The Promotion of Access to Justice through the Constitutional Development of the Doctrine of *Forum Non Conveniens*

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Abstract

South African jurisdictional principles governing cross-border litigation have seen minor development in recent years and as such, remained feudal and anachronistic. It is essential for South African courts to be equipped with the necessary jurisdictional powers to assume and exercise jurisdiction in disputes concerning its own citizens against foreign multinational corporations. This article aims to propose a way forward, centred around the constitutional reform of the South African doctrine of *forum non conveniens*, in a manner that advances sustainable and equitable legal development, while also simultaneously promoting the principle of transformative constitutionalism and the right of access to courts. To produce sustainable and viable solutions, a comparative analysis of both the principles of private international law and the proposed reform of the doctrine in comparable jurisdictions is undertaken. The effect of any associated international agreements and instruments applicable to these jurisdictions that may have an impact on or insight into the way forward is also examined. It is hoped that this article will result in a meaningful contribution to the discourse on the development of the jurisdictional principles of South African law, to achieve access to justice for all within Southern Africa and the African continent as a whole.

Keywords: Private international law; *forum non conveniens*; jurisdiction; access to justice; constitutional development

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Introduction

Thirty-five years have passed since Lord Geoff's seminal judgment in *Spiliada Maritime Corporation v Cansulex Ltd*,[1] the *locus classicus* for the modern iteration of the doctrine of *forum non conveniens*. The doctrine first appeared 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 following years. The judgment of *Bid Industrial Holdings (Pty) Ltd v Strang & Another (Minister of Justice and Constitutional Development, Third Party)*[4] has brought the discussion of the place of the doctrine of *forum non conveniens* in modern South African law to the fore.[5]

The lack of legal development 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]

Forum Non Conveniens in the United Kingdom (UK)

The Inception of the Doctrine of *Forum Non Conveniens* in the UK

It is established legal practice in Anglo-common law[7] 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*.[8] This exercise of discretionary power to stay proceedings because of a 'lack of jurisdictional connection'

1 [1986] All ER 843 (*Spiliada*).

2 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 MT Tigr and Another* 1998 (4) SA 740 (C) (*Tigr*); *Caesarstone SdotYam 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 2008 (3) SA 355 (SCA) (*Bid Industrial Holdings*).

5 Christopher Forsyth, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) 187.

6 *Lubbe v Cape Plc* (2000) UKHL 41.

7 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 private international 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.

8 Peter E Nygh, *Nygh's Conflict of Laws in Australia* (Butterworths 2019) 59–63.

or case management grounds is separate from a court's power to dismiss proceedings for being vexatious, oppressive or frivolous.[9]

The first recorded case to deal with the vexatious and oppressive test in the UK (the earliest construction of what would eventually develop into the doctrine of *forum non conveniens*) is *Logan v Bank of Scotland (No 2).*[10] Here the plaintiff, a Scottish national domiciled in Scotland, brought an action in an English court for a cause of action that arose in Scotland. The court held that the cost of the trial would be 'utterly out of proportion to the trumpery amount in dispute,' and that the case was brought 'to annoy the defendant.'[11] The court held that the action was oppressive and vexatious and an abuse of the legal process,[12] and upheld a previous order staying proceedings. In the judgment of *Logan*, it appears 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 of the case. Since 1936 the English courts have followed the framework governing the stay of proceedings laid down by Scott LJ in *St Pierre v South American Stores Ltd.*[13] To justify a stay two conditions must be met, both of which the burden of proof rests on the defendant.[14] First, the defendant must satisfy the court that the continuance of the action would be an injustice due to its oppressive or vexatious nature or that it would be an abuse of the process of the court in some other way; and, secondly, the stay must not cause an injustice to the plaintiff. 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.[15] This is reflected in the judgment of the court of Appeal in *HRH Maharanee of Baroda v Wildenstein*,[16] where the court assumed jurisdiction in a matter where the defendant had been served during a brief presence in the UK, despite the fact that both parties permanently resided in France and that there were no other English connections.

