineteenth century.

2.3.2 The coincidental development of a discretionary stay of proceedings based on error in judicial interpretation.

29 Voet 2.4.22; this was an exception to the *actor sequitur forum rei* rule.
30 *Young v Arnold* (1683) M 4833.
31 Arzandeh (n 13) 17.
32 As above.
33 As above.
34 Arzandeh (n 13) 18.
35 Arzandeh (n 13) 17.
36 Arzandeh (n 13) 18.

During the early nineteenth century the emergence of the 'embryonic'[37] form of the doctrine of *forum non conveniens* can be identified.[38] The case considered by some as the birth of the doctrine in Scotland is *Hawkins v Wedderburn*.[39] In *Hawkins* the plaintiffs instituted proceedings in Scotland in respect of a debt owed to them by the defendants, who were domiciled and working in England, but had extensive property in Scotland. These proceedings were instituted after proceedings had already commenced in a court in England. The Scottish proceedings were instituted on the basis of diligence, according to which a creditor institutes proceedings to enforce payment of debts due.[40] In this case the plaintiffs wanted to secure property belonging to the defendants in Scotland to pre-empt misappropriation of the property. The defendants sought a dismissal based on *lis alibi pendens*. The Court of Session found that the Scottish proceedings dealt with obtaining security for a debt and did not deal with the same cause of action as the English courts, and the action was not stayed. In the *dicta*, the Court stated that 'there seems to be no doubt, that in cases of *lis alibi pendens*, even in a foreign court, it is competent for the Court in this country to consider the effect of that circumstance, and if it be such as in reason and equity to require the dismissal, or the sisting, or modification of the action raised here, to give it such effect'.[41]

This is considered the first explicit recognition of a Scottish court possessing a discretionary power to stay proceedings where said court has jurisdiction over the matter.[42]

This position is somewhat undermined by two factors: first, that the *Hawkins* case was not truly a case of *lis alibi pendens*, as the Scottish proceedings were concerned with obtaining security for the debts, and not disputing the merits of the case as it was before the English courts. It stands to reason that these comments by the Court merely represent *obiter dicta*, and not 'proposition[s] of law'.[43] The importance of the case is further diminished by the apparent legal unimportance of the *Hawkins* case. *Hawkins* had scarcely been referenced by leading authorities in the second half of the nineteenth

37 Arzandeh (n 13) 19.
38 A Nuyts *L'exception de forum non conveniens* (2003) 89-90; P McEleavy & G Cuniberti 'Current developments in private international law' (2005) 54 *International and Comparative Law Quarterly* 96.
39 *Hawkins v Wedderburn* (1842) 4 D 924 (*Hawkins*).
40 Arzandeh (n 13) 19.
41 *Hawkins* (n 39) 939.
42 Nuyts (n 38) 96; Arzandeh (n 13) 20.
43 Arzandeh (n 13) 21.

century, when the practice of discretionary stay of proceedings first started gaining prominence.[44] Arzandeh suggests that this is sufficient to dissuade any belief that *Hawkins* had a direct influence on the introduction of a discretionary stay of proceedings into Scots law.[45]

There are other cases from the nineteenth century that trace a more convincing path for the doctrine of *forum non conveniens*. Two Court of Session cases come to the fore: *Macmaster v Macmaster*[46] and *Brown's Trustees v Palmer*.[47] *Brown's* dealt with a claim by beneficiaries of a will against the executor of an estate in India for mismanagement. The executer's movable property in Scotland was arrested, and the defendant challenged the existence of jurisdiction as the estate, dispute and the executor's duties of office were all centred in India. The case was dismissed, as the Court held that the arrest of movables in Scotland did not establish jurisdiction before a Scottish court. Shortly thereafter, in *Macmaster*, the plaintiffs brought proceedings against the defendants to obtain an interest in an inheritance outside of Scotland. The defendants had arrested the plaintiff's moveable property in Scotland. The defendants argued that New Brunswick, the place of the contested succession and the execution of the will, had jurisdiction. The Court dismissed the proceedings based on the assumption that foreign wills, executed outside of Scotland, were not accountable to a Scottish court. Neither of these cases were truly concerned with a discretionary stay of proceedings, but rather whether Scottish courts should entertain proceedings concerning the administration of foreign trusts and estates. In both these cases movable property had been arrested to found jurisdiction but were exceptions to the general rule of arresting chattels in Scotland to assume jurisdiction.

Both *Brown's* and *Macmaster* were referenced in *M'Morine v Cowie*,[48] which is considered the starting point of discretionary stay of proceedings in Scotland. Similarly, this case dealt with a will executed outside of Scotland, in India. The plaintiffs were beneficiaries of the will and sued the defendant to recover money allegedly owed in the will. Movable property of the defendant had been arrested in Scotland, but the defendant argued that the arrest did not found Scottish jurisdiction, as the dispute concerned a

44 Arzandeh (n 13) 21.
45 As above.
46 *Macmaster v Macmaster* (1830) 9 S 224 (*Macmaster*).
47 *Brown's Trustees v Palmer* (1833) 11 S 685 (*Brown's*).
48 *M'Morine v Cowie* (1845) 7 D 270 (*M'Morine*).

foreign will. *M'Morine* was the first reported case to acknowledge a defendant's right to request the court stay proceedings in favour of the 'proper forum'[49] as well referring to the *exercise* of jurisdiction as the *forum competens*. Lord Jeffrey held the question before the Court as one of *forum competens*, not the existence of jurisdiction. As the defendant had not challenged the court's exercise of jurisdiction, the Court held that the Scottish Court of Session was 'not the proper forum for accounting' for the dispute.[50]

The Court in *M'Morine* relied heavily on the judgments in *Brown's* and *Macmaster*, even though neither of the cases truly dealt with a discretionary stay of proceedings. Arzandeh suggests that this reliance was due to the similar nature of the facts of the cases and that the judgments were misunderstood[51] and erroneously applied in *M'Morine.* If this is truly what occurred, the doctrine of *forum non conveniens* may very well have been helped along by a misunderstanding of the law, which developed into the well-established discretionary power to stay proceedings employed in decisions such as *Longworth* and *Clements* 15 years later.[52]

Shortly after the ruling in *M'Morine*, the Scottish courts reaffirmed their own discretion to waive their own jurisdiction for another proper forum in *Tulloch v Williams*.[53] In *Tulloch* the plaintiff was a Scottish resident who employed the defendant at his Jamaican estate. The plaintiff sought damages against the defendant for alleged mismanagement of the Jamaican estate. The Court stayed the proceedings, at the request of the defendant, as the Scottish forum (though competent) was the 'inconvenient' forum to hear the dispute.[54] The cases of *Tulloch* and *M'Morine* are considered somewhat of an overnight phenomenon of the time, as it almost seems as if the courts went from having no discretionary stay of proceedings to having a fully constituted practice of staying jurisdiction in favour of a more convenient court in the span of two court cases merely a year apart.

From here the development of the doctrine can clearly be traced, as seen a few decades later in *Sim v Robinow*.[55] Here the parties, while resident in South Africa, entered into a joint venture in relation to shares in a mine in South Africa. Both parties soon left

49 Arzandeh (n 13) 22.
50 *M'Morine* (n 48) 272.
51 Arzandeh (n 13) 26.
52 As above.
53 *Tulloch v Williams* (1846) 8 D 657 (*Tulloch*).
54 *Tulloch* (n 53) 657.
55 *Sim v Robinow* (1892) 19 R 665 (*Sim*).

for the United Kingdom, where the defendant was resident at the time of the proceedings, and only intended to return to South Africa at some indeterminate time in the future. The plaintiff brought a dispute relating to these shares to the Court of Session in Scotland. The Court explicitly referred to *forum non conveniens* by name, and held that it was not satisfied, under the circumstances, that a South African court was 'more convenient for all parties, and more suitable for the ends of justice'.[56]

A few decades later the doctrine was further clarified in *Société du Gaz de Paris v Société Anonyme de Navigation Les Armateurs Francais*,[57] when a French gas company brought an action against a French merchant in Scotland for the loss of the plaintiff's shipment of coal on one of the defendant's ships. The Court defined the objective of *forum non conveniens* as the search for 'that forum which is the most suitable for the ends of justice and is preferable because pursuit of the litigation in that forum is most likely to secure those ends'.[58] It is interesting to note that the Court specified the correct translation for *conveniens* as appropriate and not convenient: 'competent is just as bad a translation for *competens* as convenient is for *conveniens*',[59] thus bringing the doctrine full circle to the linguistic interpretation known under *Spiliada*.

In accordance with the legal development set out above, four early principles of *forum non conveniens* later emerged[60]in the case of *Crédit Chimique v James Scott Engineering Group Ltd*:[61]

(1) that the burden of satisfying the tribunal that the case submitted for decision should not be allowed to proceed lies upon the defender who tables the plea;
(2) that this burden can only be discharged where weighty reasons are alleged why an admitted jurisdiction should not be exercised, mere balance of convenience being insufficient;
(3) that there is another court of competent jurisdiction in which the matter in question can be litigated; and

56 *Sim* (n 55) 669.
57 *Société du Gaz de Paris v Société Anonyme de Navigation 'Les Armateurs Francais* 1926 SC (HL) 13 (*Société du Gaz de Paris*).
58 *Société du Gaz de Paris* (n 57) 22.
59 *Société du Gaz de Paris* (n 57) 18, later confirmed in *Robinson v Robinson's Trustees* 1930 SC (HL) 20.
60 Schulze (n 16) 814.
61 *Crédit Chimique v James Scott Engineering Group Ltd* [1982] SLT 131 (*Crédit Chimique*) 133.

(4) that consideration of these reasons leads to the conclusion that the interests of the parties can more appropriately be served and the ends of justice can more appropriately be secured in that other court.

These principles have since been employed by Scottish courts when deciding whether to exercise jurisdiction over a matter. There have been judgments where courts indicate that *forum non conveniens* may be pleaded due to the involvement of foreign law,[62] and some argue that it suffices to sustain the motion.[63] What has remained irrelevant in the Scottish formulation of the doctrine is the defendant's chances of success in a foreign forum (and if these chances would improve). The courts may, however, consider the possible unfair disadvantage the defendant may experience if forced to continue proceedings in Scotland.[64]

What is certain is the Scottish provenance of the doctrine of *forum non conveniens*, although its developmental genesis within the Scottish legal system remains shrouded. Today, the modern version of the doctrine lives on in different iterations in a number of different jurisdictions influenced by Anglo-common law: South Africa, New Zealand, Australia, Israel, Canada, Hong Kong, Ireland, Gibraltar, Brunei and Singapore.[65]

Chapter 3: *Forum non conveniens* in the United Kingdom

3.1 The inception of the doctrine of *forum non conveniens* in the UK

It is established legal practice in Anglo-common law jurisdictions for a forum to grant a stay of proceedings, thereby denying the exercise of jurisdiction for the purpose of another forum being more appropriate – the *forum conveniens*.[66] The 'existence of jurisdiction is one matter, and the exercise of the jurisdiction is another'.[67] This exercise of discretionary power to stay proceedings for a 'lack of jurisdictional connection' or due

62 Schulze (n 16) 814; *Williamson v The North-Eastern Railway Co* (1884) 11 R 596; *Lane v Foulds* (OH) (1903) 11 SLT 118.
63 Schulze (n 16) 814; *Parken v Royal Exchange Assurance Co* (1846) 8 D 365.
64 Schulze (n 16) 814.
65 As above.
66 PE Nygh *Nygh's conflict of laws in Australia* (2019) 59-63.
67 *Tehrani v Secretary of State for the Home Department* [2007] AC 521 [25].

to case management grounds is separate from a court's power to dismiss proceedings for being vexatious or oppressive or frivolous.[68]

The English High Court has traditionally possessed the inherent discretion to stay proceedings, based on considerations of justice, in cases where jurisdiction may have been established and where there is no foreign jurisdiction clause present in the matter in question.[69] At the same time a stay of proceedings was not granted solely on the grounds that another forum was more appropriate.[70]

The first recorded case to deal with the vexatious and oppressive test, the earliest construction of what would eventually develop into the doctrine of *forum non conveniens*, in the UK is that of *Logan v Bank of Scotland (No 2).*[71] Here the plaintiff was a Scotsman, domiciled in Scotland, who brought an action in an English court for a cause of action that arose in Scotland. The Court held that the cost of trial would be 'utterly out of proportion to the trumpery amount in dispute', and that the case was brought 'to annoy the defendant'.[72] The Court held that the action was oppressive and vexatious and an abuse of the legal process,[73] and upheld a previous order staying proceedings. In the judgment of *Logan*, it seems that the Court relied on its inherent discretion to stay proceedings, in this case to protect against abuse of the judicial process. It bears mentioning that there was no *lis alibi pendens* in Scotland at the time that the action was heard.

From 1936 the English courts followed the framework governing the stay of proceedings laid down by Scott LJ in *St Pierre v South American Stores Ltd:*[74]

> In order to justify a stay two conditions must be satisfied, one positive and one negative:[75]
>
> (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and
>
> (b) the stay must not cause an injustice to the plaintiff.
>
> On both the burden of proof is on the defendant.

68 *Fentiman encyclopaedia of private international law* (2017) 798; R Fentiman *International commercial litigation* (2010)
69 JA Collins & J Harris (eds) *Dicey*, *Morris and Collins on the conflict of laws* (2018) 288.
70 Schulze (n 16) 815.
71 *Logan v Bank of Scotland (No 2)* (1906) 1 KB 141 (*Logan*).
72 *Logan* (n 71) 153.
73 *Logan* (n 71) 152-153.
74 *St Pierre v South American Stores Ltd* (1936) 1 KB 382 (*St Pierre*).
75 Schulze (n 16) 815.

The resulting application of the *St Pierre* test was that an English court seldom granted a stay of proceedings once English jurisdiction had been granted, even in cases where there were few or no connecting factors with England.[76]

This can be seen in the judgment of the Court of Appeal in *HRH Maharanee of Baroda v Wildenstein*,[77] where the Court assumed jurisdiction in a matter where the defendant had been served with proceedings during a brief presence in the UK, during a visit to Ascot, despite the fact that both parties permanently resided in France and that there were no other English connecting factors.

From case law it may be inferred that, in the absence of a plea of *lis alibi pendens*, an English court would not stay proceedings unless it was proved to be vexatious and oppressive.[78]

The *St Pierre* test was narrowly construed and applied and was followed until the early 1970's, whereafter the gradual globalisation of the international commercial community necessitated modernisation of long-standing court formulae[79] and led to the development of a more generalised approach to the doctrine of *forum non conveniens*. The cases that contributed to this shift include *The Atlantic Star: The Owners of the Atlantic Star v The Owners of the Bona Spes*,[80] where the House of Lords re-evaluated the interpretation of the 'vexatious and oppressive' leg of the *St Pierre* test and a more flexible approach was followed in the application thereof.

In *Atlantic Star 2* the owners of said vessel brought an appeal against the order by the Court of Appeal[81] in *Atlantic Star 1* dismissing a motion by the appellants to have the summons and all subsequent proceedings by the respondents set aside or stayed.

During January 1970 the Atlantic Star, a Dutch-owned motor vessel, collided with a moored Dutch-owned motor barge, the Bona Spes, in dense fog. This collision occurred in Belgian international waters and the Bona Spes was moored outside a Belgian barge, Hugo van der Goes. Both barges, with their cargo, sank and two men aboard the Hugo

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76 A Mainsbridge 'Discretion to stay proceedings – The impact of "the Abidin Daver" on judicial chauvinism' (1986) 11 *Sydney Law Review* 151 152.

77 *Maharanee of Baroda v Wildenstein* [1972] All ER 689 (*Maharanee of Baroda*).

78 Schulze (n 16) 816 and also the *Logan* case; *Egbert v Short* (1907) 2 Ch 205 and *In re Norton's Settlement* [1908] 1 Ch 471.

79 DG Morgan 'Discretion to stay jurisdiction' (1982) 31 *International and Comparative Law Quarterly* 582.

80 *The Atlantic Star: The Owners of the Atlantic Star v The Owners of the Bona Spes* [1973] 2 All ER 175 (*Atlantic Star 2*).

81 *The Atlantic Star: The Owners of the Atlantic Star v The Owners of the Bona Spes* [1972] 3 All ER 705 (*The Atlantic Star 1*).

van der Goes drowned.[82] The owners of the Hugo van der Goes brought an action in Belgium, and the owners of the Bona Spes brought an *actio in rem* in an English Admiralty Court. In an effort to circumvent the arrest of the vessel, the owners of the Atlantic Star agreed to English jurisdiction.

The ground for this appeal was a pending action in the Commercial Court of Belgium based on the same cause of action and seeking the same relief, and also alleging that the proceedings before the English court(s) were vexatious and oppressive and an abuse of judicial proceedings.[83]

Both the court *a quo* and the Appeal Court refused the stay of proceedings, and in *Atlantic Star 1* Lord Denning held that, although inconvenient, the proceedings were not vexatious or oppressive and did not constitute an injustice.[84]

In *Atlantic Star 2* the House of Lords rejected the position of the lower courts and the appeal succeeded. In his judgment Lord Wilberforce held, although urged to adopt *forum non conveniens* as a plea available in English law, that this was a 'radical change in direction' and that the liberalisation of existing English rules would suffice.[85] This liberalisation did not indicate an acceptance of the Scottish doctrine.[86]

In *Macshannon v Rockware Glass Ltd*[87] the House of Lords denied the application of the doctrine of *forum non conveniens* in English law with Lord Salmon going so far as to state that: 'This doctrine, however, has never been part of the law of England. And, in my view, it is now far too late for it to be made so save by Act of Parliament.'[88]

Lord Diplock, however, did admit that there existed a 'fine' difference between the discretion to stay proceedings as exercised by English courts and a generalised approach to the doctrine *of forum non convenience*.[89]

Lord Fraser of Tullybelton went as far as to state that although the solution, *forum non conveniens*, is not available in English law, the same result could be reached by application of English law. These tests 'differ more in theoretical approach than in practical substance from those that would have been applicable in Scotland'.[90]

82 *The Atlantic Star 2* (n 80) 178.
83 As above.
84 *The Atlantic Star 1* (n 81) 709.
85 *The Atlantic Star 2* (n 80) 190.
86 *The Atlantic Star 1* (n 81) 817.
87 *Macshannon v Rockware Glass Ltd* [1978] 1 All ER 625 (*Macshannon*).
88 *Macshannon* (n 87) 634.
89 *Macshannon* (n 87) 630.
90 *Macshannon* (n 87) 639.

The recalcitrance of two differently-constituted benches of the House of Lords in *Altantic Star 2* and *Macshannon* to admit the application of a general doctrine of *forum non conveniens* under the guise of the vexatious and oppressive test is an interesting occurrence and illustrates the contradictory and varying approaches held by the English courts at this point in time. The turning point in this regard can be seen in the case of *The Abidin Daver*.[91]

The facts of *The Abidin Daver* is similar to other admiralty cases: During March 1982 in the Bosporus waterway of Turkey, two vessels collided. The Turkish defendants claimed damages from the Cuban plaintiffs in a Turkish court. The plaintiffs followed this by serving a writ on a sister ship of the defendant in England, thereby launching an *actio in rem* in the Admiralty Court. The defendants applied for a stay of proceedings, which was granted on the basis of the concurrent proceedings in the Turkish court, that the litigation would be more convenient in the Turkish court and the plaintiff would not be deprived of any juridical advantage if a stay was granted. This decision was appealed by the Cuban plaintiffs in the Court of Appeal, on the grounds that a balance of convenience was not a sufficient ground to deny the plaintiffs the advantage of pursuing the action in an English court, and that the pending claim in the Turkish courts was not enough to bar the plaintiff from bringing the matter in an English court. The appeal was allowed. The matter was appealed by the defendants to the House of Lords.