The *St Pierre* test was narrowly construed and applied and was followed until the early 1970s, whereafter the gradual globalisation of the international commercial community necessitated the modernisation of long-standing court formulae,[17] which has led to the development of a more generalised approach to the doctrine of *forum non conveniens*.

9 Richard Fentiman, *Encyclopaedia of Private International Law* (Edward Elgar 2017) 798.
10 (1906) 1 KB 141 (*Logan*).
11 ibid 153.
12 ibid 152–153.
13 (1936) 1 KB 382 (*St Pierre*).
14 Christian Schulze, '*Forum Non Conveniens* in Comparative Private International Law' (2001) 118 SALJ 812 815.
15 Anne Mainsbridge, 'Discretion to Stay Proceedings – The Impact of "The Abidin Daver" on Judicial Chauvinism' (1986) 11 SLR 151 152.
16 [1972] All ER 689 (*Maharanee of Baroda*).
17 Gwynn D Morgan, 'Discretion to Stay Jurisdiction' (1982) 31 ICLQ 582.

In *The Atlantic Star: The Owners of the Atlantic Star v The Owners of the Bona Spes*[18] Lord Wilberforce held, although urged to adopt *forum non conveniens* as a plea available in English law, that it represented a 'radical change in direction' and that the liberalisation of existing English rules would suffice.[19] This liberalisation did not indicate an acceptance of the Scottish doctrine.[20]

In *Macshannon v Rockware Glass Ltd*[21] 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.'[22] 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*.[23] These tests 'differ more in theoretical approach than in practical substance from those that would have been applicable in Scotland.'[24]

After a decade of gradual liberalisation of the vexatious and oppressive test of *St Pierre*, which represented a movement from judicial chauvinism 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*.'[25] The court held that, in a case where the matter brought before an English court is pending in a foreign forum, which would be the most appropriate, 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 court.[26] Any subjective belief held by the plaintiff or the plaintiff's legal advisors in terms of the existence of an injustice would be insufficient to prevent a stay.[27] The issue of granting a stay of proceedings was a question of judicial discretion exercised by weighing all the relevant factors of each case.[28] This position was upheld in the subsequent judgment of *Spiliada*,[29] in which the House of Lords

18 [1973] 2 All ER 175 (*Atlantic Star 2*).
19 ibid 190.
20 *The Atlantic Star: The Owners of the Atlantic Star v The Owners of the Bona Spes* (1972) 3 All ER 705 817 (*Atlantic Star 1*).
21 [1978] 1 All ER 625 (*Macshannon*).
22 ibid 634.
23 ibid 630.
24 ibid 639.
25 *The Abidin Daver* [1984] 1 All ER 470 *(The Abidin Daver).*
26 ibid.
27 ibid 475–476.
28 Schulze (n 14) 819.
29 *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

allowed for the service out of 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:[30]

- A stay of proceedings will only be granted on the grounds of *forum non conveniens* where the court has been satisfied that there is another, more appropriate, forum with competent jurisdiction, to hear the matter.
- The onus is on the defendant to prove there exists a more, *prima facie*, appropriate forum elsewhere,[31] where after the onus shifts to the plaintiff, who must prove they would not receive justice in the foreign forum.[32]
- The closest and most real connection will be determined by weighing the connecting factors present in each case.
- However, if the court concludes that there is no other available forum that is more appropriate, the court will refuse the stay.
- 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 test laid down by Lord Goff has become known simply as the *Spiliada* test.

Spiliada in South Africa

As it has been established that the doctrine 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;[33] and the *extra territorium ius dicenti impune non paretur* rule, whereby those administering jurisdiction beyond their territory may be disobeyed 'with impunity.'[34] According to Pollak, these two Roman law rules were assimilated into Roman-Dutch law and 'lead to the conclusion that the court must, within its territory, have authority over the defendant sufficient to

grant a plaintiff leave if they satisfy the court that England is the most appropriate forum, thus an inquiry to establish jurisdiction.