After a decade of gradual liberalisation of the vexatious and oppressive test of *St Pierre* which represented a movement from judicial chauvinisms to judicial comity, the House of Lords finally acknowledged the equivalence of the English test to that of the Scottish doctrine: '[J]udicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge … [it is] indistinguishable from the Scottish legal doctrine of *forum non conveniens*.'[92]

The Court held that, in a case where the matter brought before the English court is pending in a foreign forum, which is also the most appropriate forum to hear the matter, the plaintiff must prove, objectively by way of cogent evidence and despite the existence of multiple proceedings, that it would be an injustice to stay the proceedings in the English

91 *The Abidin Daver* (1984) 1 All ER 470 (*The Abidin Daver*).
92 *The Abidin Daver* (n 91) 476.

court.[93] Any subjective belief held by the plaintiff or the plaintiff's legal advisors in terms of the existence of an injustice is insufficient to prevent a stay.[94]

The issue of granting a stay of proceedings was a question of judicial discretion exercised by weighing all the relevant factors of each case.[95]

This position was upheld in the subsequent judgment of *Spiliada Maritime Corporation v Cansulex Ltd*.[96] Here the House of Lords allowed for the service out of a writ in a foreign jurisdiction. Lord Goff embarked on a lengthy appraisal of the doctrine of *forum non conveniens* and set out the principles of the doctrine, as they had developed until the hearing of the *Spiliada* case:[97]

(a) The court will only grant a stay of proceedings on the grounds of *forum non conveniens* where the court has been satisfied that there is another available forum, with competent jurisdiction, that is more appropriate to hear the matter where 'the case may be tried more suitably for the interests of all the parties and the ends of justice'.

(b) The burden of proof rests on the defendant to prove there is a more appropriate forum, that is not England.[98] If the court determines that there is another forum that is *prima facie* the more appropriate forum to hear the matter, the burden of proof shifts to the plaintiff, who must prove that they would not receive justice in the foreign forum.[99]

(c) The closest and most real connection will be determined by weighing the connecting factors present in each case. In this the court is not, as the name of the doctrine would suggest, merely looking for the most *convenient* forum. These factors include factors influencing the convenience and expense of litigation in a particular forum, the proper law governing the transaction and the places the parties reside or carry out business, amongst others.

(d) However, if the court concludes that there is no other available forum that is more appropriate, the court will refuse the stay.

93 As above.
94 *The Abidin Daver* (n 91) 475-476.
95 Schulze (n 16) 819.
96 *Spiliada* (n 1). Lord Templemen on 846 discusses the difference between *forum conveniens* and *forum non conveniens*. The latter entitles a plaintiff to commence proceedings in the forum, which can only be stayed if the defendant satisfies the court there is another, more appropriate forum. It thus is seised with *exercising* jurisdiction. Under the doctrine of *forum conveniens* a court will only grant a plaintiff leave if they satisfy the court that England is the most appropriate forum, thus an inquiry to establish jurisdiction.
97 *Spiliada* (n 1) 854-856.
98 In cases concerning as-of-right proceedings, this is the first leg of the two-stage inquiry of the *Spiliada* test.
99 This represents the second leg of the *Spiliada* test, wherein the plaintiff must now prove that they (the plaintiff) would not obtain substantive justice in the more appropriate forum.

(e) If the court has determined that there is another forum which is prima facie more appropriate, it will grant a stay of proceedings unless the plaintiff can prove by way of cogent evidence that there is a reason, based on the considerations of justice, that the stay must nevertheless not be granted.

The *Spiliada* case is heralded as the *locus classicus* on the doctrine of *forum non conveniens* and following the judgment, the test laid down by Lord Goff has become known simply as the *Spiliada* test.

3.2 Consequential judicial application of the *Spiliada* test

Since the judgment in *Spiliada* the English courts have been seised with many cases where defendants have brought an application to stay proceedings on the grounds of *forum non conveniens*.

One of the more notable cases heard post-*Spiliada* is that of *Lubbe v Cape Plc*.[100] Herein South African plaintiffs brought a class action against the parent company of the former South African subsidiary, Cape Plc, in England. The Court of Appeal stayed proceedings based on the defendant's reliance on *forum non conveniens*. The plaintiff appealed to the House of Lords,[101] where the main consideration of the Court centred around the second leg of the *Spiliada* test. The House of Lords granted the plaintiff's submissions and did not stay the proceedings upon application of the second leg of the *Spiliada* inquiry, citing the inability of the South African legal system to adequately adjudicate a class action, the lack of funding for class actions and for expert evidence as amounting to a 'denial of justice'.[102] The *Lubbe* case is a good source for criticism of the application of the *Spiliada* test, but also serves as a point of discussion taking into consideration the interim legal development as shown in *Owusu v Jackson & Others.*[103]

In contrast to the case of *Lubbe* there is the recent decision of *Vedanta Resources PLC & Another v Lungowe & Others*[104] where we find similar facts before the UK Supreme Court. One of the considerations before the Court was the issue of substantial justice as it is embodied in the second leg of the *Spiliada* test. Although the cases of *Lubbe* and

100 *Lubbe* (n 6).
101 UKHL.
102 *Lubbe* (n 6) 1543.
103 *Owusu v Jackson and Others* C-281/02 (*Owusu*).
104 *Vedanta Resources PLC and Another v Lungowe and Others* [2019] UKSC 20 (*Vedanta*).

Vedanta share similar facts, the circumstances of each case differ sufficiently that it could be argued that the outcome of the application of the second leg in both cases should have been different.

Both the cases of *Lubbe* and *Vedanta* will be discussed at length in a subsequent chapter focusing on the application of the second leg of the *Spiliada* test.

3.3 The effect of the Brussels regime on the doctrine of *forum non conveniens*

Historically, there were three mutually-exclusive jurisdictional regimes that may potentially have found application in an English court:[105] the Brussels Convention;[106] the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters;[107] and the traditional English jurisdictional rules.

In accordance with the traditional English common law rules an English court may assume jurisdiction over a matter where the defendant has been served either in England[108] or overseas.[109] Under these circumstances the defendant could dispute the jurisdiction of the English court by a plea of *forum non conveniens*. The exercise of judicial discretion under traditional rules of jurisdiction in English law could have been limited by either the Brussels regime or the Lugano Convention.

The Brussels regime has been in force in the UK since 1987 as it was implemented domestically by the Civil Jurisdiction and Judgments Act[110] and amended by the Civil Jurisdiction and Judgments Act (Amendment).[111] The regime aimed to 'substantially harmonise' the national laws concerning jurisdiction and enforcement of judgments of the

105 R Fentiman 'Jurisdiction, discretion and the Brussels Convention' (1993) 59 *Cornell International Law Journal* 59 62.

106 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention). The Brussels Convention was superseded by Regulation (EC) 44/2001 of the European Parliament and of the Council of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation) which was later repealed and replaced by Regulation (EC) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation Recast). Collectively, they are referred to as the 'Brussels regime'. The effect of the Brussels regime on the working of *forum non conveniens* consistently remains the same.

107 Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention).

108 *Maharanee of Baroda* (n 77) 688. This is referred to 'serving in' jurisdiction.

109 The Rules of the Supreme Court, Ordinance 11, Rule 1(1). This is known as 'serving out' of jurisdiction.

110 Civil Jurisdiction and Judgments Act 1982.

111 The Civil Jurisdiction and Judgments Act (Amendment), SI 1990, 2591.

European Community.[112] Articles 33 and 34 of the Brussels Regulation (Recast) is the most 'important'[113] in the context of vesting jurisdiction, and is considered an imported 'variant' of the doctrine of *forum non conveniens*.[114] Articles 33 and 34 determine that a court of a European Union (EU) member state may stay proceedings in favour of parallel proceedings in a non-member state, if the court is satisfied that the stay is necessary 'for the proper administration of justice'.[115]

Originally, the effect of article 21 of the Brussels Convention was that any other court of a Convention country that had jurisdiction in terms of article 2 of the Convention had to decline the exercise thereof automatically,[116] and the traditional judicial discretion found no application under such circumstances. However, the Brussels Convention lacked a mechanism to stay proceedings where the alternate forum was outside the EU.

This problem clearly presented itself in the case of *Re Harrods (Buenos Aires) Ltd*[117] where the Court was charged with the question of whether an English court had the power to stay proceedings where a non-Convention country was the most appropriate forum in a matter where the Brussels Convention conferred jurisdiction. In *Harrods* the minority shareholder, a Swiss company, instituted proceedings in the Court of Appeal, seeking an order that the majority shareholder, also a Swiss company, should compensate the minority shareholder for the decrease in the value of the company stock due to alleged mismanagement by the majority shareholder. The company was incorporated in England, with operations taking place in Argentina. In accordance with the Brussels Convention, section 42 of the Civil Jurisdiction and Judgments Act determined that the company was domiciled where it was incorporated, namely, England. This in turn conferred jurisdiction onto the English courts[118] under article 2 of the Brussels Convention.

This exposed two jurisdictional issues under the Brussels Convention: Even though an alternative forum may exist, in circumstances such as those in *Harrods*, the doctrine of *forum non conveniens* neither found any application under the Brussels regime, nor did it provide for a stay of proceedings where the other forum was in a non-

112 Fentiman (n 105) 62; RA Brand & SR Jablonski *Forum non conveniens: History, global practice, and future under the Hague Convention on Choice of Court Agreements* (2007).
113 Fentiman (n 105) 63.
114 Fentiman (n 68) 800.
115 Under the Brussels Convention this mechanism could be found under sec 21.
116 Fentiman (n 105) 65.
117 *Re Harrods (Buenos Aires) Ltd (No 2)* [1991] 4 All ER 348 (*Harrods*).
118 Fentiman (n 105) 60.

Convention country. The Court of Appeal ultimately held that the Convention did not prevent a plea of *forum non conveniens* to stay an action in favour of a non-Convention country and granted a stay of proceedings.[119] The matter was appealed to the House of Lords, which in turn referred the matter to the European Court of Justice (ECJ). Unfortunately, the parties settled out of court before the case could make it to Luxembourg, and the erroneous judgment of the Court of Appeal stood until ten years later when the ECJ finally clarified this issue in *Owusu v Jackson & Others*.[120]

In this case Mr Owusu, a British national who was domiciled in the United Kingdom, sustained serious injuries while swimming at the Jamaican holiday villa of Mr Jackson, the first defendant. The claimant swam into a submerged sandbank and sustained severe injuries.[121] Mr Owusu sued the first defendant in contract, on the implied term that the beach, which was part of the rental agreement, would be 'reasonably safe or free from hidden damages'.[122] In the same action the claimant also sued several Jamaican companies in tort.[123] The first defendant was served in England, whereas defendant's three, four and six were served out of jurisdiction, in Jamaica. Defendants four and six argued that the Jamaican forum was the 'natural and most appropriate forum'[124] and listed the connecting factors. The third defendant brought an application to stay the proceedings, based on the fact that the cause of action arose in Jamaica, the witnesses were resident in Jamaica and that by allowing the claimant to litigate in an English court, it would be of 'real prejudice' to the defendant due to the territorial limitations of defendant three's insurance.[125]

Upon closer inspection, the grounds for the application to stay the proceedings by defendants four and six constituted the first leg of the *Spiliada* test, and defendant four's application relied on both the first leg and the second, but mostly on the latter.

On the compatibility of the doctrine of *forum non conveniens* and the Brussels Convention, the Court held as follows:[126]

119 *Harrods* (n 117) 369.
120 *Owusu* (n 103) 2.
121 *Owusu* (n 103) 2.
122 *Owusu* (n 103) 4-5.
123 It was brought to the Court's attention that the Jamaican defendants were embroiled in another claim relating to injuries sustained by a third party, Alexandra Rickham, at the very same 'concealed hazard'. Her action was heard in the Jamaican courts, as none of the defendants in her case were domiciled in England.
124 *Owusu* (n 103) 13.
125 The insurance did not cover compensation awards for damages made by courts of first instance outside Jamaica. *Owusu* (n 103) 15.
126 *Owusu* (n 103) 37.

(a) Article 2 of the Brussels Convention was mandatory in nature and there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention.

(b) The Convention did not provide for an exception to be made on the basis of *forum non conveniens*.

(c) The doctrine was recognised only in a limited number of Contracting States, thus allowing a plea of *forum non conveniens* in the context of the Brussels Convention would have affected the uniform application of the rules of jurisdiction contained therein as the doctrine was recognised only in a limited number of Contracting States.[127]

The resulting judgment was that the claimant was allowed to bring the action in an English court, based on article 2 of the Brussels Convention, even though England shared no connecting factors with the suit and Jamaica was the more appropriate forum. The Court considered the connecting factors presented by the defendants and held that 'genuine as the difficulties may be' it was not permissible to call into question the mandatory nature of article 2 of the Convention and the jurisdiction it conferred.

The effect of the judgment by the ECJ in *Owusu* was that where multiple defendants were sued in England based on the domicile of a single defendant, the English court had to reject a plea to stay proceedings even if the most appropriate forum was in a non-contracting state. Unfortunately, this meant that any defendant(s) not domiciled in England would find themselves embroiled in proceedings in England.[128]

The Court declined to answer the second question referred to it, namely, whether the application of *forum non conveniens* was ruled out in all circumstances under the Brussels Convention. This raised the question of whether this prohibition was absolute in all circumstances, or whether there was a possibility for derogation if, for example, there was an already-pending case before a court in a non-member state, if there was an exclusive jurisdiction clause in favour of a non-member-state and where the defendant was domiciled in this non-member state or when proceedings centred around an *actio in rem* in immovable property located in a non-member state. If a member state were to stay proceedings under these circumstances, in favour of a non-member state, this would be

127 *Owusu* (n 103) 43.
128 This would also later be the case under the Brussels Regulation (Recast).

an example of the 'reflexive effect'[129] of the Brussels Convention. This 'effect' therefore would be that if the *Owusu* dispute took place between two contracting states, if the contracting state first seised with the dispute was not the UK, the court first seised with the matter would have sole jurisdiction, and the English courts would not have been 'juridically competent'.[130]

Hartley notes that none of the nine judges on the Grand Chamber panel of the ECJ in the *Owusu* judgment was an English common law judge, which seems odd if one considers that the Anglo-common law in some sense was on trial.[131] In considering *forum non conveniens* the ECJ did not consider to whose benefit the doctrine operated[132] but merely that it would undermine legal certainty if a court with jurisdiction under the Brussels regime could also apply *forum non conveniens*. Three main objections to the application of the doctrine seemed to come to the fore, the first being that a defendant would not be able to foresee in which other courts they may be sued, if the possibility of the application of the doctrine exists,[133] which suggests that the purpose of banning the doctrine is to protect the defendant.[134] This is a *non sequitur*, as it is the defendant who applies for the stay in the first place. If a defendant wanted to be sued in their own forum, the defendant should simply not apply for the stay.[135] Hartley also notes that the defendant in such proceedings would by definition be domiciled within the forum, and thus it does not follow why the EU would want to protect a defendant against the laws of their own forum.[136]

The second objection raised by the Court was that the onus lay with the plaintiff, when objecting to a stay, to establish that the foreign court does not have jurisdiction or (if the court has jurisdiction) that the plaintiff would not obtain justice in said forum.[137]

Finally, the Court considered that, as most EU member states do not apply *forum non conveniens*, it would undermine the mandatory nature of the uniform rules of jurisdiction set out in the Brussels regime if Anglo-common law member states were

129 J Harris 'Stay of proceedings and the Brussels Convention' (2005) 54 *International and Comparative Law Quarterly* 933 943.
130 Harris (n 129) 943.
131 TC Hartley 'Jurisdictional conflicts: The common law approach' International Commercial Litigation (2015) 224.
132 Hartley (n 131) 275.
133 *Owusu* (n 103) 42.
134 Hartley (n 131) 275.
135 As above.
136 Hartley (n 131) 276
137 *Owusu* (n 103) 42.

allowed to apply the doctrine.[138] This indicates a 'startling lack of concern' for the interests of the parties,[139] as well as the interests of justice under the second leg of the doctrine.

In contrast to the reasons set out by the Court in *Owusu*, Hartley states that there is only one 'reasonable' argument against *forum non conveniens*: that a plaintiff has an interest in knowing, with reasonable certainty, whether a court has jurisdiction to hear a claim[140] (or if it will be an exercise in futility). It seems that English courts and English litigators accept that legal certainty often is outweighed by other considerations, such as access to justice.[141]

Hartley suggests a reasonable compromise by the ECJ in *Owusu* would have been if the Court limited its ban of *forum non conveniens* to cases where the plaintiff was domiciled in a member state other than the forum's.[142] Rather, *Owusu* should be seen as an attempt by the ECJ to promote legal certainty within the EU and between its member states at all costs, 'abolishing common law doctrines' even where there is 'no legitimate EU interest at stake'.[143]

Shortly after the *Owusu* judgment was handed down by the ECJ, the English High Court was faced with similar facts in *Konkola Copper Mines plc v Coromin*,[144] where the Court had jurisdiction under article 2 of the Brussels Convention and article 6(2) of the Lugano Convention.[145] The defendants argued that the parties to the action were bound by an exclusive jurisdiction clause in favour of Zambia, and requested the Court to stay proceedings for a more appropriate, Zambian, forum. Colman J held that 'article 17 [of the Convention] recognises certainty and party autonomy by superimposing it on the domicile rule'.[146] The Court held the earlier approach of the Cour d'Appel of *Versailles in Bruno v Société Citibank*,[147] in which case the defendant domicile rule contained in article 2 prevailed against an exclusive jurisdiction clause in favour of a non-contracting state, to be 'formalistic' and '[without] conceptual foundation' and that this view originated from

138 *Owusu* (n 103) 45.
139 Hartley (n 131) 276.
140 Hartley (n 131) 276.
141 As above.
142 As above.
143 As above.
144 *Konkola Copper Mines plc v Coromin* [2005] EWHC (Comm) 898 (*Konkola*).
145 Lugano Convention (n 107).
146 *Konkola* (n 144) para 99.
147 *Versailles in Bruno v Société Citibank* 1992 Rev Crit 333.

the 'assumption that the courts of Contracting States should respect party autonomy only if that is expressed in terms of jurisdiction in the Courts of Contracting States'.[148]

This is known as the *Konkola* approach, whereby proceedings will be stayed in favour of a non-contracting state based on the Brussels Convention. The court retains the ability to apply national laws when dealing with non-contracting states, even where the national laws are discretionary. This discretionary approach has been defended by many English legal scholars,[149] and is often reflective of their favour of the application of the doctrine of *forum non conveniens* and the inherent discretionary powers it confers on the judiciary of the forum.[150] The *Konkola* approach works through the medium of national laws to achieve Regulation aims of the Brussels regime, by staying proceedings in favour of courts of non-member states on grounds similar to those found in the Convention, while not necessarily complying with the 'finer details' of the Convention.[151] Granting a stay of proceedings allows the court to apply national laws when dealing with non-member states, offering an element of 'independence'.[152]

3.5 Post-Brexit

The United Kingdom formally left the EU on 31 January 2020, also known as Exit Day, in accordance with the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.[153] Article 67(1) of the Withdrawal Agreement determines the continued application of the Brussels Regulation for any legal proceedings 'instituted before the end of the transition period'[154] or legal proceedings that are instituted after the transition period, but that are related to proceedings instituted before the end of the transition period 'pursuant to Articles 29 to 31 of the [Brussels Regulation (Recast)]'.[155]

148 *Konkola* (n 144) 100.
149 See E Peel '*Forum non conveniens* and European ideals' (2005) *Lloyd's Maritime and Commercial Law Quarterly* 363; A Briggs '*Forum non conveniens* and ideal Europeans' (2005) *Lloyd's Maritime and Commercial Law Quarterly* 378; Harris (n 129) 291.
150 CJS Knight 'Owusu and Turner: The shark in the water?' (2007) 66 *Cambridge Law Journal* 288 291; See also *Turner v Grovit* C-159/02 (ECJ).
151 Knight (n 150) 291.
152 As above.
153 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 (Withdrawal Agreement).
154 Withdrawal Agreement (n 153) art 67(1)(a).
155 As above.