30 ibid 854–856.

31 In cases concerning as-of-right proceedings, this is the first limb of the two-stage inquiry of the *Spiliada* test.

32 This represents the second limb of the *Spiliada* test, wherein the plaintiff must now prove that they (the plaintiff) would not obtain substantive justice in the more appropriate forum.

33 C. 3.13.2.

34 D 2.1.1.20.

be able to enforce its orders'[35] and, by extension, a court may choose to decline to exercise jurisdiction if a more appropriate forum exists.[36]

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.

Serving Out of Jurisdiction

There are a few statutory provisions in South African law whereby a plaintiff can serve a defendant out of jurisdiction, which requires leave of the court in terms of Rule 5(2) of the Uniform Rules of the Court.[37] Section 27(1) of the Superior Courts Act[38] 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,'[39] but the court first seised, must have had jurisdiction.[40] 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.[41] Two other sections that embody this principle are section 2 of the Divorce Act[42] and section 149(1) of the Insolvency Act.[43]

Forsyth contends that if *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*.[44] As early as 1918, in *Western Assurance Co v Caldwell's Trustee*,[45] 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.'[46]

35 Walter Pollak and David Pistorius, 'Introduction and General Principles' in David Pistorius (ed), *Pollak on Jurisdiction* (Juta 1993) 3.
36 ibid 2.
37 Uniform Rules of the Court.
38 The Superior Courts Act 10 of 2013.
39 Forsyth (n 5) 185.
40 *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.
41 Magistrates' Courts Act 32 of 1944.
42 Divorce Act 70 of 1979.
43 Insolvency Act 24 of 1936.
44 Forsyth (n 5) 187.
45 1918 AD 262.
46 ibid 274.

The last example is the exercise of admiralty jurisdiction in terms of section 5(3)(a) of the Admiralty Jurisdiction Regulation Act,[47] under which a court is entitled to decline jurisdiction when there is a more appropriate forum to hear the matter.

Although these examples embody some part of the basic principles of *forum non conveniens*, they all fall short of the doctrine proper.[48]Cases in South Africa

Estate Agents Board v Lek[49]

A Mr Lek, who resided in Cape Town, but whose registered office was in Johannesburg was declined a Fidelity Fund certificate by the Estate Agents Board. Lek approached the court to contest the Board's decision.[50] 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 therefore the nearest court he could turn to for legal redress. Taking into consideration the inconvenience to the plaintiff, 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.'[51]

Taitz believed this *obiter* contains the 'germs' of the doctrine of *forum non conveniens*.[52] 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.[53] 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.'[54]

47 Admiralty Jurisdiction Regulation Act 105 of 1989 (Admiralty Act).

48 Forsyth (n 5) 187.

49 1979 (3) SA 1048 (AD) (*Lek*).

50 *Lek* (n 49) 1062.

51 ibid.

52 Jerold Taitz, 'Jurisdiction and F*orum Conveniens*, a New Approach?' (1980*)* 43 THRHR 187; Jerold Jerold Taitz, 'Jurisdiction and *Forum Non Conveniens*: A Reply' (1981) 44 THRHR 372 374.

53 Edwin Spiro, '*Forum Non Conveniens*' (1980) 13 CILSA 333 338.

54 Spiro (n 53) 339. In *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* 2013 (5) SA 484 (SCA), the Supreme Court of Appeal held at para 19 that '[s]ave in admiralty matters, our law does not recognise the doctrine of *forum non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction.' It is submitted that the Supreme Court of Appeal's erroneously negated the doctrine strictly to admiralty matters. This can perhaps be ascribed to the codification of the doctrine in s 5(3)(a) of the Admiralty Act, and that private international law rules are rarely pleaded in South African courts (even when they are applicable).

Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris[55]

The *Thalassini Avgi*, owned by Astromando Compania Naviera SA (Astromando), undertook to transport cargo from ports in East Asia to various ports in the Middle East. At the time Astromando was domiciled in Panama and had an official business address in Greece. The ship was registered in Greece and the crew was mostly Greek.[56] Astromando entered into 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 the Yemeni consignees.[57] Two days after the *Thalassini Avgi* arrived in its last port in Aden, a fire broke out on board the ship and destroyed most of its cargo and caused extensive damage to the ship. The Yemeni consignees suffered losses estimated at $1 037 407, as they were the owners of the damaged cargo and therefore, the holders of the bills of lading.[58] Anchored in the Port Elizabeth harbour was the *Dimitris*, 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[59] for the arrest of the *Dimitris*, as an associated ship[60] of the *Thalassini Avgi*. Herein the applicants stated to be the Yemeni consignees of the cargo destroyed in the *Thalassini Avgi*.[61] 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.[62] 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.'[63]

This is the first recorded judgment wherein a South African court referred to the doctrine, or the modern version thereof, as set out in *Spiliada*.[64] The court dealt with the second leg of the test, where the respondents relied on considerations of justice to prove 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 lastly, the low

55 *Thalassini* (n 2).
56 ibid 824.
57 ibid 825.
58 ibid 824.
59 Read in conjunction with ss 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.
60 The action was brought against an 'associated ship' based on ss 3(6) and 3(7) of the Admiralty Act (n 47).
61 *Thalassini* (n 2) 825.
62 Admiralty Act (n 47).
63 *Thalassini* (n 2) 833.
64 *Spiliada* (n 1).

standard of the judiciary.[65] However, the respondents indicated that they could not furnish affidavits to prove these allegations as they 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.[66]

Dias Compania Naviera SA v MV AL Kaziemah & Others[67]

This 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*, which was anchored in the Durban harbour. 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.[68] Counsel for the respondents, relying on the *Spiliada* judgment, raised section 7(1)(a) of the Admiralty Act[69] and requested the court decline to exercise jurisdiction.[70] The respondents relied on the fact that the vessel was registered in Greece, therefore: transfer of the title of the vessel would be carried out under 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 relating to 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.[71] Bristow J did not stay proceedings as he '[could] see no compelling reason … why this issue cannot be resolved in a South African court.'[72] He held that though there existed a 'great deal of connection'[73] between the matter before the court and Greece, the presence of the vessel in a Durban port remained of 'overriding importance.'[74] Here Bristow J relied on the as-of-right jurisdiction of his court, due to the fact that the *forum rei sitae* has jurisdiction over the title of movable property within the forum's jurisdiction.[75]

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.

65 *Thalassini* (n 2) 846.
66 ibid 846–847.
67 *Dias Compania* (n 3).
68 *Dias Compania* (n 3) 572.
69 Admiralty Act (n 47).
70 *Dias Compania* (n 3) 575.
71 ibid 577.
72 ibid.
73 ibid.
74 ibid.
75 ibid.

Great River Shipping Inc v Sunnyface Marine Ltd[76]

In this case the applicant argued for a stay of proceedings under section 7(1) of the Admiralty Act. The dispute concerned an application brought by Great River Shipping to 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 *Spiliada* test, the applicant proved China to be the more appropriate forum to hear the dispute as: 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 high cost of bringing witnesses to South Africa to testify; the fairness of the proceedings 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).[77] Consequently, the onus of proof shifted towards the respondent, who had to prove that justice would not be obtained in China.[78] The respondent argued they would: be unable to obtain legal representation in the People's Republic of China (PRC); 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 to 'the principles of natural justice.'[79] Although an 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. He also 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 and that there was no political or other barrier preventing the respondent from obtaining legal representation in the PRC as the country had a proper civil procedure system.[80]

For the first time a South African court considered both stages of the doctrine of *forum non conveniens*, as set out in *Spiliada*. Though Berman J 'seems to [have] conflated the two stages'[81] 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.'[82]

76 *Great River Shipping* (n 3).
77 ibid 619.
78 ibid 621.
79 ibid.
80 ibid 621–623.
81 Elsabe Schoeman, 'The *Spiliada* in South Africa: Sailing into the Future' (2019) forthcoming.
82 *Great River Shipping* (n 3) 623.