The transition period will run from the Exit Date to 31 December 2020.[156] Until the lapse of the transition period jurisdictional matters were governed by the Brussels Regulation (Recast). Post-Brexit the Brussels regime ceased to apply as determined in the Civil Jurisdiction and Judgments Act.[157]

On 1 January 2021 the UK acceded to the Hague Convention on Choice of Court Agreements[158] which is applicable to exclusive jurisdiction clauses.[159] Hereunder a court requires courts of contracting states to dismiss proceedings in favour of courts of contracting states with designated exclusive jurisdiction.[160] While this seemed to ease some uncertainty surrounding exclusive jurisdiction clauses, it does not give clarity on circumstances where there are non-exclusive jurisdiction clauses or no jurisdiction clauses at all. Before Brexit, the UK was party to the Hague Convention as a result of its EU membership. There is some lingering uncertainty whether the Hague Convention will extend protection to agreements entered into before 1 January 2021, as neither the UK nor the EU are in agreement on how the Hague Convention will apply. The UK has legislated to apply the Hague Convention to contracts entered into before their accension to the Hague Convention since its EU membership in 2015. In contrast, the EU has indicated the preferred way forward would be that the Hague Convention will only apply to exclusive jurisdiction clauses entered into after 1 January 2020,[161] from the date of re-joining. This is an unprecedented question which will, ultimately, have to be decided by the courts of EU member states.

During April 2020 the UK applied to join the Lugano Convention as an independent contracting state, which regulates trade jurisdiction and the enforcement of judgments between Denmark (in its own right, as an opt-out state), Switzerland, Norway and Iceland, members of the European Free Trade Association (EFTA States) and the EU. The Convention, as a 'double convention',[162] sets out jurisdiction in civil and commercial cross-border disputes and inter-state recognition and enforcement of judgments, which offered a possible solution to the jurisdiction problem faced by the UK post-Brexit, in that

156 Withdrawal Agreement (n 153) art 126.
157 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 479 secs 7 & 8.
158 Hague Conference on Private International Law, *Hague Convention on Choice of Court Agreements*, 30 June 2005 (Hague Convention).
159 Hague Convention (n 158) art 1.
160 Hague Convention (n 158) art 6.
161 Communication from the Commission to the European Parliament and the Council Assessment on the Application of the United Kingdom of Great Britain and Northern Ireland to Accede to the 2007 Lugano Convention.
162 As above.

the Convention is 'very similar' to the Brussels Regulation (Recast).[163] This would have mostly returned the UK to the position in which it was pre-Brexit, insofar as it related to jurisdiction and recognition and enforcement of judgments. The Convention is open to EU member states (for their non-European territories) and future members of EFTA. For any other state to accede, an application to the depository must be made, which in turn is communicated to the contracting parties.[164]

The Lugano Convention requires 'unanimous agreement' of the contracting states for a new contracting state to receive an invite from the depository to accede to the Convention.[165] On 1 July 2021 the European Commission notified the UK of not being 'in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention'.[166]

The Hague Convention will only apply in cases of exclusive jurisdiction clauses between contracting states. Therefore, as the attempt to accede to the Lugano Convention has been unsuccessful, and in cases where the Hague Convention does not apply, the UK courts will have to revert to common law jurisdictional principles, which once again opens the door for the return of the doctrine of *forum non conveniens*. English courts may once again default back to the exercise of unencumbered judicial discretion in the absence of the Brussels regime, as it had in the past. This would be in line with the UK's preference for English law and English courts.[167]

This creates an increased risk of parallel proceedings and leaves the UK once more vulnerable to torpedo proceedings,[168] as English courts are no longer protected under the Brussels Regulation (Recast).

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163 TC Hartley 'Arbitration and the Brussels I Regulation – Before and after Brexit' (2021) 17 *Journal of Private International Law* 53.

164 Lugano Convention (n 107) art 70.

165 Lugano Convention (n 107) art 72(3).

166 Communication from the European Commission representing the European Union to the Swiss Federal Council as the Depository of the 2007 Lugano Convention (concerning the application of the United Kingdom of Great Britain and Northern Ireland to accede the 2007 Lugano Convention).

167 J Ham '(Br)exit strategy: The future of the *forum non conveniens* doctrine in the United Kingdom after "Brexit"' (2020) 52 *Cornell International Law Journal* 717 744.

168 The 'Italian torpedo' was historically employed as a delay tactic in strategic litigation, whereby an action was filed in a country with a legal system known to be slow (such as Italy), despite any agreements between the parties for the matter to be heard elsewhere. Any action brought in the appropriate court is frustrated by the delay created in the foreign court, as the appropriate court cannot continue before the foreign court has declined jurisdiction.

Chapter 4: Comparable jurisdictions

4.1 Civil law systems

Civil law systems take a different approach to jurisdiction than their common law counterparts. Civil law systems do 'nothing'[169] until the same case appears before two different courts, whereby the doctrine of *lis alibi pendens* is applied.[170] Civil law courts make no attempt to perceive the most appropriate forum, and the court second seised will give up the dispute in favour of the first.[171] There exists one exception to the general rule in terms of article 15 of the Regulation Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility,[172] whereby a court of a (Civil or Common law) member state, having jurisdiction in a matter, may stay the case or the part thereof to a court of another member state. The stay is justified if the child in question had a particular connection with the transferee member state, if said court is better placed to hear the matter or a part thereof, or if it is in the best interests of the child in question.

Although the doctrine of *forum non conveniens* finds no application in civil law systems, there are certain judicial mechanisms that reminds one of the discretionary stay of proceedings.

4.1.1 Germany

The doctrine of *forum non conveniens* is unknown to the German legal system. Jurisdictional rules in Germany consist of strict, clearly-formulated statutory rules with no general judicial discretion.[173] Discretionary stay of proceedings, or anything resembling *forum non conveniens*, does not exist in German law,[174] with the exception of section 47

169 Hartley (n 131) 244.
170 As above; Fentiman (n 68) 799.
171 Hartley (n 131) 244.
172 Regulation (EC) 2201/2003 of the European Parliament and of the Council of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) 1347/2000 (also known as Brussels IIa).
173 H Schack 'Die Versagung der deutschen internationalen Zuständigkeit wegen *forum non conveniens* und *lis alibi pendens* (1994) 58 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 40 42.
174 Schulze (n 16) 826.

of the Code on Non-Contentious Proceedings[175] in international law. Section 47 of the Code determines that a court may abstain from placing a minor under the court's guardianship if the minor's interests are better provided for by a foreign court. It has been attempted to incorporate the legal concept of *Rechtsschutzbedürfnis*, using a legitimate interest to take legal action, as an additional procedural requirement.[176] The 'legitimate interest' is relevant under circumstances where the plaintiff abuses legal processes.[177] In terms of section 35 of the Code of Civil Procedure[178] a plaintiff has a right to choose between several courts with concurrent jurisdiction. There is also *Justizgewährungsanspruch*, an individual's constitutional right to access to courts in Germany.[179] All of this falls short of *forum non conveniens*. There are two main arguments against the adoption of the doctrine in German law: The first is that the doctrine would undermine *Rechtssicherheit*, the doctrine of legal certainty,[180] which requires clear and unambiguous jurisdictional rules and is the cornerstone of the codified legal system in Germany. The second argument is that article 101(1) of the German Basic Law[181] contains a right to be heard by a *statutorily*-designated court. This requires that the competent forum be identified as clearly and unambiguously as possible and cannot be derogated from.[182] This interpretation leaves no room for *forum non conveniens*. As such, the current position is that the effect of the doctrine in the exercise of such a broad judicial discretion would infringe against the German legal system and its most sacrosanct principles, which is built on 'statutorily-defined jurisdictional interests'.[183]

4.1.2 France

175 Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction of 17 December 2008 (Federal Law Gazette I, 2586, 2587) last amended by art 2 of the Act of 22 June 2019 (Federal Law Gazette I 866) (Code).

176 E Jayme 'Zur Übernahme der Lehre vom "*forum non conveniens*" in das Internationale Verfahrensrecht' (1975) *Das Standesamt* 91 94.

177 Schulze (n 16) 826.

178 Code of Civil Procedure as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBl, Federal Law Gazette) I 3202; 2006 I 431; 2007 I 1781), last amended by art 1 of the Act dated 10 October 2013 (Federal Law Gazette I 3786).

179 Schulze (n 16) 826.

180 Schulze (n 16) 827.

181 Germany: Basic Law for the Federal Republic of Germany.

182 Schack (n 173) 42.

183 A Reus 'Die "*forum non conveniens* doctrine" in Großbritannien und den USA in Zunkunft auch im deutschen Proseß? (1991) *Recht der internationalen Privatrecht* 40 42.

Similarly, *forum non conveniens* is a foreign doctrine in municipal and international French law.[184] There are domestic jurisdictional mechanisms that allocate a dispute to a specific authority based on competence of attribution and territorial jurisdiction, subject to the interests of litigants and the requirements of administration of justice.[185] As such there is no reasonable basis to grant courts the power of a discretionary stay.[186] A French court has jurisdiction if a ground of competence is present: the nationality of the parties; *locus contractus*; place of performance; and the *locus delicti*.[187] In terms of article 92 of the New Code a judge may declare the court incompetent *ab initio* if the court does not have the jurisdiction to hear the matter. However, in doing so a judge is not exercising a judicial discretion to stay proceedings in favour of a more appropriate forum, but merely acknowledging that the court has no jurisdiction.[188]

European civil law jurisdictions do not recognise discretionary stay of proceeding powers at all. This seems to be due in part to their 'closed legal systems'[189] with strictly-defined jurisdictional rules, as well as the EU countries being subject to the Brussels regime.

4.2 Anglo-common law systems

4.2.1 Australia

The House of Lords decision in *Spiliada* has not been met with universal acceptance in the Australian judiciary. The Australian High Court in *Oceanic Sun Line Special Shipping Co Inc v Fay*[190] declined to follow the judgment in *Spiliada*. The respondent, a resident of Queensland, had booked a cruise on the Aegean Sea to the Greek Islands in a ship owned by Oceanic, a company incorporated in Greece. While the ship was sailing in Greek waters, the respondent sustained injuries while taking part in on-deck activities. The respondent launched proceedings against the appellant in the Supreme Court of New South Wales and received leave to serve the appellants out in Greece. In the court *a quo*

184 Schulze (n 16) 825.
185 New Code of Civil Procedure (New Code); Schulze (n 16) 825.
186 JJ Fawcett 'Declining jurisdiction in private international law' (Reports to the 14th Congress of the International Academy of Comparative Law (1995) 1 14.
187 Schulze (n 16) 826.
188 As above.
189 Schulze (n 16) 829.
190 *Oceanic Sun Line Special Shipping Co Inc v Fay* 1988 165 CLR 197 (*Oceanic Sun*).

the appellant sought to have the claim struck out or set aside for lack of jurisdiction, and to have the proceedings stayed. The order was declined, and the proceedings were not stayed. The decision was upheld on appeal and culminated in an interlocutory matter before the High Court.

In *Oceanic Sun* the emergence of the 'clearly inappropriate forum' test can be observed. The Court held that a stay of proceedings should be granted if the local court is clearly the inappropriate forum, which is the case if proceedings that are 'seriously and unfairly burdensome, prejudicial or damaging', or vexatious, meaning 'productive of serious and unjustified trouble and harassment'.[191] Therefore, a defendant must not prove that there is an alternative, jurisdictionally-competent forum available to hear the plaintiff's case. Second, conversely to the *Spiliada* test, the defendant must prove the local forum is 'clearly inappropriate'[192] to necessitate a stay. The court, in determining the 'inappropriateness' of the forum, takes into account connecting factors, such as legitimate personal or juridical advantage; *lis alibi pendens*; waste of costs; local professional standards; law of the local forum; choice of law clauses; and arbitration agreements.[193] The Court in *Oceanic Sun* refused, by majority, to adopt *Spiliada*, and went on to state that 'the 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'.[194]

The test in *Oceanic Sun* is not one that is easy for a defendant to satisfy,[195] as the plaintiff has a *prima facie* right to choose their forum.[196]

Following the judgment in *Oceanic Sun*, the Court in *Green v Australian Industrial Investment Ltd*[197] relied on the inability of the plaintiffs to pursue the claim outside Australia, and the failure of the defendant to prove the Australian forum inappropriate or oppressive. Had *Spiliada* been applied, the action would surely have been stayed for a more appropriate forum, namely, England. The plaintiff was resident in England; the dispute centred around the sale of shares (brokered in England) in an English company; and the contract of sale had both an English choice of law clause and exclusive

191 *Oceanic Sun* (n 190) 247.
192 *Oceanic Sun* (n 190) 248.
193 As above.
194 As above.
195 R Garnett 'Stay of proceedings in Australia: A "clearly inappropriate" test?' (1999) 23 *Melbourne University Law Review* 30 34; M Keyes *Jurisdiction in international litigation* (2005) 275.
196 *Oceanic Sun* (n 190) 248.
197 *Green v Australian Industrial Investment Ltd* (1989) 90 ALR 500.

jurisdiction clause. The defendant had commenced proceedings in an English court prior to the commencement of *Green* in Australia by the plaintiff. All of these pointed towards England as the most appropriate forum and showcases the converse nature of the *Oceanic Sun* test when compared to *Spiliada*.

Prior to *Voth v Manildra Flour Mills*[198] the position of *forum non conveniens* in Australian law was one of 'confusion'.[199] The appellant, a US national, lived and practised as a professional accountant in the US under Manildra Milling Corporation (MMC), incorporated in Kansas. MMC was a subsidiary of Manildra Group. A claim was brought for losses suffered by the respondents, two of the Manildra Group's Australian subsidiaries, regarding negligent advice they had received from the appellant that led to tax liabilities in the US, which created a loss in New South Wales. The respondents received permission from the Court to serve outside of jurisdiction, in Missouri. The defendant disputed the existence of jurisdiction and sought to have the order granting leave to serve outside Australia discharged, or alternatively a stay of proceedings pending proceedings in a court in the US. The appellant argued for the adoption of the *Spiliada* test (as opposed to the test adopted by the Court in *Oceanic Sun*). The majority of the High Court rejected the submission and stayed the proceedings on application of the 'clearly inappropriate forum' test, thereby confirming the judgment in *Oceanic Sun*. It is considered a matter of 'settled' law in Australia that courts are to exercise power to stay proceedings if the defendant proves to the court that it is the 'clearly inappropriate forum'.[200] The Australian court was clearly inappropriate due to the connecting factors the case held with Missouri. The Court considered the connections with Australia negligible, even though the plaintiff had the possibility of greater recovery of legal costs and award of interest on damages in Australia.[201]

The 'clearly inappropriate forum test' can be divided into two stages: During the first stage, similar to that of *Spiliada*, the defendant must convince the court of the inappropriateness of the local forum.[202] In this stage of the inquiry connecting factors are of 'valuable assistance'.[203] The second stage is an investigation into the juridical or

198 *Voth v Manildra Flour Mills* (1991) 65 ALJR 83.
199 P Brereton '*Forum non conveniens* in Australia: A case note on *Voth v Manildra Flour Mills*' (1991) 40 *International and Comparative Law Quarterly* 895.
200 Brereton (n 199) 896.
201 The Court considered these connecting factors of 'diminished importance' due to the strength of the connection the dispute had with Missouri.
202 Brereton (n 199) 896.
203 *Voth* (n 198) 92.

personal advantages of the local forum, often referring to matters such as costs and damages, and advantages the plaintiff possesses within the local forum.[204] The Court in *Voth* expressly denied the application of the second leg of the *Spiliada* test, refusing to form 'subjective views' about the 'merits' of another legal jurisdiction or the 'standards and impartiality' of the judiciary and legal professionals therein.[205] It is clear that the Australian legal system has only truly adopted the first leg of the *Spiliada* inquiry, which represents a clear departure from the *Spiliada* test. The High Court found the 'more appropriate forum' test preferable to *Spiliada*, from both an abstract and international approach,[206] as they consider it simpler and more suitable to interlocutory proceedings.[207] The High Court in *Voth* held that the distinction between the clearly inappropriate forum test and the more appropriate forum test was 'slight' and the tests would deliver the same results in most cases. The substance of the 'inappropriate forum' test is similar to that of *Spiliada*, but is structured differently. The result is that on application of the 'inappropriate forum' test, the courts in practice 'inevitably conflate' the test with that of the most appropriate forum.[208]

4.2.2 The United States of America[209]

Within the US each of the fifty states have their own legal system and courts, in addition to courts on federal level. Federal courts are courts of limited jurisdiction, that apply state laws, but federal rules of procedure and jurisdiction. One of the rules of jurisdiction applied on federal level is the doctrine of *forum non conveniens*. Most states in the US have assumed some form of the federal *forum non conveniens*, as set out by the Supreme Court decisions in *Piper Aircraft v Reyno*[210] and *Gulf Oil Corp v Gilbert*,[211] though these

204 Brereton (n 199) 896.
205 *Voth* (n 198) 90.
206 *Voth* (n 198) 89; Brereton (n 199) 896.
207 Brereton (n 199) 896.
208 Fentiman (n 68) 799.
209 In the case of the United States, it is considered an Anglo-American legal system, and not merely an Anglo-common law system.
210 *Piper Aircraft v Reyno* 454 US 235, 102 S Ct 252 (1981) (*Piper Aircraft*). The motion proceedings took place in a Californian court and was eventually appealed to the Supreme Court.
211 *Gulf Oil Corp v Gilbert* (1947) 330 US 501 (*Gulf Oil*). The matter was first heard in a Texan court, and later in the Supreme Court.

decisions are not binding in state courts.[212] This section will discuss only the leading cases, from different states, that has led to the current position of *forum non conveniens* within the US.

Long before England first adopted the doctrine of *forum non conveniens*, the US utilised the doctrine as a way of alleviating full court rolls.[213] The doctrine takes on another form in the US legal system: it is often used to dismiss proceedings without establishing whether the forum has jurisdiction.[214] In some jurisdictions, such as New York, the courts favour a strong presumption for giving effect to a plaintiff's choice of forum,[215] especially where a plaintiff has 'legitimate reasons' for the choice of forum,[216] while also regarding the relative means of the parties to the dispute.[217]

The first recorded case of *forum non conveniens* in the US was that of *Gulf Oil*, where a court first recognised the discretion to decline jurisdiction: 'A court may resist imposition upon its jurisdiction even when jurisdiction is authorised by the letter of a general venue statute.'[218] As a "threshold matter,"[219] federal courts must ascertain if there is an appropriate, alternative forum to hear the case. An alternative forum is considered appropriate if the forum offers the plaintiff a remedy and will treat the plaintiff fairly. If an alternative, appropriate forum exists, a court must weigh factors relevant to the case. The Court in *Gulf Oil* divided the factors to be weighed into private-interests of the parties concerned and public-interests of the competing forum.[220] This was a clear step away from the English approach to *forum non conveniens*, as the English courts mostly only consider the private interests of the parties.[221] Public interest factors include factors such as court congestion, public interest in judging local issues at home, the fairness of

212 See *Chick Kam Choo v. Exxon Corp* 486 U.S. 140 (1988) wherein the Supreme Court determined that state courts are not bound by the federal *forum non conveniens* where the federal doctrine is incompatible with state law. Accordingly, independent doctrines have developed on state level, which are clearly distinct from the federal doctrine, and in some states (such as Montana) do not exist.

213 Hartley (n 131) 253; Fentiman (n 68) 798; P Blair 'The doctrine of *forum non conveniens* in Anglo-American law' (1929) 29 *Columbia Law Review* 1 29.

214 Fentiman (n 68) 798; *Sinochem International Co Ltd v Malaysia International Shipping Corporation* (2007) 594 US 422.

215 *Wiwa v Royal Dutch Petroleum Co* 226 E3d88, 101 (2d Cir 2000); Fentiman (n 68) 798.

216 *Bigio v Coca Cola Company* 448 F.3d 176 (2d Cir 2006); Fentiman (n 68) 798.

217 *Presbyterian Church of Sudan v Talisman Energy Inc* 244 F.Supp.2d 289 (SDNY) 2003)); Fentiman (n 68) 798.

218 *Gulf Oil* (n 211) 507.

219 JE Baldwin 'International human rights plaintiffs and the doctrine of *forum non conveniens*' (2007) 40 *Cornell International Law Journal* 750 754.