MT Tigr Bouygues Offshore SA & Another v Owners of the MT Tigr & Another[83]

This matter concerned a barge that ran ashore close to Cape Town. The tug, known as *Caspian*, belonged to a body incorporated in the Republic of Azerbaijan, and had been chartered by Ultisol Transport Contractors Ltd (Ultisol), a Bermudan company based in the Netherlands. The barge was owned by Bouygues Offshore SA ('Bouygues') and insured by French companies.[84] 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.[85] This agreement contained an exclusive jurisdiction clause in favour of the High Court in London. This matter concerned a claim *in personam* by the owner of the barge, Buoygues, 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 in order to stay proceedings in favour of a more appropriate forum. The following connecting factors were considered by the court: South Africa was the 'natural' forum for the dispute, due to the cause of action having arisen there, 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 neither amendable to proceedings in England nor the probable consolidation of proceedings.[86] 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.'[87] The only connecting factor pointing to England was the exclusive jurisdiction clause in the agreement, to which the defendant was not a party.[88]

The court considered 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[89] 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[90] would apply. The former would more favourably affect the limitation of liability of the plaintiff than the latter.[91] King DJP held that the South African court was clearly the more appropriate forum to hear the matter.[92]

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83 *Tigr* (n 3).
84 ibid 455.
85 ibid 456.
86 ibid 744.
87 ibid.
88 ibid.
89 Convention of 10 October 1957 Relating to the Limitation of Owners of Seagoing Ships (1957 Convention).
90 International Convention of 19 November 1976 of Limitation on Liability for Maritime Claims (1976 Convention).
91 *Tigr* (n 3) 744.
92 ibid.

Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC & Others[93]

This dispute concerned an agency agreement negotiated on behalf of the World of Marble and Granite (WOMAG) and the Sachs family by one Oren Sachs with the appellants, Caesarstone. Proceedings were brought in Israel and the Western Cape High Court arising from the same agreement. The defendant in the South African proceedings, Caesarstone, pled *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' for 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.[94] 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 this argument, as the plaintiffs could not discharge the onus of proof of abuse of process.[95] Lastly, the plaintiffs argued that Cape Town was the 'more natural' forum 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 the relevant reports had to be prepared in South Africa. Wallis JA rejected this argument, as the defendant had failed to submit cogent evidence to substantiate the third contention.[96]

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

Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd[97]

This case is not considered a 'conventional'[98] *forum non conveniens* inquiry, as the court merely considered the appropriateness of the South African forum, and not the more appropriate of the two different fora. In other words, this case was concerned with *forum conveniens*.[99] 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 in the suit. The Nigerian defendant, Africa Prepaid Services Nigeria Limited (ASPN) was a subsidiary of the first defendant, a South African company, by way of its shareholding in the second defendant. In the absence of attachment as a method of founding or

93 *Caesarstone* (n 3).
94 ibid 37.
95 ibid 38.
96 ibid 39.
97 *Multi-Links* (n 3).
98 Schoeman (n 81).
99 See n 29 for the difference between *forum conveniens* and *forum non conveniens*.

confirming jurisdiction, the court considered the following factors to determine the 'appropriateness and convenience'[100] 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-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; and
- 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.[101]

Fabricius J held that *forum non conveniens* arose in the context of the interpretation of section 19(1) of the Supreme Court Act,[102] in terms of which a provincial or local division of a court will have jurisdiction 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.[103] Although Fabricius J extensively referred to the *Spiliada* the judgment solely focused on the appropriateness of South Africa as a forum, and not a true application of the *Spiliada* test for *forum non conveniens*. 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.