220 Hartley (n 131) 254.

221 As above.

burdening citizens in foreign jurisdictions with jury duty and the enforcement of the judgment. Private interest factors include accessibility of legal resources, availability of witnesses, *in loco* inspections and any other factor that relates to the expense, ease and expedition of the proceedings. Here the 'deference' afforded to a plaintiff's choice of forum is first seen: '[Unless] the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'[222]

The first case to apply *forum non conveniens* in a transnational context was that of *Piper Aircraft.* In this case an aircraft, made by Piper Aircraft in the US, owned by a British company and with British travellers aboard, crashed in Scotland. The passengers brought proceedings in a US court against the manufacturers. The motion court found that a Scottish court would be the more appropriate forum, but on appeal the Court found that Scottish proceedings would be less favourable to the plaintiffs. This judgment draws a distinction between resident and foreign plaintiffs. In the past American courts have displayed a reluctance to dismiss proceedings where the plaintiffs were American and the defendants were foreigners,[223] but eager to exclude foreign plaintiffs from suing American defendants in American courts.[224] In *Piper Aircraft*, notwithstanding the deference afforded to the plaintiff's choice of forum, the Court held that '[d]ismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.'[225] However, in the precedent set in *Piper Aircraft*, the Supreme Court did not indicate how much, or how to determine how much, deference a court should afford a foreign plaintiff's choice of forum.[226]

The current legal position regarding *forum non conveniens* in the US is set out in *Irragori v United States Techs Corp*.[227] *Irragori* follows the development of *forum non conveniens* in *Piper Aircraft* and poses the following question: 'What degree of deference

222 *Gulf Oil* (n 211) 508.
223 T Hartley (n 131) 258. See also *Rudetsky v 44 Dowd* 660 F Supp 341 (Eastern District of New York 1987) (*Rudetsky*), heard in the state of New York.
224 Schulze (n 16) 822.
225 *Piper Aircraft* (n 210) 256.
226 Baldwin (n 219) 756.
227 *Irragori v United States Techs Corp* 274 f.3d 65, 69 (2nd Cir 2001) (*Irragori*). *Irragori* was heard in the state of Maine.

should the district court accord to a United States plaintiff's choice of a United States forum where that forum is different from the one in which the plaintiff resides?[228]

This has become known as the *Irragori* sliding-scale approach to the application of *forum non conveniens*. This approach encompasses a degree of deference afforded to the plaintiff's choice of forum, and an 'appropriate' degree of scepticism when assessing whether a defendant has sufficiently demonstrated inconvenience. The greater the degree to which a plaintiff chooses a forum, the harder it should be for the defendant to prove 'inconvenience'.[229]

In the US international human rights plaintiffs may bring a claim under the Alien Tort Claims Act[230] ('ATCA'). Under ATCA jurisdiction vests in federal courts over any "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the [US]."[231] ATCA and the doctrine of *forum non conveniens* are in clear conflict with one another: the former granting foreign (or "alien") plaintiffs' access to a US forum and the latter which denies a foreign plaintiff the same forum.[232] ATCA cases are considered to have a significant, inherent foreign element due to requiring a foreign plaintiff. Under the doctrine of *forum non conveniens*, if relied on by the defendants, federal courts must give deference to the foreign plaintiff's choice of forum, while the private interest factors simultaneously weigh against the same federal courts retaining jurisdiction over the ATCA matter.[233] This "tension" between the working of ATCA and *forum non conveniens* has not been addressed by the federal courts as of yet.[234]

The most recent case to address the interaction between *forum non conveniens* and ATCA is *Kiobel*,[235] heard before the Supreme Court. *Kiobel* concerned a claim for damages brought against Nigerian, Dutch and British oil companies in the US by claimants alleging a violation of the "law of nations" for the purposes of ATCA. The resulting judgment concluded that ATCA does not operate extraterritorially where a foreign cause of action occurred in a foreign forum. The Supreme Court conceded that jurisdiction under similar facts could exist under ATCA if claims "touch and concern the

228 *Irragori* (n 227) 69.
229 *Irragori* (n 227) 74.
230 Alien Tort Claims Act 28 USC §1350 (2000), also known as the Alien Tort Statute.
231 As above.
232 Baldwin (n 219) 750.
233 Baldwin (n 219) 757.
234 Baldwin (n 219) 758.
235 *Kiobel* (n 9).

territory of the [US]…with sufficient force to displace the presumption against extraterritorial application."[236]

This means that it has now become increasingly difficult for claimants to bring claims against multinational corporations in the US under ATCA, even if that is where the defendants may have more resources for satisfaction of claims. This has perhaps skewed the chances for granting of a stay of proceedings in favour of the defendant, where ACTA litigation is applicable, though it would depend on the state in which the claim is brought.[237]

4.2.3 Canada

In the Canadian *forum non conveniens* context there are three well-known cases that bear mentioning: *Amchem Products Inc v British Columbia (Workers Comp Bd)*;[238] *Club Resorts Ltd v Van Breda*;[239] and *GIAO Consultants Ltd v 7779534 Canada Inc.*[240]

In *Amchem* 194 claimants sued the plaintiffs, several asbestos companies, for damages relating to asbestosis caused by prolonged asbestos exposure. The claimants either suffered due to asbestos exposure themselves or were the dependents of deceased persons affected. Most of the claimants were resident in British Columbia, with some in Alberta, Manitoba, New Brunswick and Washington State. Most of the plaintiffs were based and incorporated in the US, and the manufacturing was based mostly in Texas. A claim was brought in a Texan court, whereupon the plaintiffs applied for an injunction in a court in British Columbia, to prevent continuation of the US suit and an abuse of process claim. The British Columbia Supreme Court granted the anti-suit injunction[241] but rejected the abuse of process claim. The British Columbia Court of Appeal dismissed the appeal but affirmed the decision of the motion court to strike out the abuse of process claim. On appeal the Supreme Court of Canada set aside the anti-suit injunction and rejected the two-stage *forum non conveniens* approach as it was set

236 *Kiobel* (n 9) 1669.
237 O Webb '*Kiobel*, the Alien Tort Statute and the common law: human rights litigation in this 'present, imperfect word'' (2013) 20 *Australian International Law Journal* 132 151.
238 *Amchem Products Inc v British Columbia (Workers Comp Bd)* [1993] 1 SCR 897 (*Amchem*).
239 *Club Resorts Ltd v Van Breda* 2012 SCC 17 (*Van Breda*).
240 *GIAO Consultants Ltd v 7779534 Canada Inc* 2020 ONCA 778 (*GIAO Consultants*).
241 Anti-suit injunctions are granted to restrain proceedings in a foreign court, restraining not the foreign court, but the parties to the dispute from proceeding in a foreign court,

out in *MacShannon*[242] by the House of Lords. It held that the test for *forum non conveniens* in Canada entailed the establishment of another, more appropriate forum, in which justice can be done at substantially less cost and inconvenience, and without the deprivation of personal or judicial advantage.[243] The Court considered, and then expressly refused, the adoption of the *Voth*[244] test for *forum non conveniens*.

Van Breda was a joinder of two separate cases in which the plaintiffs were injured while on holiday in Cuba, one being severely injured on a beach and the other perishing in a scuba accident. Actions were brought against a number of respondents, one being the group that managed the hotels where these accidents occurred, Club Resorts, incorporated in the Cayman Islands. Club Resorts alleged that the Ontario forum did not have jurisdiction, and alternatively raised *forum non conveniens*, citing Cuba as the most appropriate forum to hear the dispute. The Supreme Court of Canada considered the factors listed in the Court Jurisdiction and Proceedings Transfer Act[245] and factors previously considered in case law concerning *forum non conveniens*[246] and held that the doctrine focused on the individual context of each case, and thus the applicable factors may vary depending on the context of each case.[247]

The Court listed a few factors to be considered, from a non-exhaustive list of factors:[248]

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
> (b) the law to be applied to issues in the proceedings;
> (c) the desirability of avoiding multiplicity of legal proceedings;
> (d) the desirability of avoiding conflicting decisions in different courts;
> (e) the enforcement of an eventual judgment; and
> (f) the fair and efficient working of the Canadian legal system as a whole.

242 *Macshannon* (n 87).
243 *Amchem* (n 238) paras 31-32. The test laid down in *Amchem* was confirmed by the Supreme Court of Canada in *Unifund Assurance Co v Insurance Corp of British Columbia* [2003] 2 SCR 63, 37 (Can); *Holt Cargo Systems Inc v ABC Containerline NV* (Trustees of) [2001] 3 SCR 907, 89 (Can).
244 *Voth* (n 198).
245 Court Jurisdiction and Proceedings Transfer Act SBC 2003 C.28.
246 *Van Breda* (n 239) 105.
247 As above.
248 As above.

These factors have since become knowns and applied judicially as the *Van Breda* factors. On application of the *Van Breda* factors, the Court held that although the injuries were suffered in Cuba and the defendants were resident there, 'other issues related to fairness to the parties and to the efficient disposition of the claim must be considered'.[249] These issues included the challenges created by locations of witnesses, the application of local procedures and the costs of litigating in Cuba. The Court found that the burden these factors would place on the plaintiffs to be too onerous.[250] The Court refused to stay proceedings, as Club Resorts had not met the onus of proof in showing that Cuba was the more appropriate forum.

In *GIAO Consultants* a claim was brought against the appellants and others in the courts of Ontario for breach of contract, negligence, intentional misrepresentation, breach of trust and/or fiduciary duty, and civil conspiracy. Of the eight defendants, two were resident in Ontario, two submitted to the jurisdiction of the Ontario court and the remaining four brought a motion to challenge the jurisdiction of the court or, alternatively, to have the Ontario courts declared *forum non conveniens*. The main argument for Ontario was *forum non conveniens* in that the defendants would need to hire expert witnesses for testimony relating to Québec law, as the contract between the parties had a choice of law clause in favour of the laws of Québec. The Superior Court of Justice found that three of the four *Van Breda* factors were present in this case, namely, that the cause of action arose in Ontario; the appellants were conducting business in Ontario; and the *lex loci contractus* was Ontario. Cameron J found that if proceedings necessitated the appointment of Québécois legal experts, the expense and effort thereof would not render proceedings unfair.

On appeal the appellants contested the decision of Cameron J that expert evidence was not needed to prove Québec law. The Ontario Court of Appeal rejected this argument on the basis that Cameron J's decision did not preclude the possibility of hiring experts, but merely stated that if the appointment of experts were necessary, it would not be unfairly prejudicial to the appellants. The appeal was dismissed. The *GIAO Consultants* case serves to illustrate Canadian appeal courts' hesitance to interfere with the decision of a motion judge, unless the judge erred in principle, misinterpreted or ignored material evidence or reached an unreasonable decision.[251]

249 *Van Breda* (n 239) 118.
250 As above.
251 *Haaretz.com v Goldhar*, 2018 SCC 28 49.

The Canadian iteration of *forum non conveniens* involves a flexible, multi-factored analysis of whether the court may stay proceedings in favour of another, more appropriate jurisdiction.[252] The courts emphasise the balance of convenience between the parties,[253] and in *Beals v Saldanha*[254] the Supreme Court of Canada took judicial notice that a party may raise *forum non conveniens* when challenging a foreign judgment.[255]

The onus of proof is not applied consistently throughout the Canadian provinces. The majority, including Québec, place the onus on the defendant, whereas courts in British Columbia, Ontario and Alberta place the onus on the plaintiff to justify the choice of forum, especially *ex juris*.[256]

Chapter 5: *Spiliada* in South Africa

As it has been established that the doctrine of *forum non conveniens* exists in the Anglo-common law, the question arises as to whether the doctrine exists in Roman-Dutch law and, by extension, in South African law. Early versions of a discretionary stay of proceedings in Roman-Dutch law can be traced back to two Roman law principles: *actor sequitur forum rei*, whereby the plaintiff must follow the defendant to their court;[257] and the *extra territorium ius dicenti impune non paretur* rule, whereby those administering jurisdiction beyond their territory may be disobeyed 'with impunity'.[258]

According to Pollak, these two Roman law rules are assimilated into Roman-Dutch law and 'lead to the conclusion that the court must, within its territory, have authority over the defendant sufficient to be able to enforce its orders'[259] and, by extension, a court may choose to decline to exercise jurisdiction if a more appropriate forum exists.[260]

Pollak defined jurisdiction under a South African court as the right or authority of the various divisions under the Constitutional Court of South Africa to entertain (civil and

252 FM Manolis, NJ Vermette & RF Hungerford 'The doctrine of *forum non conveniens*: Canada and the United States compared' (2009) *FDCC International Practice and Law Section* 1 34.
253 As above.
254 *Beals v Saldanha* 2003 SCC 72 (*Beals*). The same was later held by the Court of Appeal of Ontario in *Yaiguaje v Chevron Corporation* [2013] ONCA 758, although the Court questioned the appropriateness of a *forum non conveniens* inquiry in an enforcement context.
255 *Beals* (n 254) 35.
256 Manolis et al (n 252) 34.
257 C. 3.13.2.
258 D 2.1.1.20.
259 W Pollak & D Pistorius 'Introduction and general principles' in D Pistorius *Pollak on jurisdiction* (1993) 3.
260 Pollak & Pistorius (n 259) 2.

commercial) legal proceedings under South African law.[261] Similarly, Voet defined jurisdiction as 'the public power of deciding cases, both civil and criminal and putting the decisions into execution'.[262]

The doctrine of *forum non conveniens* by way of the *Spiliada* test has in recent years been referenced by South African courts in a handful of cases. A review of these cases will follow.

5.1 *Forum non conveniens* in South Africa

5.1.1 Serving out of jurisdiction

There are a few statutory provisions in South African law whereby a plaintiff can serve a defendant out of jurisdiction. When serving a defendant out of jurisdiction, leave of the court is required in terms of Rule 5(2) of the Uniform Rules of the Court[263] to serve a process outside South Africa. In the opinion of Forsyth, policy considerations embodied in the doctrine of *forum non conveniens* 'have been previously articulated in our [South African] law on many occasions'.[264] Section 27(1) of the Superior Courts Act[265] determines that if a civil matter instituted in a local division may appear to be more convenient or fit to be heard in another division, the matter may be 'removed to that other division'. Under section 27(1) the more appropriate division need not have been 'originally competent'[266] but the court first seised must have had jurisdiction.[267] Although section 27(1) provides for the stay of a matter from one High Court to another High Court in South Africa (and not for the serving of proceedings in a foreign jurisdiction) this embodies the basic legal principles of *forum non conveniens*. The same principles can be found in sections 35 and 40 of the Magistrate's Courts Act.[268]

In terms of section 2 of the Divorce Act[269] a South African court will have jurisdiction where both or either one of the parties are domiciled in the area of the court's jurisdiction

261 Pollak & Pistorius (n 259) 1.
262 Voet 2.1.1.
263 Uniform Rules of the Court.
264 Forsyth (n 5) 185.
265 The Superior Courts Act 10 of 2013.
266 Forsyth (n 5) 185.
267 *Van der Sandt v Van der Sandt* 1947 (1) SA 259 (T) 262-263; *Ex parte Benjamin* 1962 (4) SA 32 (W); *Welgemoed & Another NO v The Master & Another* 1976 (1) SA 513 (T) 523.
268 Magistrates' Courts Act 32 of 1944.
269 Divorce Act 70 of 1979.

on the date on which the action is instituted or ordinarily resident in the area of jurisdiction of the court on the date on which the action is instituted or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date. Therefore, if one spouse is outside of the Republic, the spouse in South Africa may institute divorce proceedings against the spouse overseas.

Section 149(1) of the Insolvency Act[270] determines that a South African court retains the discretion to stay or postpone sequestration proceedings relating to an estate of a person not domiciled in South Africa, based on considerations of convenience:

> Provided that when it appears to the court equitable or convenient that the estate of a person domiciled in [another] state … should be sequestered by a court outside the Republic, or that the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic, the court may refuse or postpone the acceptance of the surrender or the sequestration.

Under South African law the defence of *lis alibi pendens* operates as a separate doctrine, and the working thereof prevents a plaintiff from instituting further action between the same parties on the same subject matter where there is another court that has first been seised with the matter. Such proceedings are *prima facie* vexatious.[271]

Furthermore, if both the plaintiff and defendant are *peregrines* of South Africa, the court will not assume jurisdiction unless the cause of action arose within the jurisdiction of the court.[272] As stated by van Heerden J in *Maritime & Industrial Services Ltd Marcierta Compania Naviera SA*:[273]

> There seems to be no good reason why by mere attachment peregrine defendants should be put to the inconvenience and expense of defending actions in South African Courts at the instance of peregrine plaintiffs and why in the process the time of South African Courts (which may have to apply foreign law in deciding such disputes) and State funds should be taken up with disputes which are unconnected with South Africa and between persons who have no connection with South Africa.

270 Insolvency Act 24 of 1936.
271 *Osman v Hector* 1933 CPD 503; *Painter v Strauss* 1951 (3) All SA 207 (O).
272 Forsyth (n 5) 186.
273 *Maritime & Industrial Services Ltd Marcierta Compania Naviera SA; NV Sheepsvictualienhandel Atlas & Economic Shipstores Ltd v Marcierta Compania Naviera SA* 1969 (3) All SA 115 (D) 122.

Forsyth contents that if the exception of *lis alibi pendens* exists in South African law and is accepted without dispute, it would seem 'artificial' not to extend the same recognition to *forum non conveniens*.[274]

The modern doctrine of *causae continentia*, as developed in *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd*,[275] states that a court may assume jurisdiction over a matter 'with which it is only peripherally concerned'[276] to prevent the unnecessary duplication of proceedings dealing with the same cause of action. The *continentia* rule serves to expand jurisdiction, not limit it.[277]

As early as 1918, in *Western Assurance Co v Caldwell's Trustee*,[278] Solomon JA spoke of the Supreme Court's inherent jurisdiction to prevent abuse of process by litigants by ordering a stay of proceedings but commented that this power 'ought to be sparingly exercised and only in very exceptional circumstances'.[279]

The last example is the exercise of admiralty jurisdiction in terms of section 5(3)(a) of the Admiralty Jurisdiction Regulation Act[280] under which a court is entitled to decline jurisdiction when there is a more appropriate forum to hear the matter.

Although all these examples embody some part of the basic principles *of forum non conveniens*, they all fall short of the doctrine proper.[281]

5.2 Cases in South Africa

5.2.1 *Estate Agents Board v Lek*[282]

Mr Lek, a resident of Cape Town, wanted to open an estate agent office in Cape Town. The controlling body, the Estate Agent Board, was registered and had its office in Johannesburg. To operate as an estate agent Mr Lek was in need of a Fidelity Fund certificate, which was declined by the Board. Mr Lek approached the Court to contest the

274 Forsyth (n 5) 187.
275 *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* 1962 (4) SA 326 (A) (*Roberts Construction*).
276 Forsyth (n 5) 186.
277 *Roberts Construction* (n 275) 301.
278 *Western Assurance Co v Caldwell's Trustee* 1918 AD 262.
279 *Western Assurance Co v Caldwell's Trustee* (n 278) 274.
280 Admiralty Jurisdiction Regulation Act 105 of 1989 (Admiralty Act).
281 Forsyth (n 5) 187.
282 *Estate Agents Board v Lek* 1979 (3) SA 1048 (AD) (*Lek*).

decision of the Board.[283] The Court in *Lek* held that the court a quo had jurisdiction as the defendant was resident within the court's jurisdictional area and that it was the court closest to the defendant to which he would turn for legal redress. Taking into consideration the inconvenience the plaintiff would suffer, Trollip JA commented in his *obiter* that 'every consideration of convenience and common sense indicated that the court *a quo* was the appropriate court to hear and determine the matter'.[284]

Taitz believed the *obiter* of Trollip JA to contain the 'germs' of the doctrine of *forum non conveniens*.[285] Shortly thereafter, Spiro wrote that the competent jurisdiction of a South African court under the unilateral judicial system was unlike that of the choice between a South African and a foreign court.[286] Although he acknowledged the comment of Taitz on the matter, Spiro held firm that the case of Lek did not deal with the doctrine of *forum non conveniens* in the context of the South African conflict of laws, as it '[carried] it no further'.[287]

5.2.2 *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris*[288]

The *Thalassini Avgi*, owned by Astromando Compania Naviera SA (Astromando), undertook a load of general cargo from various ports in East Asia for carriage to various ports in the Middle East. At the time Astromando was domiciled in Panama and had an official business address in Athens, Greece. The ship was registered in Greece and the crew was comprised of mostly Greek nationals.[289] In this instance Astromando entered into a time charter party, a lease agreement, with Nippon Yusen Kaisha (NYK), a Japanese company based in Tokyo. NYK issued bills of lading in respect of various goods on board the *Thalassini Avgi* to, among others, the Yemeni consignees.[290]

283 *Lek* (n 282) 1062.
284 As above.
285 J Taitz 'Jurisdiction and *forum conveniens*, a new approach?' (1980) 43 *Journal for Contemporary Roman Dutch Law* 187; Taitz, J 'Jurisdiction and forum non conveniens: A reply' (1981) 44 Journal of Contemporary Roman Dutch Law 372 374.
286 E Spiro '*Forum non conveniens*' (1980) 13 *Comparative and International Law Journal of Southern Africa* 333 338.
287 Spiro (n 286) 339.
288 *Thalassini* (n 2).
289 *Thalassini* (n 2) 824.
290 *Thalassini* (n 2) 825.