Bid Industrial Holdings (Pty) Ltd v Strang & Another (Minister of Justice and Constitutional Development, Third Party)[104]

The respondents, two citizens resident and domiciled in Australia, were arrested while in South Africa to find or confirm jurisdiction in the Johannesburg High Court.[105] The respondents challenged the constitutionality of the arrest of foreign *peregrini ad fundandam jurisdictionem*, alleging that the practice infringed on their

100 *Multi-Links* (n 3) 15.
101 ibid.
102 Supreme Court Act 59 of 1959 (Supreme Court Act). This Act has since been replaced by the Superior Courts Act (n 38), with s 21 being the equivalent of s 9(1).
103 *Multi-Links* (n 3) 15.
104 *Bid Industrial Holdings* (n 4).
105 ibid 3–4.

right to equality before the law;[106] their guarantee against unfair discrimination;[107] their right to human dignity;[108] their right to freedom of security and the person;[109] and their right to a fair trial.[110] 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, was 'contrary to the spirit, purport and objects of the Bill of Rights'[111] 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.[112] In his *obiter*, Howie J remarked, with reference to *forum non conveniens*:[113]

> 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 somewhat 'ambiguous,'[114] it introduced the possibility of the doctrine in South African law, although the court did not discuss the doctrine in any detail or the proposed application thereof. The judgment represents a critical move from the arrest of foreign *peregrini ad fundandam jurisdictionem* to the use of connecting factors to found jurisdiction in a matter, which is more cohesive with private international law principles. This also makes way for the possible future application of the doctrine in such cases, as it essentially confirms the first leg of the *Spiliada* test.

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

106 The Constitution of the Republic of South Africa, 1996 s 9(1).
107 ibid s 9(3).
108 ibid s 10.
109 ibid s 12.
110 ibid s 34.
111 *Bid Industrial Holdings* (n 4) 59.
112 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.
113 *Bid Industrial Holdings* (n 4) 55.
114 Sieg Eiselen, 'Goodbye Arrest *Ad Fundandam*, Hello *Forum Non Conveniens*?' (2008) 4 SALJ 794 799.

cases discussed above 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.'[115]

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,[116] which concerns serving foreign defendants while they are abroad.[117] In contrast, 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),[118] if there exists a 'sufficient connection'[119] between the suit and the forum of the court seised with the matter, so that it is 'appropriate and convenient.'[120]

Criticism

The development of the doctrine of *forum non conveniens* into what is now known as the *Spiliada* test has ensued 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, it has many critics.

The Application of the *Spiliada* Test

The application of the two legs of the *Spiliada* test is considered different in both 'focus and nature.'[121] The first leg is a factual inquiry that aims to either avoid trans-national 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.[122] The first stage of the *Spiliada* inquiry leaves considerably less judicial discretion than the second stage, and eliminates much of the possibility of inconsistent application. With the exception of *VTB Capital Plc v Nutritek International Corp*,[123] 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

115 *Great River Shipping* (n 3) 614.
116 Schoeman (n 81).
117 North PM, *Cheshire and North's Private International Law* (Butterworths 2017) 428.
118 Schoeman (n 81).
119 *Bid Industrial Holdings* (n 4) 59.
120 ibid.
121 Ardavan Arzandeh, 'Should the *Spiliada* Test be Revised?' (2014) 10 J Priv Int Law 89 89–92.
122 ibid 92–93.
123 [2013] UKSC 5 (*VTB Capital*).

first leg of the inquiry.[124] The factual nature of the first leg seems to be precise enough in nature not to 'render its application problematic.'[125] This seems to be true for other Anglo-common law forums, such as the 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,[126] and the principle of legal certainty in general.