Two days after the *Thalassini Avgi* arrived in its last port of discharge in the city of Aden, a fire broke out on board the ship and destroyed or damaged most of the cargo on board. The ship itself was also extensively damaged by the fire. The Yemeni consignees suffered losses estimated at $1 037 407, as they were the holders of the bills of lading and owners of the damaged cargo.[291]

Anchored in Port Elizabeth harbour with a cargo of steel, intended for the US, was the Dimitris. The Dimitris was owned by the Compania de Navegacion Aeolus SA, a company based in Panama. On 21 April 1986 an application was made under section 5(3)(a) of the Admiralty Act[292] for the arrest of the Dimitris, as the Dimitris was considered an associated ship[293] of the *Thalassini Avgi*. Herein the applicants stated to be the Yemeni consignees of the cargo destroyed in the *Thalassini Avgi*.[294]

Two separate applications were launched. The first application secured an order for arrest of the Dimitris as security as envisioned in section 5(3)(a) of the Admiralty Act.[295] The order contained the provision that the Dimitris may be released if the respondent delivered security in respect of foreign courts. The parties reached an agreement on the quantum and form of security but could not agree on the foreign courts to include for the purposes of security.[296] The reason for the dispute originated from the standard form bill of lading used by NYK, which contained an exclusive jurisdiction clause in favour of the Tokyo District Court in Japan.[297] The applicants wished to include any judgments by the courts of South Yemen, while the respondent (the owner of the Dimitris*)* wished to solely rely on the exclusive jurisdiction clause contained in the bill of lading.[298]

The insurers of the cargo issued an undertaking to the original applicants, now the appellants on appeal, whereafter they consented to the release of the Dimitris. This undertaking contained an exclusive jurisdiction clause in favour of either the Tokyo District Court or the Supreme Court of South Africa.[299]

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291 *Thalassini* (n 2) 824.
292 Read in conjunction with secs 3(6) and 3(7) of the Admiralty Act under which an *actio in personam* may be instituted in a forum with jurisdiction not adjacent to the territorial waters of South Africa.
293 The action was brought against an 'associated ship' based on secs 3(6) and 3(7) of the Admiralty Act (n 280).
294 *Thalassini* (n 2) 825.
295 Admiralty Act (n 280).
296 *Thalassini* (n 2) 825.
297 *Thalassini* (n 2) 827.
298 As above.
299 *Thalassini* (n 2) 828.

Some time later the appellants brought a second application whereby they requested an order that the above-mentioned undertaking cover judgments in both contract and delict granted by 'any Court of competent jurisdiction in the People's Democratic Republic of Yemen.'[300] The second application was dismissed.

It was during the Court's consideration of the second application that the *Spiliada* test was referred to. Botha AJ stated that '[i]n this regard the *onus* of proof is a heavy one. In England it is well settled that a litigant who asserts that he may not obtain justice in a foreign jurisdiction is required to prove and establish his assertion objectively and by means of positive and cogent evidence.'[301]

This is the first recorded judgment wherein a South African court referred to the *forum non conveniens* doctrine, or the modern version thereof, as set out in *Spiliada*.[302] The Court dealt with the second leg of the test, where the respondents relied on considerations of justice to prove that there was a probability of an unfair trial in South Yemen. The factors raised by the respondents were the Marxist nature of the South Yemeni government, the temporary evacuation of foreigners due to the outbreak of a violent power struggle within the local government, the overwhelming weight Yemeni courts attached to the 'public interest principle' (whereby the interests of the public sector outweigh all others) and the low standard of the judiciary.[303] However, the respondents indicated that they could not furnish affidavits to prove these allegations, as that would place the witnesses in danger. This falls short of the onus of proof required by the second leg of the *Spiliada* test, whereby the court must be furnished with cogent evidence to prove the possible injustice. As a result, Botha JA held that the respondents had failed to discharge the onus of proof.[304]

5.2.3 *Dias Compania Naviera SA v MV AL Kaziemah & Others*[305]

This case is an admiralty case that dealt with the ownership of the vessel MV Al Kaziemah. An application was brought whereby the applicant sought the return of the possession of the MV Al Kaziemah from the master of the vessel, or whomever had the

300 As above.
301 *Thalassini* (n 2) 833.
302 *Spiliada* (n 1).
303 *Thalassini* (n 2) 846.
304 *Thalassini* (n 2) 846-847.
305 *Dias Compania* (n 3).

ship in their possession. The vessel was anchored in Durban harbour, and the local sheriff carried out a court order to arrest and attach the ship. Both the parties agreed to Greek law as the proper law of the dispute.[306] Counsel for the respondents raised section 7(1)(a) of the Admiralty Act,[307] and requested the Court decline to exercise jurisdiction,[308] relying on the *Spiliada* judgment. The respondents relied on the fact that the vessel was registered in Greece; transfer of title of the vessel would be done in terms of Greek law; the applicant had obtained a *declarator* in Greece; one of the respondents obtained a ministerial decree to deregister the vessel; the applicant had launched proceedings to reverse this decree; and there were other pending claims in Greece around the crew of the MV Al Kaziemah as connecting factors to prove that a Greek court was a more appropriate forum for the matter to be heard.[309] Bristow J did not stay proceedings as he '[could] see no compelling reason … why this issue cannot be resolved in a South African court'.[310]

Bristow J held that though there existed a 'great deal of connection'[311] between the matter before the court and Greece, the presence of the vessel in a Durban port remained of 'overriding importance'.[312] Here Bristow J relied on the as-of-right jurisdiction of his court, due to the fact that the *forum rei sitae* has jurisdiction to the title of movable property within the forum's jurisdiction.[313]

In this case the Court dealt with the first leg of the *Spiliada* test, wherein the respondents argued there was a more appropriate forum to hear the matter. The second leg of the test, relating to justice in the foreign forum, was neither argued by the respondents nor discussed by the Court.

5.2.4 *Great River Shipping Inc v Sunnyface Marine Ltd*[314]

In this case the applicant argued for a stay of proceedings in terms of section 7(1) of the Admiralty Act. The dispute concerns an application brought by Great River Shipping to

306 *Dias Compania* (n 3) 572.
307 Admiralty Act (n 280).
308 *Dias Compania* (n 3) 575.
309 *Dias Compania* (n 3) 577.
310 As above.
311 As above.
312 As above.
313 As above.
314 *Great River Shipping* (n 3).

set aside and rescind a warrant of arrest, under which the vessel in dispute (MV Great Eagle) had been arrested at the instance of the respondents, Sunnyface Marine Ltd. Under the first leg of the test as laid down in *Spiliada*, the applicant proved China to be the more appropriate forum to hear the dispute: The ship had been arrested, sold and transferred in China in terms of Chinese law; the witnesses were all Chinese nationals who mostly spoke Chinese and who could not be compelled to testify in South Africa; the costs of bringing witnesses to South Africa to testify; the fairness thereof if some witnesses testified and others not; the proper law governing the dispute was Chinese and this necessitated legal experts in Chinese law; translation issues that might arise; and; lastly; the fact that South Africa had no real connection with the dispute (as the vessel was 'coincidently' found in a South African port).[315] Consequently, the onus of proof shifted towards the respondent, who had to prove that justice would not be obtained in China.[316] Against this the respondent argued they would be unable to obtain legal representation in the People's Republic of China (PRC), would lose advantage of an arrested ship if the proceedings took place in the PRC and that the local Maritime Court was not impartial and would not act according 'the principles of natural justice'.[317] Although expert witness was led on this matter, Berman J found that the respondent had not discharged the onus of proof required for the second leg of the *Spiliada* test. Berman J held that the respondent was not limited to the Quingdao Maritime Court, that too much weight must not be afforded to the advantage of an arrested ship, that there was no political or other barrier preventing the respondent from obtaining legal representation in the PRC and that the PRC had a proper civil procedure system.[318]

For the first time a South African court considered both stages of the doctrine of *forum non conveniens*, as set out in the *Spiliada* case. Though Berman J 'seems to [have] conflated the two stages'[319] when he concluded his discussion of the second stage of the enquiry with '[i]t seems to me that [the respondent] has failed to discharge the onus of showing the existence of special circumstances which warrant a finding that a Court in the PRC is not a more appropriate forum to entertain the action'.[320]

315 *Great River Shipping* (n 3) 619.
316 *Great River Shipping* (n 3) 621.
317 As above.
318 *Great River Shipping* (n 3) 621-623.
319 E Schoeman 'The *Spiliada* in South Africa: Sailing into the future' (2019) forthcoming.
320 *Great River Shipping* (n 3) 623.

5.2.5 *MT Tigr Bouygues Offshore SA & Another v Owners of the MT Tigr & Another*[321]

This matter concerned a barge tugged by Tigr, that ran aground somewhere close to Cape Town. The tug belonged to a body incorporated in the Republic of Azerbaijan, known as Caspian, and had been chartered to Ultisol Transport Contractors Ltd (Ultisol), a Bermudan company based in The Netherlands. The barge was both owned (by Bouygues Offshore SA, 'Bouygues') and insured by French companies.[322]

At the time the barge was being towed from the Congo to Cape Town in terms of an international towage agreement between Bouygones and Ultisol known as a BIMCO Towncon.[323] This Towncon agreement contained an exclusive jurisdiction clause in favour of the High Court of Justice in London. This matter concerned a claim *in personam* by the owner of the barge, Bouygues, against the owner of the tug, Tigr, for the damages resulting from the loss of the barge. The defendant pleaded *forum non conveniens* in terms of section 7(1) of the Admiralty Act, to stay proceedings in favour of a more appropriate forum. The following connecting factors were considered by the Court: that South Africa was the 'natural' forum of the dispute due to the cause of action having arisen here, and consequently most of the witnesses would be from South Africa, and in a separate action the plaintiff sued the local harbour authority, Portnet, which was not amendable to proceedings in England and the probable consolidation of proceedings.[324] The fact that proceedings were underway in England and that there '[would] be an unavoidable fragmentation with the concomitant possibility of inconsistent decisions', according to King DJP, was 'unfortunate, but … unavoidable'.[325] The only connecting factor pointing to England was the exclusive jurisdiction clause in the Towncon agreement, to which the defendant was not a party.[326]

The Court also considered the issue of forum shopping and the juridical advantage that may be a result thereof. If heard in South Africa, the court would apply the regime prescribed by the Convention Relating to the Limitation of Owners of Seagoing Ships[327]

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321 *Tigr* (n 3).
322 *Tigr* (n 3) 455.
323 *Tigr* (n 3) 456.
324 *Tigr* (n 3) 744.
325 As above.
326 As above.
327 Convention of 10 October 1957 Relating to the Limitation of Owners of Seagoing Ships (1957 Convention).

to which South Africa is a party, and if the proceedings were to be stayed for an English forum, the International Convention of Limitation on Liability for Maritime Claims[328] would apply. The former would more favourably affect the limitation of liability of the plaintiff than the latter,[329] and which legitimate juridical advantage is not necessarily a decisive factor. King DJP held that the South African court was clearly the more appropriate forum to hear the matter.[330]

King DJP held that South Africa clearly was the more appropriate forum to hear the matter.[331]

5.2.6 *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC & Others*[332]

This dispute concerned an agency agreement negotiated on behalf of the World of Marble and Granite (WOMAG) and the Sachs family by an Oren Sachs with the appellants, Caersarstone. Proceedings has been brought in Israel and the Western Cape High Court arising from the same agreement. The defendant in the South African proceedings, Caersarstone, plead *lis alibi pendens*, and for the action to be stayed pending final judgment of the action in Israel. The plaintiffs opposed the stay on three grounds: first, that it would be 'prohibitively expensive' to the plaintiffs to litigate the matter before Israeli courts. The Court rejected this argument and found that the plaintiffs were not obligated to institute a counter claim in the Israeli court, and they would be free to pursue the matter in a South African court, pleading *res judicata* to issues already decided by the Israeli court.[333]

The second ground of contestation was that the Israeli proceedings had been initiated in a *mala fide* manner, as the plaintiffs (the respondents in Israel) were lured to Israel under the pretext of a meeting, only to be served in order to establish jurisdiction in an Israeli court. Wallis JA rejected the second ground, as the plaintiffs could not discharge the onus of proof to prove this had been done as an abuse of process.[334]

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328 International Convention of 19 November 1976 of Limitation on Liability for Maritime Claims (1976 Convention).
329 *Tigr* (n 3) 744.
330 As above.
331 As above.
332 *Caesarstone* (n 3).
333 *Caesarstone* (n 3) 37.
334 *Caesarstone* (n 3) 38.

Lastly, the plaintiffs argued that Cape Town was the 'more natural' jurisdiction to hear and determine the matter, as the bulk of the evidence was in South Africa, it was the place of performance of the contract and relevant reports had to be prepared in South Africa. Wallis JA took issue with the argument, as the defendant had submitted no cogent evidence to substantiate the third contention.[335]

Based on these arguments Wallis JA stayed the proceedings in pending the final outcome of the Israeli proceedings.

5.2.7 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*[336]

This case is not considered a 'conventional'[337] *forum non conveniens* inquiry, as the Court merely considered the appropriateness of the South African forum, and not the more appropriate forum out of two different fora. In other words, this case was concerned with *forum conveniens*.[338]

The case dealt with the question of whether the Court had jurisdiction over the third of the six defendants, which was the only non-South African defendant to the suit. The Nigerian defendant, Africa Prepaid Services Nigeria Limited (ASPN) was a subsidiary of the first defendant, a South African company, through its shareholding in the second defendant.

In the absence of attachment as a method of founding or confirming jurisdiction, the Court considered the following factors to determine the 'appropriateness and convenience'[339] of the trial court: ASPN was the cessionary in terms of the disputed agreement; South Africa was the agreed upon arbitration venue; the nominated *domicilium citandi et executandi* was within the Court's territory; South African law was the proper law of the contract and any dispute originating therefrom; ASPN revoked the arbitration clause without qualification; the arbitration agreement was extended to include the determination of a special plea; ASPN was controlled by the first and second defendants (both domiciled within the jurisdictional area of the court); ASPN was a co-

335 *Caesarstone* (n 3) 39.
336 *Multi-Links* (n 3).
337 Schoeman (n 319).
338 See n 96 for the difference between *forum conveniens* and *forum non conveniens*.
339 *Multi-Links* (n 3) 15.

defendant; ASPN was both domiciled and habitually resident in the territory of the court; the cause of action arose in the jurisdictional area of the court; the defendants were being sued jointly and severally, and the possibility of successful enforcement of any judgment handed down in this matter in South Africa.[340]

Fabricius J held that *forum non conveniens* arose in the context of the interpretation of section 19(1) of the Supreme Court Act,[341] in terms of which a provincial or local division of a court will have jurisdiction in and over all persons residing or being in and all causes arising and all offences triable within its jurisdiction. Fabricius J interpreted the meaning of 'cause arising' in section 19(1) to mean the most suitable forum for achieving the ends of justice.[342] Fabricius J held:[343]

> [O]ne must determine the forum most suitable for the ends of justice and because pursuit of the litigation in that forum is most likely to secure those ends. The appropriate or natural forum is that with which the action has the most real and substantial connection. In that context then, the Court would look to all the connecting factors including all background facts, convenience, experts, the law governing the relevant transaction or action, the place where the parties reside or carry on business, etc.

Although Fabricius J extensively referred to the *Spiliada* case, and discussed the *Spiliada* test in the context of the case, the focus was solely on the appropriateness of South Africa as a forum, and not a true application of the *Spiliada* test for *forum non conveniens*: 'In the present case it is common cause that no other court has jurisdiction over all the defendants. The causae upon which Telkom's and Multi-Links' cases are founded largely occurred in this court's area of jurisdiction involved parties that are resident therein, and the facts giving rise to the action are intertwined.'[344]

Consequently, the Court held that in terms of section 19(1) of the Supreme Court Act the trial court did indeed have jurisdiction over the third defendant, ASPN.

340 As above.
341 Supreme Court Act 59 of 1959 (Supreme Court Act). This Act has since been replaced by the Superior Courts Act (n 265), with sec 21 being the equivalent of sec 9(1).
342 *Multi-Links* (n 3) 15.
343 *Multi-Links* (n 3) 23.
344 *Multi-Links* (n 3) 21.

5.2.8 *Bid Industrial Holdings (Pty) Ltd v Strang & Another (Minister of Justice and Constitutional Development, Third Party)*[345]

The respondents were two natural persons, Australian citizens and residents, also domiciled in Australia. They were arrested while in South Africa to find or confirm jurisdiction in the Johannesburg High Court.[346] The respondents challenged the constitutionality of the arrest of foreign *peregrini ad fundandam jurisdictionem*, alleging that the practice infringed on their right to equality before the law;[347] their guarantee against unfair discrimination;[348] their right to human dignity;[349] their right to freedom of security and the person;[350] and their right to a fair trial.[351]

The Supreme Court of Appeal found that the common law rule of arresting foreign defendants to find or confirm jurisdiction, as a law of general application, could not satisfy the limitation requirements of section 36 of the Constitution, was 'contrary to the spirit, purport and objects of the Bill of Rights'[352] and, therefore, unconstitutional. Howie J instead recognised the serving of a person who is only temporarily in South Africa as a sufficient procedure to vest jurisdiction over a matter.[353] In his *obiter*, Howie J remarked, with reference to *forum non conveniens*:[354]

> If the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the *forum conveniens* and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant's domicile.

Although this statement is considered to be somewhat 'ambiguous',[355] it introduced the possibility of the doctrine of *forum non conveniens* in South African law, although the Court did not discuss the doctrine in any detail or the proposed application thereof.

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345 *Bid Industrial Holdings* (n 4)
346 *Bid Industrial Holdings* (n 4) 3-4.
347 The Constitution (n 10) sec 9(1).
348 The Constitution (n 10) sec 9(3).
349 The Constitution (n 10) sec 10.
350 The Constitution (n 10) sec 12.
351 The Constitution (n 10) sec 34.
352 *Bid Industrial Holdings* (n 4) 59.
353 Howie J relied on the judgment in *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA) wherein the Court exercised jurisdiction over a matter based on the presence of the defendant within the court's jurisdictional area.
354 *Bid Industrial Holdings* (n 4) 55.
355 S Eiselen 'Goodbye arrest *ad fundandam*, hello *forum non conveniens*?' (2008) 4 *Journal of South African Law* 794 799.

The judgment represents a critical move from arresting of foreign *peregrini ad fundandam jurisdictionem* to found jurisdiction in a matter, to using connecting factors, which is more cohesive with private international law principles. This also makes way for the possible future application of the doctrine of *forum non conveniens* in such cases, as it essentially confirms the first leg of the *Spiliada* test.

5.3 Current position in South Africa

Undeniably, *forum non conveniens* exists under South African law. Under the widely-accepted *Spiliada* construction, the doctrine of *forum non conveniens* serves as a defence to jurisdiction that has been established, or already exists. This is seen in the *Caesarstone* case, where the onus was on the defendant to establish the appropriateness of another forum bearing jurisdiction to grant a stay of proceedings, whereafter the onus shifted to the plaintiff to disprove a stay based on justice considerations.