Broad Judicial Discretion

In *Atlantic Star 2* Lord Wilberforce described the judicial discretion contained in the second leg of *forum non conveniens* as 'an instinctive process.'[127] A judicial discretion that is often criticised as 'so broad and so vaguely circumscribed as to amount to "an instinctive process"'[128] necessitates scrutiny. The same critical estimation of the doctrine was held by the High Court of Australia in *Oceanic Sun Line Special Shipping Co Inc v Fay*,[129] 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'[130] under *St Pierre*[131] 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"'[132] under *Spiliada*.

In hindsight, early critics of the *Spiliada* test have been somewhat vindicated. 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,'[133] but stated that any attempt to crystallise the approach or reduce it to a formula is doomed to fail, as it must

124 Arzandeh (n 121) 93.
125 ibid.
126 ibid.
127 *Atlantic Star 2* (n 18) 194.
128 David W Robertson, '*Forum Non Conveniens* in America and England: A Rather Fantastic Fiction' (1987) 103 LQR 398 414, citing Lord Wilberforce in *Atlantic Star 2*.
129 1988 165 CLR 197 (*Oceanic Sun*).
130 ibid 238.
131 *St Pierre* (n 13).
132 *Oceanic Sun* (n 129) 238.
133 Robertson (n 128) 414.

accommodate two false assumptions, namely, that the 'proper forum' is self-evident in most cases, and that trial judges will be impartial adjudicators.[134]

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.'[135] This is extremely costly, and in most cases it is disproportionate for parties to incur exorbitant costs on such a hearing.[136] 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,'[137] and warned that such inquiries should only be reopened on appeal if 'satisfied that the judge made a significant error of principle.'[138] If the unpredictable nature of the second leg of the *Spiliada* test carries the inherent risk of an imponderable exercise of judicial 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'[139] 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.[140] This may serve as a deterrent to future litigants.

Possibility of Abuse of the Doctrine of *Forum Non Conveniens*

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 these cases are complex, they share the same basic facts, namely that 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*;[141] *OJSC Oil Company Yugraneft (in liquidation) v Abramovich*;[142] *Pacific International Sports Club Ltd v Soccer Marketing*

134 ibid.
135 *Spiliada* (n 1) 846.
136 *VTB Capital* (n 123) 83. Lord Neuberger, expressing a similar and strongly-worded opinion on parties launching mini-trials on preliminary issues such as jurisdiction.
137 ibid 93.
138 ibid 69.
139 *Macshannon* (n 21) 632.
140 *VTB Capital* (n 123) 8.
141 [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).
142 EWHC Civ 849 (*OJSC*).

International Ltd;[143] and *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*.[144] 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 International* the centre of the dispute was Ukraine; and in *Altimo Holdings* it was Kyrgzstan.

In all the above-mentioned 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* they 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.[145]

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.'[146] 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.[147] In the field of private international law, many academics believe that when the principle of the comity of nations is applied, if at all, it is applied in meaningless or misleading ways.[148]

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.[149] 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,'

143 [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*).

144 [2011] UKPC 7 (*Altimo Holdings*).

145 Trevor C Hartley, 'Jurisdictional Conflicts: The Common Law Approach' International Commercial Litigation (2015) 224.

146 Aaron X Fellmeth and Maurice 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*.

147 Thomas Schultz and Jason Mitchenson, 'Rediscovering the Principle of Comity in English Private International Law' (2018) 26 ERPL 1.

148 North (n 117) 430.

149 *Abidin Diver* (n 25) 476.

'inefficiency' or 'excessive delay' of these foreign courts, or the unavailability of 'suitable remedies' in such legal systems.[150] 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.

The scope of inquiry under the second leg of the *Spiliada* doctrine creates opportunity for judicial chauvinism. The extensive list of factors that can be taken into consideration by a court applying the second part of the *Spiliada* test can possibly lead to the court engaging in a forensic examination of a court's (in)ability 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.[151] Instances of judicial chauvinism inadvertently bring about a breach of comity, as these principles are closely connected. When a court undertakes 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.