The Admiralty cases discussed above, *Cargo Laden*, *Dias Compania*, *Great River Shipping* and *Tigr*, all embody *a forum non conveniens* inquiry as established in *Spiliada*. In *Great River Shipping* Bernman J went so far as to classify section 7(1)(a) of the Admiralty Jurisdiction Act as 'the *forum non conveniens* principle expressed in statutory form'.[356]

In the cases of *Bid Industrial Holdings* and *Multi-Links*, however, the courts were seised with determining the appropriateness of a single forum: a South African court. The cases concerned the service of proceedings on foreign defendants in South Africa. This is a *forum conveniens* inquiry that is similar in construction to serving out in Anglo-common law jurisdictions,[357] which concerns serving foreign defendants while they are abroad.[358] In contrast to this, in *Bid Industrial Holdings* and *Multi-Links* the courts took a slightly different approach to the doctrine of *forum conveniens* wherein the foreign defendants were served while in South Africa (and not abroad)[359] if there exists a 'sufficient connection'[360] between the suit and the forum of the court seised with the matter, so that it is 'appropriate and convenient'.[361]

356 Great River Shipping (n 3) 614.
357 Schoeman (n 319).
358 JJ Fawcett et al *Cheshire, North & Fawcett: Private international law* (2017) 428.
359 Schoeman (n 319).
360 *Bid Industrial Holdings* (n 4) 59.
361 As above.

Chapter 6: Criticism

The development of the doctrine of *forum non conveniens* into what is now known as the *Spiliada* test occurred over roughly a century, starting with the judgment in *St Pierre* and culminating in *Spiliada*, which has since been assimilated into many Anglo-common law jurisdictions globally. Despite the growing application of the doctrine, and the favour it seems to court with defendants in cross-border disputes in certain jurisdictions, the doctrine has many critics. This chapter discusses the application of the *Spiliada* test, the accompanying disproportionately broad judicial discretion, the effects of the application on the litigation process and the role of judicial chauvinism and the power imbalance between litigants in the proceedings.

6.1 The application of the *Spiliada* test

The application of the two legs of the *Spiliada* test is considered different in both 'focus and nature'.[362] The first leg is a factual inquiry that aims to either avoid transnational commercial litigation in a specific jurisdiction as an unconnected forum, or to stay proceedings if the existence of *lis alibi pendens* results in a foreign forum being better suited to adjudicate the matter.[363] The first stage of the *Spiliada* inquiry, being factual in nature, leaves considerably less judicial discretion than present in the second stage, and as such eliminates much of the possibility of inconsistent application. With the exception of *VTB Capital Plc v Nutritek International Corp*,[364] where the Supreme Court was split three to two on the application of the first stage of the *Spiliada* inquiry and the appropriateness of England as forum, the courts in the UK have applied their judicial discretion very consistently under the first leg of the inquiry.[365] The factual nature of the first leg of the doctrine seems to be precise enough in nature not to 'render its application problematic'.[366] This seems to be true for other Anglo-common law forums, such as the

362 Arzandeh (n 11) 89-92.
363 Arzandeh (n 11) 92-93.
364 *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5 (*VTB Capital*).
365 Arzandeh (n 11) 93.
366 As above.

US and Australia, and common law systems with an Anglo-common law influence such as South Africa.

The problem, however, seems to make itself known in the application of the second leg of the doctrine. Hereunder, the plaintiff may argue for a stay not to be granted on the basis of considerations of justice. This means that a court can consider almost any factor in determining the possible injustice that may occur in a foreign forum if a stay is granted. This can lead to courts of differing hierarchies and jurisdictions not weighing or valuing these factors similarly, which in turn undermines the predictability of the *Spiliada* test as a whole,[367] and the principle of legal certainty in general.

6.1.1 The broad judicial discretion present in *Spiliada*

In *Atlantic Star 2* Lord Wilberforce described the judicial discretion contained in the second leg of *forum non conveniens* as 'an instinctive process'.[368] A judicial discretion that is often criticised as 'so broad and so vaguely circumscribed as to amount to "an instinctive process"'[369] necessitates scrutiny. The same critical estimation of the doctrine was held by the High Court of Australia in *Oceanic Sun*,[370] where the court refused to adopt the *Spiliada* test. Brennan J characterised the test as English law moving from a discretion 'confined by a tolerably precise principle'[371] under *St Pierre*[372] to a 'broad discretion to be exercised according to the judge's view of what is suitable "for the interests of all the parties and the ends of justice"'[373] under *Spiliada*.

Unfortunately, in hindsight, early critics of the *Spiliada* test have been proven true. The application of the disproportionately wide discretion contained in the second leg of the *Spiliada* test has led to unpredictable applications and diverging results in many jurisdictions. Robertson characterised the extensive discretion under the *Spiliada* test as an 'essential and unavoidable part of the suitable forum approach',[374] but stated that any attempt to crystallise the approach or reduce it to a formula is doomed to fail, as it must

367 As above.
368 *Atlantic Star 2* (n 80) 194.
369 DW Robertson '*Forum non conveniens* in America and England: A rather fantastic fiction' (1987) 103 *Law Quarterly Review* 398 414, citing Lord Wilberforce in *Atlantic Star 2* (n 80).
370 *Oceanic Sun* (n 190).
371 *Oceanic Sun* (n 190) 238.
372 *St Pierre* (n 74).
373 *Oceanic Sun* (n 190) 238.
374 Robertson (n 369) 414.

accommodate two false assumptions, namely, that the 'proper forum' is self-evident in most cases, and that trial judges will be impartial adjudicators.[375]

6.1.2 Drawn out, wasteful litigation

In litigation where jurisdiction is raised as a point *in limine*, often by way of the doctrine of *forum non conveniens*, the cases frequently devolve into scenarios where the parties end up 'litigating about where to litigate'.[376] This is extremely costly, and in most cases it is disproportionate for parties to incur such exorbitant costs on such a hearing.[377] The UKSC stressed this point in *VTB Capital*, especially in cases concerning permission to serve out of jurisdiction, urging appellate courts to 'be vigilant in discouraging appellants from arguing the merits of an evaluative interlocutory decision reached by a judge',[378] and warned that such inquiries should only be reopened on appeal if 'satisfied that the judge made a significant error of principle'.[379] If the unpredictable nature of the second leg of the *Spiliada* test carries the inherent risk of an imponderable exercise of jurisdictional discretion, it is inevitable that litigants run the risk of extremely costly litigation on matters of jurisdiction. This judicial discretion must manifest a 'reasonable consistency'[380] from one case to the next. If not, it undermines legal certainty and leaves lawyers for litigating parties with uncertainty as to what legal advice to give to their clients and may end in an exercise of legal futility. Furthermore, when jurisdictional issues are litigated, it means that parties spend considerable time and resources before the litigation on the true dispute commences. This means that, when cases are not contained in time and cost, wealthier litigants may use this as an opportunity to wear down poorer litigants.[381] This may serve as a deterrent to future litigants.

6.1.3. Abuse of discretion standard

375 As above.
376 *Spiliada* (n 1) 846.
377 *VTB Capital* (n 364) 83. Lord Neuberger, expressing a similar and strongly-worded opinion on parties launching mini-trials on preliminary issues such as jurisdiction.
378 *VTB Capital* (n 364) 93.
379 *VTB Capital* (n 364) 69.
380 *Macshannon* (n 87) 632.
381 *VTB Capital* (n 364) 8.

When a court of first instance makes a discretionary ruling under the second leg of the *Spiliada* test, and this ruling is challenged on review by a party to the dispute, the review by the appeals court in certain jurisdictions, such as the US and UK, is subject to the abuse of discretion standard. In the UK, the grounds for interference by an appeals court in the exercise of discretion of a court *a quo* is limited to an error in law by the court *a quo*; where irrelevant factors have been taken into consideration in the exercise of the discretion; and where the court's decision is 'plainly wrong'.[382] It is clear that when applying the abuse of discretion standard an appeals court may not interfere with the ruling of the lower court based solely on the fact that the members would have come to a different judgment, had the case appeared before them in the first instance. Robinson qualifies the US approach to the appellate review, generally described by the abuse of discretion standard, as an extreme form of deference to the trial judge's *forum non conveniens* discretion.[383]

6.1.4 Possibility of abuse of the doctrine of *forum non conveneins*

There are a handful of cases that illustrate a different, but substantial, issue that comes to light under the broad application of the second leg of the *Spiliada* test. Although the facts of these cases are complex, these cases share the same basic facts: The plaintiffs claimed large-scale fraud on the part of the defendants, and the defendants claimed that they would not achieve substantive justice in the proper forums, all in the former Soviet Union. These cases are *Cherney v Deripaska*;[384] *OJSC Oil Company Yugraneft (in liquidation) v Abramovich*;[385] *Pacific International Sports Club Ltd v Soccer Marketing International Ltd*;[386] and *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*.[387] In all these cases it was clear that England was not the most appropriate forum, but rather a former Soviet state. In the case of *Cherney* and *OFSC*, it was Russia; in *Pacific*

382 *Abidin Diver* (n 91) 482.
383 Robertson (n 369) 414
384 *Cherney v Deripaska* [2008] EWHC 1530 (Comm) affirmed by Court of Appeal in *Deripaska v Cherney* [2009] EWCA Civ 849 [2009] EWCA Civ 849 (*Cherney*); see also *Cherney v Deripaska* [2008] EWHC 1530 (Comm).
385 *OJSC Oil Company Yugraneft (in liquidation) v Abramovich* [2008] EWHC Civ 849('*OJSC*).
386 *Pacific International Sports Club Ltd v Soccer Marketing International Ltd* [2009] EWHC 1839 (Ch), affirmed by the Court of Appeal in *Pacific International Sports Club Ltd v Soccer Marketing International Ltd* [2010] EWCA Civ 753 (*Pacific International*).
387 *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*, also known as *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 (*Altimo Holdings*).

International the centre of the dispute was Ukraine; and in *Altimo Holdings* it was Kyrgzstan.

OJSC dealt with an application to serve out of jurisdiction where the plaintiff claimed restitution for alleged fraud by the defendant. Evidence brought before the Court consisted of various unsubstantiated claims that Russian courts were corrupt and incompetent.[388] The Court could not be swayed, on a balance of probabilities, that the plaintiff faced the risk of injustice, and the application was unsuccessful. *Cherney* dealt with an application by the plaintiff for permission to serve the defendant out of jurisdiction; this, despite the plaintiff's business dealings all having taken place in Russia and the defendant being a resident of Russia. In this case the plaintiff, a Russian exile and *persona non grata* in the country, faced a risk of assassination and the defendant allegedly had ties with the Russian government, which called into question the impartiality of any potential legal proceedings. What set *Cherney* apart from other, similar, cases was the quality of the cogent evidence presented to the Court. Proof of previous assassination attempts, the interference by the government in other court proceedings and the defendant's 'umbilical' connection to the government had all been laid before the Court.[389]

Pacific International dealt with as of right proceedings disputing ownership of shareholding in the Dynamo Kiev football club. The plaintiff, a company registered in Mauritius, sought proceedings in the UK, against companies registered in the UK, despite most of the evidence (documents and witnesses) being Ukrainian. The dispute also centred around a Ukrainian football club. The plaintiffs alleged that a fair trial would be an impossibility in a Ukrainian court but could not sufficiently substantiate these claims for the Court to exercise jurisdiction. In *Altimo Holdings* a case was appealed from the Isle of Man to the Privy Council, for leave to serve proceedings out of jurisdiction. England was not the most closely-connected forum, but the plaintiffs argued that the judgments by courts in Kyrgyzstan, relating to the case brought before the English court, had been fraudulently obtained. The Court deliberated whether it was sufficient for the second leg to prove that there was a risk that justice would not be done in a foreign jurisdiction, or whether the plaintiff must show that justice will not be done.[390]

In both *Cherney* and *Pacific International* the Courts held that the cogent evidence need only prove that there is a *risk* that justice will not be done in the foreign jurisdiction,

388 *OJSC* (n 385) 491.
389 *Cherney* (n 384) 237-248.
390 *Altimo Holdings* (n 387) 90.

and that it is not necessary to establish the eventuation of this risk on a balance of probabilities,[391] meaning that the plaintiff need not prove that there definitely will be an injustice in the foreign court, merely the real *risk* thereof.[392]

In all the abovementioned disputes, *forum non conveniens* was raised on the part of the defendants, and the plaintiffs all invoked the second leg of the *Spiliada* test, which entailed that they would not achieve proper justice in the former, respective Soviet states. The plaintiffs all presented profuse degrees of cogent evidence (of varying evidential weight) to support this claim, with differing results: In *Cherney* and *Altimo Holdings* the Courts stayed proceedings, and in *Pacific International* and *OJSC* the Courts did not. It seems that the trade-off for justice in individual cases is considerable uncertainty as to whether a claimant will have jurisdiction before an English court.[393]

6.1.5 Comity of nations

Known as *comitas gentium*, or courtesy of nations, comity in Anglo-common law jurisdictions is commonly defined as the 'equitable consideration for a foreign state's interest in the outcome of a dispute or the observance of its own laws'.[394] Comity is relevant in disputes where an application of law or the exercise of a domestic or foreign judicial power may have an effect outside of the jurisdictional boundaries of the forum.[395] In the field of private international law, many academics believe that when the principle of comity of nations is applied, if at all, it is applied in meaningless or misleading ways.[396] This could perhaps be ascribed to the lack of an adequate definition of the term,[397] or at least one that is widely accepted. Generally, many consider the concept of comity to be ambiguous and imprecise.[398] A contributing factor may be the judicial discretion often found in the interpretation of comity, which often differs greatly from courts in the same

391 *Cherney* (n 384) 28-29; *Pacific International* (n 386) 34-35.
392 This was previously confirmed by Lord Diplock in *Abidin Diver* (n 91) 476.
393 Hartley (n 131) 244.
394 AX Fellmeth & M Horwitz *Guide to Latin in international law* (2009) 57. The principle of comity of nations is widely accepted in other jurisdictions and is known in civil law systems as *courtoisie internationale* or *völkercourtoisie*.
395 T Schultz & J Mitchenson 'Rediscovering the principle of comity in English private international law' (2018) 26 *European Review of Private Law* 1.
396 Fawcett (n 358) 430.
397 Schultz & Mitchenson (n 395) 4.
398 As above.

jurisdiction, and often from courts in foreign fora. Gaudron J is known for referring to the principle of comity as something that judges in various forums use 'when they need to'.[399]

This is clearly seen in *Abidin Diver*, where Lord Diplock both reinforced the idea of comity and disparaged the principle in the same judgment. His Lordship simultaneously praised the progressive 'change in attitude' of the English courts as seen in *Atlantic Star 2* and *MacShannon* which replaced judicial chauvinism with the principle of comity.[400] Nary a paragraph later, Lord Diplock accounted for various factors that may be considered in the second part of the *Spiliada* inquiry, such as the 'possibility' that there are 'some countries' where there is a risk that a foreign litigant will not obtain justice in these courts, for political or ideological reasons, due to the supposed 'inexperience', 'inefficiency' or 'excessive delay' of these foreign courts, or the unavailability of 'suitable remedies' in such legal systems.[401] Without cogent evidence proving these allegations, it can be argued that the courts, in applying the wide judicial discretion in the second leg of the *Spiliada* test, expose their own unconscious bias towards foreign legal systems and in so doing simultaneously infringe upon the principle of *comitas gentium*, and upon said state's sovereignty and rule of law.

Moreover, the scope of inquiry under the second leg of the *Spiliada* doctrine creates much opportunity for judicial chauvinism. The extensive list of factors that can be taken into consideration by a court applying the *Spiliada* test can possibly lead to the court engaging in a forensic examination of a court's ability (or inability) to dispose of a claim in general or in a specific case, and in so doing calls into question the quality, resources and expertise of the foreign legal system, and the justice dispensed by foreign courts.[402] Instances of judicial chauvinism inadvertently bring about a breach of comity, and as such these principles are closely connected. When a court undertakes such an examination of the capabilities of another legal system under the second leg of *Spiliada*, it must be done with the utmost caution, as even in the presence of cogent evidence to support such claims a court may, in the way in which they dispose of this test, expose their own unconscious bias towards foreign legal systems.

399 *Dow Jones & Co Inc v Gutnick* [2002] HCA Trans 253 (28 May 2002).
400 *Abidin Diver* (n 91) 476.
401 *Abidin Diver* (n 91) 476.
402 Arzandeh (n 11) 98-99.

6.1.6. Forum shopping

As part of strategic litigation plaintiffs often choose fora based on the jurisdiction they feel would deliver a more favourable verdict. This is known as forum shopping. Ideally, the first leg of the *Spiliada* test as a possible unfettered choice to bring a claim anywhere is limited to the forum with which the claim has its closest and most real connection, thereby limiting forum shopping on the part of the plaintiff. However, the inconsistent application of the second leg means that courts that stay proceedings without meeting the necessary cogent evidentiary requirements may create an opportunity for the plaintiff to circumvent the jurisdiction of the most appropriate forum and continue with proceedings in the trial court. Such application of the second leg, where plaintiffs are guilty of forum shopping, would mean that the working of the discretion in the second leg of the *Spiliada* test would leave the first leg, and its protection against said forum shopping, ineffective and render its purpose moot. Despite this, not all jurists view forum shopping with contempt. Lord Denning in *Atlantic Star 1*, on discussing the pro-forum shopping approach in English courts, had the following to say:[403]

> If a plaintiff considers that the procedure of our courts, or the substantive law of England, may hold advantages for him superior to that of any other country, he is entitled to bring his action here – provided always that he can serve the defendant, or arrest his ship, within the jurisdiction of these courts – and provided also that his action is not vexatious or oppressive.

The judicial discretion in the second leg may create the opportunity for a plaintiff to abuse judicial processes. If precedent exists in a legal system that (certain) courts are quick to accept weak evidential proof of an alleged injustice in a foreign forum, it might promote the choice of the plaintiff to institute proceedings in said forum. Lord Denning called English courts a ‘good place to shop in’, implying that both the English law and the service that forum shoppers receive in English courts are superior and, therefore, preferable.[404] Advocating in favour of forum shopping on these grounds is an egregious attack on the sovereignty and rule of law of the foreign forum and the principle of comity of nations. Lord Reid in *Atlantic Star 2*[405] addressed these comments by Lord Denning as an attempt

403 *Atlantic Star 1* (n 81) 709.
404 As above.
405 *Atlantic Star 2* (n 80) 181.

to recall 'the good old days', an overt reference to the perceived superiority of English courts to those in other jurisdictions. The judicial record of English courts in matters involving *forum non conveniens* lends credence to the second of Robertson's false assumptions surrounding the development of the doctrine that trial judges will be impartial adjudicators.[406]

Apart from the Soviet cases of *Cherney*, *Altimo Holdings*, *Pacific International* and *OJSC* there are two cases that perfectly reflect the critique levelled at the second leg of the *Spiliada* test, namely, *Vedanta* and *Lubbe*.

In *Lubbe* the claimants consisted of more than 3 000 South African citizens claiming damages for personal injury and death suffered through the actions and omissions of the subsidiaries of Cape plc, of which the parent company was registered in England. The damage caused was due to the exposure of the claimants to asbestos across South Africa, over a period, in the course of their employment in the mines of Cape plc or due to exposure to contaminated areas surrounding the mines. At the time the claim was brought in England, the defendant, Cape plc, no longer had a presence or any assets in South Africa. The defendants argued for a stay of proceedings under *forum non conveniens*. Under the first leg of the *Spiliada* test South Africa clearly was the more appropriate forum. One of the contributing factors was the submission by the defendants to the jurisdiction of South African courts. The UKHL did not grant the stay under the application of the second leg as the Court felt that justice would not be done in a South African court. The UKHL considered the possibility of a settlement if the case was brought in a South African court; the insufficient financial resources of the claimants to fund the litigation out of pocket; that contingency fee agreements in South Africa would not be suitable as they do not cover the costs of expert witnesses; and that legal aid no longer covered the costs relating to personal injury matters. Furthermore, at the date of this judgment there had not yet been a class action heard in a South African court, and the UKHL doubted the ability of the domestic courts and professionalism of lawyers to handle such claims. Lastly, the UKHL determined that the case could only be 'handled efficiently, cost-effectively and expeditiously on a group basis [in the UK]'.[407] The Court neither heard nor considered any cogent evidence to substantiate these claims.

406 Robertson (n 369) 414.
407 *Lubbe* (n 6) 1543.

The *Lubbe* case serves to illustrate an extreme case of judicial chauvinism by one jurisdiction levelled against the legal system of another, especially considering the fact that the South African legal system had its first class action within a few months of the time when the *Lubbe* judgment was handed down, in *Permanent Secretary, Department of Welfare, Eastern Cape, & Another v Ngxuza & Others*.[408] The *Ngxuza* case served as an illustration of the judicial capacity of the South Africa courts, as well as South African jurists, in judging a class action where there had not before been one in South Africa. A few years later, in *Nkala & Others V Harmony Gold Mining Company Limited & Others*,[409] the South Gauteng High Court was able to, very successfully, judge a major class action lawsuit in accordance with the provisions made under section 38(c) of the Constitution.[410] The case of *Nkala* had near similar facts to that of *Lubbe*, and both ended in a court-approved settlement. Class actions have been a legal possibility in South Africa since their post-apartheid introduction in the interim Constitution.[411]

To date there have only been 15 cases where a superior court of first instance in South Africa made a conclusive judgment on whether a class action could proceed, where it was clear that the applicants intended for the matter to be brought as a class action.[412] Of these 15 cases, three passed certification, of which one culminated in a court-approved class action settlement,[413] one went to trial but was unsuccessful[414] and only one has been litigated to (successful) completion.[415] The remaining 12 cases were either allowed to proceed as class actions by the court *a quo*, and later failed on appeal,[416] or

408 *Permanent Secretary, Department of Welfare, Eastern Cape & Another v Ngxuza & Others* 2001 (4) SA 1184 (SCA) (*Ngxuza*).

409 *Nkala & Others v Harmony Gold Mining Company Limited & Others* 2016 (5) All SA 233 (GJ) (*Nkala*). For the settlement itself, see *Ex Parte Nkala* 2019 JDR 0059 (GJ).

410 The Constitution (n 10).

411 Sec 7(4)(b)(iv) of the interim Constitution of the Republic of South Africa 1993, the equivalent of sec 38(c) of the final Constitution of the Republic of South Africa,1996.

412 T Broodryk 'An empirical analysis of class actions in South Africa' (2020) 24 *Law, Democracy and Development* 54 61.

413 *Nkala* (n 409).

414 *Magidiwana & Other Injured and Arrested Persons & Others v President of the Republic of South Africa & Others (Black Lawyers Association as amicus curiae)* 2013 (11) BCLR 1251 (CC).

415 *Linkside & Others v Minister of Basic Education* 2015 JDR 0032 (ECG); *Linkside & Others v Minister of Basic Education* order (by agreement) by the High Court of South Africa, Eastern Cape Division, Grahamstown, 20 March 2014, Case 3844/2013.

416 *Pretorius & Another v Transport Pension Fund & Others* 2018 (7) BCLR 838 (CC); *Road Freight Association v Chief Fire Officer Emakhazeni* 2015 JDR 1802 (GP); *Grootboom v MEC: Department of Education, Eastern Cape Province* 2019 JDR 0018 (ECG); *Magidiwana & Others v President of the Republic of South Africa & Others* (No 1) 2014 (1) All SA 61 (GNP).

did not pass the certification process.[417] Certification was refused mainly due to a failure by the applicants to satisfy the court that there was a cause of action raising triable issues or a failure to prove *locus standi* in terms of section 38 of the Constitution, but some cases were refused certification due to a lack of common issues or a failure to show that a class action was the preferable procedure.[418]

This largely disproves the claims made by the UKHL in *Lubbe* relating to the ability of the South African legal system to hear class actions. The South African Law Reform Commission itself has stated that the purpose of class actions is 'to facilitate access to justice for the man on the street'.[419]

Another major fault exposed by the *Lubbe* case was the wide judicial discretion under the second leg of the *Spiliada* test, whereby the court was able to stay proceedings without hearing any cogent evidence. In the trial court, *Lubbe* was stayed in favour of the more appropriate, South African forum.[420] The defendants appealed the judgment, which was rejected by the Court of Appeal.[421] The House of Lords, however, unanimously refused a stay of the proceedings. This exemplifies the 'drawn-out' and 'resource-inefficient' nature of litigation under the *Spiliada* test,[422] as well as the unpredictable outcomes the test might deliver within a singular legal system, where courts hearing roughly the same body of evidence can come to staggeringly different judgments.

6.1.7 *Vedanta*

417 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) All SA 544 (C); *Trustees for the Time Being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 (1) All SA 648 (SCA); *Bartosch v Standard Bank of South Africa Limited* 2014 JDR 1687 (ECP); *National Union of Metalworkers of South Africa v Oosthuizen & Others* 2017 (6) SA 272 (GJ); *Solidarity v Government Employees Pension Fund* 2018 JDR 0312 (GP); *Gqirana v Government Employees Pension Fund* 2018 JDR 0199 (GP); *Sabie Chamber of Commerce and Tourism & Others v Thaba Chweu Local Municipality & Others*; *Resilient Properties Proprietary Limited & Others v Eskom Holdings Soc Ltd & Others* (2295/2017, 83581/2017) 2019 ZAGPPHC 112 (7 March 2019); *Tindleli & Another v Government Employees Pension Fund* 2019 JDR 0977 (GP).

418 Broodryk (n 412) 78.

419 South African Law Reform Commission 'The recognition of a class action in South African law' Working Paper 57 Project 88 (1995) para 5.28. The South African Law Commission has been the South African Law Reform Commission since 2002.

420 *Lubbe & Others v Cape Plc* [1998] EWCA Civ 1351.

421 *Lubbe & Others v Cape Plc* [2000] CLC 45.

422 Arzandeh (n 11) 104.

The facts in *Vedanta* echoed many of the facts in *Lubbe*. The claimants were a group of indigent subsistence farmers in Zambia. The claim was based on damages suffered due to ground water pollution from nearby copper mines, which had severely affected the water sources used by the claimants in their homes, to water crops and for livestock. The copper mine situated in Zambia, Konkola Copper Mines (KCM), was the subsidiary of Vedanta Resources plc, which was both domiciled and incorporated in the UK. KCM is wholly controlled by Vedanta, the latter of which owns a majority shareholding in the former. The rest of the shareholding in KCM was held by the Zambian government. The only issue on appeal was the jurisdiction of English courts to hear the matter against both KCM and Vedanta. Article 4 of Brussels I recast[423] established jurisdiction over Vedanta, as a 'person' domiciled in a member state (at the time). Jurisdiction over KCM had been established in accordance with traditional English procedural law. KCM, as a 'necessary or proper party' to the dispute against Vedanta, had been served outside the jurisdiction of the court.[424] Vedanta had been used as an anchor defendant, thereby allowing the English court's jurisdiction over KCM. Similar to *Lubbe*, the case of *Vedanta* was an 'access to justice issue'[425] as the Court, under the second leg of *Spiliada*, was seised with determining the availability of Zambian legal teams appropriately experienced to handle class action lawsuits of this magnitude and the (lack of) access to funding on the part of the claimants, as extremely vulnerable litigants. In Zambia, much as the case in South Africa at the time of the *Lubbe* litigation, the claimants could not access legal aid, nor contingency fee agreements.[426] However, what set *Vedanta* apart from *Lubbe* was the quality of the cogent evidence considered by the Court. The UKSC considered *Nyasulu v Konkola Copper Mines plc*,[427] *Fred Kapya Sinkala v Bruce Mining and Others*[428] and *Shamilimo v Nitrogen Chemicals of Zambia*.[429] In *Nyasulu* the Supreme Court of Zambia held that each individual claimant in a class action must prove both causation and loss, as well as quantum of damages. Only 12 out of some 2 000 claimants were successful in proving their case in *Nyasulu*. This was attributed to the high cost of obtaining expert medical evidence, which the majority of claimants could not afford. Their claims were

423 Brussels Regulation Recast (n 106).
424 Rule 6.36 Civil Procedure Rules; Practice Direction 6B – Service out of the Jurisdiction, para 3.1.
425 *Vedanta* (n 104) 89.
426 *Vedanta* (n 104) 90. Contingency fee agreements in Zambia are unlawful.
427 *Nyasulu v Konkola Copper Mines plc* [2015] ZMSC 33 (*Nyasulu*).
428 *Fred Kapya Sinkala v Bruce Mining & Others* (2002/HK/547) [2013] ZMHC 9.
429 *Shamilimo v Nitrogen Chemicals of Zambia* 2007/HP/0725 (*Shamilimo*).

dismissed. In *Shamilimo* the claimants failed as they could not fund the expert evidence reports required to prove causation.[430] Although the claimants in *Lubbe* faced similar financial difficulties, no cogent evidence was led to prove this point. The same court, roughly 20 years apart, came to similar conclusions based on similar facts, but by accepting vastly different standards of proof. This further illustrates the necessity of reform of the second leg of the *Spiliada* inquiry.

Chapter 7: Proposed constitutional development

7.1 Inherent power imbalance

A plaintiff as *dominus litis* in civil proceedings not only has the right to choose when to institute action against a defendant, but in which competent forum to do so.[431] The doctrine of *forum non conveniens* limits the rights of a plaintiff as *dominus litis* to select *any* competent forum,[432] as a matter may be stayed by the plaintiff's chosen court to be heard in a more suitable jurisdiction. When considering factors under the second leg of the *Spiliada* inquiry, such as the availability of witnesses, legal costs and the cost of expert witnesses, a court is engaged in some capacity in a comparative analysis of the hardships possibly experienced by the defendant if jurisdiction is retained, and by the plaintiff if the proceedings are stayed and they are obligated to bring the proceedings in another forum.[433] A tension exists between the concept of absolute justice, which offers a claimant access to its forum of choice, and relative justice which requires that a claimant has access to its most appropriate forum.[434] The working of the doctrine of *forum non conveniens*, where a competent court stays proceedings in favour of a more appropriate forum, limits the freedom a plaintiff normally experiences as the *dominus litis* in civil proceedings.[435]

Where there are jurisdictional disputes between countries from civil and Anglo-common law legal systems, a tension may exist between legal systems due to jurisprudential differences. In civil law systems the courts wish to avoid litigation on

430 *Vedanta* (n 104) 99-100; Schoeman (n 319).
431 Law of South Africa (LAWSA) Civil Procedure: Superior Courts (Volume 4 – 3rd Edition Replacement) 579.
432 Forsyth (n 5) 184.
433 *Irragori* (n 227).
434 Fentiman (n 68) 805.
435 Forsyth (n 5) 184.

jurisdiction. Therefore, civil courts with jurisdiction to hear a matter will generally hear the proceedings, as these legal systems do not allow courts the discretion to stay proceedings in favour of another forum, regardless of appropriateness.[436] Anglo-common law systems are more concerned with the appropriateness of the court hearing the matter and in so doing often inadvertently open themselves to costly and timeous *in limine* litigation on the matter of jurisdiction. This leaves civil and Anglo-common law legal systems at cross-purposes when faced with jurisdictional disputes.[437] Where a civil law court is seised with a matter first, the court would lend no credence to jurisdictional arguments such as *forum non conveniens*. Where the civil court has jurisdiction, it will hear the matter regardless of connection or appropriateness. A civil law court would only decline jurisdiction on the basis of *lis alibi pendens*, where proceedings have been brought in another court first, and second in said civil law court. In contrast, where a Anglo-common law forum is seised second, it would carry out the *forum non conveniens* analysis, and if the proceedings pass the two-pronged inquiry, the proceedings will continue regardless.[438] Civil law systems place the principle of comity above the Anglo-common law principle of closest connection and appropriateness (and, it may be argued, over access to justice when it comes to the second leg of the inquiry). These jurisprudential differences create a tension between the interests and the dignity of the litigants. In the case of *De Dampierre v De Dampierre*[439] the divorcing parties were both French nationals who relocated to London shortly after their marriage. In 1984 the wife moved to the United States with their child and later refused to return. The husband, now domiciled in France, instituted divorce proceedings in a French court. In turn, the wife petitioned for divorce in a court in London. The husband attempted to stay the proceedings on the grounds that his wife chose the UK courts as a divorce settlement would be more financially beneficial to her than one awarded in France. The UKHL stayed the proceedings as France was the most appropriate forum, due to the wife voluntarily having severed her connections with the English jurisdiction when she moved and later refused to return.[440] The Court referred to the 'legitimate personal or juridical advantage' as considered in *Spiliada*[441] and came to the conclusion that it should not be deterred

436 Hartley (n 131) 225.
437 As above.
438 As above.
439 *De Dampierre v De Dampierre* [1987] 2 All ER 1 (*De Dampierre*).
440 *De Dampierre* (n 439) 6.
441 *Spiliada* (n 1) 859-861.

from granting the stay because the plaintiff would be deprived of this advantage, if the Court is satisfied that substantial justice awaits in the appropriate, foreign forum. The prospect of a more generous settlement under English law did not mean that substantive justice could not be found in a French court. There was no risk of injustice in restricting the wife to a French forum, but the Court considered it unjust to allow the wife to bring a claim in an English court, as if she were entitled to the rights that would be conferred on her under English law.[442]

Former chief justice of the South African Constitutional Court, Justice Pius Langa, wrote that a symptom of the inequality prevailing in South Africa is the limitation it places on access to justice and that equal access to justice is a priority of transformative constitutionalism.[443] From a South African jurisprudential perspective the Constitution, as the supreme law, lies at the heart of all legal development. Implicit in both the criminal and civil aspects of fair trial is the principle of equality, which requires a 'fair balance' between litigating parties. Constitutional development of the doctrine of *forum non conveniens* can simultaneously address the problems inherent in the second part of the inquiry and strive to maintain a fair balance between parties in civil trials.

7.2 Proposed revision of the doctrine of *forum non conveniens*

7.2.1 United Kingdom

Pre-Brexit, there was not much push for reform of the doctrine of *forum non conveniens* in the UK, as the *Owusu* judgment limited the powers of an English court to stay proceedings where the defendant was domiciled in England. This was confirmed in *Vedanta* where the UKSC confirmed that article 4 was considered a mandatory rule under EU law.[444]

There have been multiple suggestions on how the UK courts should apply the doctrine of *forum non conveniens* post-Brexit: rejecting the ECJ's preclusive model and returning to either the Anglo-common law model[445] (with or without development of the second leg of the *Spiliada* test) or adopting the American model of the doctrine.[446]

442 *De Dampierre* (n 439) 6.
443 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 355.
444 *Vedanta* (n 104) 29.
445 Arzandeh (n 11) 106.
446 Ham (n 167) 725.

7.2.2 The *Irragori* sliding-scale approach

The approach favoured by US courts, the *Irragori* sliding-scale approach, encompasses a degree of deference afforded to a plaintiff's choice of forum, with an 'appropriate' degree of scepticism when assessing whether a defendant has sufficiently demonstrated inconvenience. The greater the degree to which a plaintiff chose a forum, the harder it should be for the defendant to prove 'inconvenience'.[447] This approach has been lauded by some as 'superior' to the haphazard and formalistic approach followed by the first leg of the *Spiliada* test.[448] This approach is backed by, for example, a list of 25 factors drawn up by a Californian court to be considered when dealing with a *forum non conveniens* inquiry.[449]

Although the sliding-scale approach may be characterised as having a more 'formulaic structure' than the traditional *forum non conveniens* inquiry, the formulation by the American courts does not adequately address the possible injustice to the plaintiff in a foreign forum, and as such fails to find application in the context of the development of the South African common law.

7.2.3 Section 6(1) of the European Convention

Arzandeh proposes two suggestions for development of the *Spiliada* test. The first is that of the UK returning to their Anglo-common law model of *Spiliada* – the courts abolishing the second leg of the *Spiliada* inquiry, turning back to the 'purer' Scottish model of *forum non conveniens*. This would simplify the doctrine, reducing it to a factual inquiry weighing the connecting factors to determine the most appropriate forum.[450] This would eradicate all issues experienced under the second leg of the inquiry. However, the complete abolishment of the second leg of the inquiry is considered 'disproportionate' to the problems that arise therefrom.[451] In virtually all the cases where a Scottish court considered *forum non conveniens*, the main inquiry concerned the most appropriate forum, which was mostly an English court. Arzandeh suggests the possibility that if the

447 *Irragori* (n 227) 839.
448 Ham (n 167) 725.
449 *Great Northern Ry Co v Superior Court*, 12 Cal App 3d 105 (1970); *Church of Sudan v Talisman Energy Inc* 224 SDNY (2003).
450 Arzandeh (n 11) 103-104.
451 Arzandeh (n 11) 104.

issue of substantive (in)justice was ever raised, the Scottish courts could have been forced to develop the doctrine further.[452] The abolishment of the second leg of the inquiry would mean that English courts would have to grant a stay in favour of the most appropriate forum under the first leg, regardless of any risk of injustice in another forum. In more extreme cases, this could easily lead to human rights violations,[453] such as discrimination based on any of the grounds listed in section 9(2) of the Constitution. For these reasons the complete abolishment of the second leg is not favoured.

The second recommendation bases the reform of the second leg of *Spiliada* on article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[454] Article 6(1) provides that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

This approach aims to refine the scope of inquiry and judicial discretion under the second leg, which would lead to increased legal certainty, and reduce the problems currently associated with the second leg of *Spiliada*. A European Convention contracting state is obligated to protect all the rights contained in the Convention, and more specifically the article 6(1) rights of a person within its jurisdiction.

In both domestic cases, where contracting states must ensure the rights contained in the European Convention are not infringed in its own jurisdiction, and cases relating to deportation or extradition of an accused person by the contracting state to another jurisdiction, where a court must ensure the expulsion would not violate the article 6(1) rights of the individual, an ECHR contracting state is obligated to protect article 6(1) rights. This receiving state may or may not be a member state, but the expulsion cannot lead to a violation of the article 6(1) rights of the accused in the receiving state. If there is a real risk that deporting a deportee from a contracting state would infringe on their article 6(1) right to a fair trial in the receiving country, and the deportee is deported regardlessly, it would amount to a breach of the contracting state's European Convention obligations.[455] Unlike *Spiliada*, a 'real risk' under article 6(1) has never been properly defined, although

452 As above.
453 Arzandeh (n 11) 105.
454 Convention of 20 March 1952 for the Protection of Human Rights and Fundamental Freedoms.
455 A caveat would be if the receiving state could give diplomatic assurances that the deportee's art 6(1) rights would not be infringed by such an injustice.

courts of different member states have attempted to do so. At present it seems that the test of a real risk of injustice in the receiving state is narrowly construed, with limited discretion, and very tightly defines the concept of injustice in the receiving state.[456] *Othman (Abu Qatada) v The United Kingdom*[457] is the only case to date where the Court found that deporting an accused from a contracting state would lead to injustice in the receiving state, and in turn the state being in breach of its obligations in terms of article 6(1), despite the deluge of cases that have been brought under article 6(1). This proves that the limitation placed on the interpretation of a 'flagrant denial of justice' facilitates legal certainty and leads to consistent legal outcomes.

The ECHR in *Othman* found that the accused's removal from the UK to Jordan would breach his article 6(1) right to a fair trial, as the evidence against him had been obtained using torture, that in itself being a 'fragrant denial of justice'.[458] On application of the 'flagrant denial of justice test', the ECHR admitted to the test not having a concrete definition, but held that 'certain forms of unfairness could amount to a flagrant denial of justice'.[459] These include the conviction of an accused *in absentia* without the possibility of obtaining a fresh determination of the merits of the charge; a trial 'summary in nature' that is conducted in total disregard of the rights of the defence; the detention of an accused without any access to an independent and impartial tribunal to review the legality of the detention; and the deliberate and systematic refusal of access to legal representation, especially for an individual detained in a foreign country.[460]

In expulsion cases the articulation of an injustice, albeit not perfect, has much narrower application than the second leg of *Spiliada*, where the risk of injustice need only be proved by way of cogent evidence.

Section 6(1) of the European Convention is said to have two constructions: a direct and indirect effect.[461] A direct effect manifests where a contracting state is directly responsible, due to an act or omission, for a breach of a Convention right,[462] better known as a 'domestic case'.[463]

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456 Arzandeh (n 11) 107. See *Justin Surendran Devaseelan v Secretary of State for the Home Department* [2002] UKIAT; *Mamatkulov and Askarov v Turkey* 46827/99 and 46951/99 (ECJ).
457 *Othman (Abu Qatada) v The United Kingdom* C-8139/09 (*Othman*).
458 *Othman* (n 457) 258.
459 As above.
460 As above.
461 JJ Fawcett 'The impact of article 6(1) of the ECHR on private international law' (2007) 56 *International and Comparative Law Quarterly* 1 2.
462 *R (Razgar) v Special Adjudicator* [2004] UKHL 27 para 41 (*Razgar*).
463 *R (Ullah) v Special Adjudicator* [2004] UKHL 26 para 7 (*Ullah*).

In such cases the contracting state may not act in a way that is incompatible with the European Convention. The indirect effect of the Convention rights may occur where the contracting state itself does not infringe on the aforementioned rights but expels or extradites the person from its territory to another where the applicant's Convention rights will be violated.[464] The indirect cases are known as 'foreign cases'.[465] There are two situations in which Convention rights may be violated in foreign cases. The first is where a state extradites or deports a person to a jurisdiction where they face a real risk of these rights being infringed.[466] In private international law, it is not a person that is transferred abroad, but an action, when proceedings are stayed in favour of a more appropriate forum. However, it is purported that the issue at hand arguably is the same.[467]

Article 6 concerns are raised in three instances under *forum non conveniens* in English courts: when there has been a denial in access, a breach abroad or a delay in trial.[468] A denial of access is an inevitable consequence of staying proceedings and transferring the action to a more appropriate forum abroad. The question is whether this poses a breach of England's article 6 rights. Article 6 requires a trial somewhere, domestically or abroad, that is held in accordance with article 6.[469] This does not mean that a litigant has an 'unfettered choice' of forum under article 6.[470] Therefore, as long as the proceedings are stayed to a forum under which article 6 will not be infringed, the stay would not constitute a breach of the member state's obligations.

The second concern is also inherent to the doctrine. It is inevitable that the proceedings will be delayed as the court considers the stay, and a trial on the merits will be even further delayed if the stay is granted.[471] Under article 6 a litigant has a right to a fair hearing, within a reasonable time. Are these delays reasonable or, otherwise stated, do these delays constitute a breach of the article 6 right?[472] In his opinion on the *Owusu* case, Advocate-General Leger stated that *a forum non conveniens* inquiry would likely

464 *Ullah* (n 463) 9.
465 As above.
466 First established in *Soering v United Kingdom* [1989] 11 EHHR 493; see further *Einhorn v France*; *Tomic v United Kingdom*, 17837/03, Council of Europe: European Court of Human Rights, 14 October 2003; *Bankovic v Belgium* [2001] ECHR 890; *MAR v United Kingdom* (1996) 23 EHRR CD 120; *Dehwari v Netherlands* (2000) 29 EHRR CD 120.
467 Fawcett (n 461) 4.
468 Fawcett (n 461) 9.
469 As above.
470 *OT Africa Line Ltd v Hijazy (The Kribi)* [2001] 1 Lloyd's Rep 76 para 42 (*Kribi*).
471 Fawcett (n 461) 9.
472 As above.

prolong proceedings significantly, and could be seen as incompatible with article 6 of the European Convention.[473]

Third, where proceedings are stayed in a court of a member state for a more appropriate, foreign, forum and the foreign court breached the litigant's right to a fair trial,[474] would this constitute a breach of the member state's obligations under the European Convention? This issue was raised by the plaintiffs in *Lubbe*, who submitted that a stay of proceedings in favour of a South African court would violate their rights under article 6, as they were on an unequal footing with the claimants, due to a lack of public funding for class action litigation in South Africa, which denied them a fair trial.[475] The Court in *Lubbe* treated the article 6 inquiry as an afterthought in the greater inquiry into the prospect of not receiving substantive justice in the foreign forum. The Court first considered and applied private international law principles, the *Spiliada* test, and came to the conclusion that the South African forum could not offer the claimants substantive justice and refused the stay, before considering the human rights aspect (and the UK's obligations under the European Convention). Lord Bingham concluded the inquiry into the applicability of article 6 by stating that he 'did not think article 6 supports any conclusion which is not already reached on application of *Spiliada* principles'.[476] This approach does not give rise to any human rights concerns, as in essence a plaintiff's right to a fair trial is entrenched in the second leg of the *Spiliada* test.

However, Fawcett raises concerns over the possibility that the method whereby private international law principles are considered by a court first, before human rights considerations, might lead to future cases where proceedings are stayed in favour of a forum where article 6 may be breached.[477] This may be due to the difference in standards of what a court considers an injustice in private international law, and in terms of article 6. The unfettered judicial discretion under the second leg of *forum non conveniens* may lead to a transfer to another forum that breached article 6. Under such circumstances a court may be in breach of article 6 under the indirect effect doctrine.[478]

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473 Case C-281/02 Opinion of Advocate General Léger delivered on 14 December 2004 para 270.
474 Fawcett (n 461) 9.
475 *Lubbe* (n 6)1561.
476 As above.
477 Fawcett (n 461) 10.
478 Fawcett (n 461) 11. If the *Lubbe* case were decided today, the Supreme Court would be in breach of the UK's obligation under sec 2 of the Human Rights Act 1998 to take into account relevant decisions of the European Court of Human Rights, as in the case of *Airey v Ireland* (1979) 2 EHRR 305 (*Airey*), where the Court held that the unavailability of legal representation can constitute a breach of art 6.

Comparatively, in the *Kribi* case the Court considered article 6 first, before considering the applicable private international law rules. This is seen as the logical approach to an issue that encompasses both human rights and private international law.[479] The approach followed in *Lubbe* negates the human rights concern, as it creates the impression that *forum non conveniens* deals with the human rights concern, so 'there is no such concern'.[480] Other courts, such as the Court of Appeal in *Dow Jones & Co Inc v Yousef Abdul Latif Jameel*,[481] have followed suit. In *Dow Jones* the Court followed a similar approach to *Lubbe*, deciding the case based on private international law principles, essentially rejecting the article 6 argument. The assumption where the private international law principles are considered and applied before human rights considerations seems to be that the private international law principles (whether it be *forum non conveniens* or another rule, such as an anti-suit injunction) themselves embody and meet the human rights requirements under the European Convention. The flexibility in private international law rules, such as the second leg of *Spiliada*, may be sufficient to deal with any human rights concerns.[482]

Post-Brexit, the UK has affirmed its 'respect' for the Universal Declaration of Human Rights and the international human rights treaties to which they are party within the EU-UK Trade and Cooperation Agreement.[483] Although the Trade Agreement does not specifically mention the European Convention, it is one of the above-mentioned 'treaties' and for the time being the UK remains committed to the European Convention and the rights contained therein. However, the UK can choose to remain within the ECJ's jurisdiction,[484] withdraw from the European Convention and the ECJ's jurisdiction[485] or pass domestic legislation to limit the working of the Convention on UK soil. The Trade Agreement also does not stipulate the consequences of non-compliance with the European Convention.

479 Fawcett (n 461) 10.
480 As above.
481 *Dow Jones & Co Inc v Yousef Abdul Latif Jameel* 2 [2005] EWCA Civ 75 (*Dow Jones*).
482 Fawcett (n 461) 37.
483 Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one Part, and The United Kingdom of Great Britain and Northern Ireland, of the Other Part, 31 December 2020, L 444/14, Article SPS.4: Rights and obligations (Trade Agreement).
484 Also known as a 'soft Brexit'.
485 Conversely, a 'hard Brexit'.

7.2.2 South Africa

It is clear that the South African approach to *forum non conveniens* requires an overhaul. The *Irragori* sliding-scale approach favoured by US courts is too far removed from the *Spiliada* approach that has been (haphazardly) favoured by South African courts. The more favourable approach would be for South African courts to adopt a similar approach as suggested by Arzandeh for European Convention member states, namely, adopting the construction of injustice in a foreign forum as courts apply it in expulsion case dealing with section 6 of the European Convention. It is interesting to note that recently, in the case of *Hayley Dawn Young v Attorney-General*,[486] the Supreme Court of New Zealand recognised that 'the place of international human rights instruments in the assessment of a claim of *forum non conveniens* may be an issue worthy of consideration in an appropriate case'.[487]

The South African Constitution is known to be an international law-friendly constitution.[488] Section 39 of the Constitution states that when interpreting the Bill of Rights, a court must consider international law,[489] and may consider foreign law.[490] When interpreting legislation, a court must give preference to a reasonable interpretation consistent with international law above any other interpretation that is inconsistent with international law.[491] Furthermore, customary international law is considered law in the Republic except where it is in conflict with the Constitution or an Act of Parliament.[492] Section 39(2) of the Constitution states that when developing the common law, such as the doctrine of *forum non conveniens*, doing so must promote the spirit, purpose and the objectives of the Bill of Rights. Thus, the Constitution lays the foundation for, and encourages, this proposed development. Certain rights in the Bill of Rights will benefit from a reimagined constitutional application of the doctrine of *forum non conveniens*.

The South African equivalent of article 6 of the European Convention is section 34 of the Constitution. Section 34 determines that [e]veryone has the right to have any

486 *Hayley Dawn Young v Attorney-General* [2019] NZSC 23 (6 March 2019) (*Hayley*).
487 *Hayley* (n 486) 14.
488 D Tladi 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 310 311.
489 The Constitution (n 10) sec 39(1)(a).
490 The Constitution (n 10) sec 39(1)(b).
491 The Constitution (n 10) sec 233.
492 As above.

dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

Section 34 appears to be derived from article 6(1) of the European Convention[493] which reads that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal'.

The jurisprudential philosophy of article 6 is relevant to the interpretation of section 34,[494] for purposes of the development of the second leg of the *Spiliada* test and, as per Budlender, it is part of the international law framework within which the Bill of Rights is to be evaluated and understood,[495] due to the apparent inference of section 34 from the European Convention.[496]

The article 6 right of access to courts contains two inter-related rights, namely, a right of access to court, and a right to a fair trial once one is brought before a court.[497] This article 6 right includes the standard protections offered under most human rights instruments to a fair trial: the right to legal representation and the right to an impartial hearing before a court or tribunal. Article 6 goes somewhat further than most and entrenches the right to place a matter effectively before a court.[498] This was illustrated in the case of *Airey*, where the applicant was unable to afford legal representation, and did not have access to legal aid. The Court held that Convention rights must be 'practical and effective rights' and not merely theoretical or illusory.[499] The Court held that, as the proceedings were highly complex and all other similar cases had been argued by legal representation, the applicant would not be able to successfully present the case without the assistance of legal representation and that, therefore, her article 6 right to a fair trial had been breached. Similarly, in *Nkuzi Development Association v Government of the Republic of South Africa & Another*[500] the Land Claims Court dealt with a case concerning persons with the right of security of tender in terms of the Extension of Security of Tenure

493 G Budlender 'Access to courts' (2004) *South African Law Journal* 339.
494 As above.
495 *S v Makwanyane* 1995 (3) SA 391 (CC) 35.
496 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 45; Budlender (n 493) 339.
497 As per the European Court in *P, C and S v United Kingdom* (2002) 35 EHRR 31 89 91.
498 Budlender (n 493) 339-340.
499 *Airey* (n 478) 24.
500 *Nkuzi Development Association v Government of the Republic of South Africa & Another* 2002 (2) SA 733 (LCC) (*Nkuzi*).

Act[501] and the Land Reform (Labour Tenants) Act.[502] A very large number of persons who would otherwise enjoy protection under these acts are left out in the cold when their rights are infringed or threatened with infringement. The litigants were 'overwhelmingly' poor and vulnerable, could not afford legal representation, were largely illiterate and, therefore, could not understand the procedures or documents relating to the action. The Court held that the result was that the litigants in similar tenure disputes are 'quite often unable to defend or enforce their rights and their entitlement under the Constitution, the Labour Tenants Act and ESTA'.[503] This illustrates a similar jurisprudential spirit in section 34 of the Constitution: The right to access to courts is more than merely accessing a court or affording legal representation, but also includes the right to effectively bring a claim before a court.

It is an accepted fact that in many courts in South Africa the court roll is very full. Section 35 of the Constitution protects the right of an accused person in a criminal matter to have their trial 'begin and conclude without unreasonable delay'.[504] Analogously, the section 34 right of access to courts enshrines the well-known maxim that 'justice delayed is justice denied'. Parties to civil proceedings have a right to proceedings that are not unreasonably delayed, and it may be argued that this is part of being able to effectively bring a claim before a court. Fair access to a well-functioning judicial system under section 34 is inextricably linked to the right to dignity.[505] Access to justice is realised through the judicial brand of government's constitutional duty to ensure that every person who finds themselves within the legal system can invoke legal rights, procedures and processes seeking legal redress, irrespective of social or economic capacity. Access to 'equal' justice to facilitate substantive justice is a 'central tenet' of transformative constitutionalism,[506] which often suffers at the hand of socio-economic inequality. Just as the Constitution, and the doctrine of transformative constitutionalism, should not become a tool of the rich,[507] similarly access to effective justice (through jurisdictional rules and doctrines such as *forum non conveniens*) should not. Therefore, facilitating equal access to justice is a constitutional priority.[508]

501 Extension of Security of Tenure Act 62 of 1997 (ESTA).
502 Land Reform (Labour Tenants) Act 3 of 1996.
503 *Nkuzi* (n 500) 4.
504 The Constitution (n 10) sec 35(3)(d).
505 The Constitution (n 10) sec 10.
506 Langa (n 443) 355.
507 As above.
508 Langa (n 443) 355.

In *Owusu* concerns were raised that a delay caused by a stay granted on the basis of *forum non conveniens* could be incompatible with article 6 of the European Convention.[509] The possibility therefore exists that delays caused by a stay granted in terms of *forum non conveniens* may be an infringement of a plaintiff's section 34 right of access to justice in a South African forum.

Forsyth identifies three possible article 6 concerns under *forum non conveniens*[510] that may well arise under section 34 of the Constitution.

Under the second leg of the *Spiliada* test, a South African court must ensure that a plaintiff's section 34 right is not infringed by staying the proceedings for a more appropriate court. If there is a real risk that a stay would lead to a plaintiff's section 34 rights being infringed, it would be a breach of the court's duty to promote the spirit, purpose and the objectives of the Bill of Rights. This possibility should be assessed using a similar test to that of the 'flagrant denial of justice test' as it was applied in the *Othman* case, determined on the basis of real, cogent evidence presented before a court. The 'flagrant denial of justice test' requires a higher standard of proof than the mere *risk* of injustice that is currently required under *Spiliada*, and in so doing removes much of the judicial discretion and facilitates legal certainty. A denial of access can raise another section 34 concern. Where a South African court stays proceedings in favour of a foreign court, thereby transferring the action elsewhere, does this encompass a breach of a right by the court? As with article 6, if the proceedings meet the section 34 requirements, it will not matter where the trial took place.[511]

The final human rights concern raised by a stay under the doctrine is where the courts stay the action to a forum where a possible breach of section 34 may take place. This begs the question of whether a court would be in breach of section 34 if a trial is stayed to a forum with substantial delays or any other issue that may affect the quality of justice offered to the parties. This was directly raised in *Lubbe*, where the UKSC held that an article 6 (and, therefore, section 34) breach by a domestic court, supported by cogent evidence, would be enough to prove a substantive injustice and refuse a stay.[512]

In *Lubbe* the UK House of Lords considered the private international law principles before considering any human rights enquiries. Lord Bingham stated that he did not

509 Case C-281/02 Opinion of Advocate General Léger delivered on 14 December 2004 para 270.
510 Fawcett (n 461) 9.
511 As above.
512 *Lubbe* (n 6) 1561.

believe that article 6 offered any relief that was not already available under *forum non conveniens*.[513] Fawcett warns that this approach, whereby private international law principles are considered before human rights principles, may one day lead to a court transferring a trial to a forum where the trial would involve a breach of the court's rights under article 6 (and section 34).[514]

A narrower definition of what constitutes a risk of injustice under section 34 may help to mitigate these risks.

This approach to the doctrine of *forum non convenience* may serve as evidence that the judicial discretion under the second leg need not be inherent in the nature of the inquiry itself, as it is neither 'essential' nor 'unavoidable'.[515] This arrests Robertson's assumptions of self-evident closest connected forum and impartial trial judges,[516] as it necessitates a factual, evidence-driven inquiry into the most appropriate forum and sets a higher and more tangible standard of proof than what is currently applied under the doctrine.

8 Conclusion

Forum non conveniens, undoubtedly, is part of South African law.[517] The proposed constitutional development of the doctrine of *forum non conveniens* takes its inspiration from the recommendations to develop the doctrine in the UK to be in line with article 6(1) of the European Convention as applied in expulsion cases.[518] This is considered a more acceptable and practical 'middle ground'[519] between the diverging alternatives of maintaining the *Spiiliada* test as it currently stands or completely doing away with the second leg of the *Spiiliada* inquiry.

In as of right proceedings, reform of the doctrine under section 34 of the Constitution would mean that the burden of proof would rest on the defendant to show that another forum is the most appropriate on (as per the first leg of the *Spiliada* inquiry). If the defendant cannot discharge this burden, the stay would be rejected, and the dispute

513 As above.
514 Fawcett (n 461) 10.
515 Robertson (n 369) 414.
516 As above.
517 Schoeman (n 319).
518 Arzandeh (n 11) 109.
519 As above.

will be heard in a South African court. If the defendant is able to prove that there is a more appropriate forum to hear the matter, the proceedings would be stayed unless the plaintiff can prove that it would infringe upon their section 34 right to access to justice for the matter to be heard in the other jurisdiction.

In the case of serving outside of the jurisdictional border of South Africa, the court should only grant the leave to serve out of jurisdiction if South Africa is the most appropriate forum or, failing that, that the plaintiff's section 34 right to access to justice would be violated if the dispute were to be heard in the more closely-connected jurisdiction.[520]

This means that for both service in and service out proceedings, a South African court should only exercise jurisdiction in cross-border disputes if doing otherwise would lead to an infringement of a plaintiff's section 34 constitutional right of access to justice.

It is highly unlikely that arguments brought by the defendants about a lack of resources and experience of both court systems and legal professionals in the appropriate forum, such as was the case in *Lubbe*, would be able to meet the standard of proof required by the proposed discretionary powers of the court under the revised second leg of the *Spiliada* inquiry, as it would not necessarily constitute a breach of the plaintiff's section 34 constitutional rights.

The narrowing of the court's discretionary powers under the second leg would render the application of the revised *Spiliada* test more predictable, as courts would not easily depart from findings made under the first leg of the *Spiliada* inquiry.[521] This in turn would facilitate legal certainty, optimise legal proceedings and potentially reduce the resource-intensive nature of the inquiry. The proposed revision would create a doctrinal framework that is more 'tolerant' of the laws of other legal systems and thus less chauvinistic[522] and more respectful of judicial comity.

The suggested development of the doctrinal framework is not without deficiencies. As with section 6(1) of the European Convention as applied in expulsion cases, section 34 does not have a 'categorical definition'[523] of what exactly constitutes an infringement. This means that the application of the reformed *Spiliada* test would not be without its own

520 See Arzandeh (n 11) 109, where the author makes the same argument in favour of the development of *forum non conveniens* in service out proceedings and art 6(1) of the European Convention.
521 Arzandeh (n 11) 111.
522 As above.
523 As above.

set of challenges. Regardless, it is argued that the proposed reform of the doctrine of *forum non conveniens* is necessary to alleviate the problems that have resulted from the application of the second leg of the *Spiliada* inquiry.

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Voet 2.1.1

Voet 2.4.1

Voet 2.4.22