Forum Shopping

As part of strategic litigation plaintiffs often choose fora based on the jurisdiction they feel would deliver a more favourable verdict—namely forum shopping.[152] 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.[153] 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 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:[154]

> 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

150 ibid 476.
151 Arzandeh (n 121) 98, 99.
152 Schulze (n 14) 813.
153 Forsyth (n 5) 184.
154 *Atlantic Star 1* (n 20) 709.

> 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.[155]

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*.

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 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 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 because of: 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 the ability of legal practitioners 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].'[156] The court neither heard nor considered any cogent evidence to substantiate these claims. 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

155 ibid.
156 *Lubbe* (n 6) 1543.

time when the *Lubbe* judgment was handed down, in *Permanent Secretary, Department of Welfare, Eastern Cape, & Another v Ngxuza & Others*.[157] 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*,[158] 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.[159] 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 its post-apartheid introduction in the interim Constitution.[160] 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.

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.[161] The defendants appealed the judgment, which was rejected by the Court of Appeal.[162] 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,[163] 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.

Vedanta

The facts in *Vedanta Resources PLC and Another v Lungowe and Others*[164] 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 and for subsistence farming. The copper mine situated in Zambia, Konkola Copper Mines (KCM), was the subsidiary of Vedanta Resources plc, both of which were 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

157 2001 (4) SA 1184 (SCA) (*Ngxuza*).
158 2016 (5) All SA 233 (GJ) (*Nkala*). For the settlement itself, see *Ex Parte Nkala* 2019 JDR 0059 (GJ).
159 The Constitution (n 106).
160 Section 7(4)(b)(iv) of the interim Constitution of the Republic of South Africa 1993, the equivalent of s 38(c) of the 'final' Constitution of the Republic of South Africa,1996.
161 *Lubbe & Others v Cape Plc* [1998] EWCA Civ 1351.
162 ibid [2000] CLC 45.
163 Arzandeh (n 121) 104.
164 *Vedanta Resources PLC and Another v Lungowe and Others* [2019] UKSC 20 (*Vedanta*).

Vedanta. Article 4 of Brussels I recast[165] 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.[166] 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' 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 access neither legal aid, nor contingency fee agreements.[167] 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*,[168] *Fred Kapya Sinkala v Bruce Mining and Others*[169] and *Shamilimo v Nitrogen Chemicals of Zambia*.[170] 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 twelve 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 dismissed. In *Shamilimo* the claimants failed as they could not fund the expert evidence reports required to prove causation.[171] Although the claimants in *Lubbe* faced similar financial difficulties, no cogent evidence was led to prove this point. The same court, roughly twenty years later, 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.

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.[172] The doctrine of *forum non conveniens* limits the rights of a plaintiff as *dominus litis* to select *any* competent forum,[173] 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

165 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).

166 Rule 6.36 Civil Procedure Rules; Practice Direction 6B – Service out of the Jurisdiction, para 3.1.

167 *Vedanta* (n 164) 90. Contingency fee agreements in Zambia are unlawful.

168 [2015] ZMSC 33 (*Nyasulu*).

169 (2002/HK/547) [2013] ZMHC 9.

170 2007/HP/0725 (*Shamilimo*).

171 *Vedanta* (n 164) 99–100; Schoeman (n 81).

172 *Law of South Africa (LAWSA) Civil Procedure: Superior Courts Volume 4* (3rd replacement) 579.

173 Forsyth (n 5) 184.

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.[174] 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.[175] 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.[176]

Where there are jurisdictional disputes between countries from civil and Anglo-common law legal systems, a tension may exist between legal systems, owing to jurisprudential differences. In civil law systems the courts wish to avoid litigation on jurisdiction. 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.[177] 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.[178] 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 a civil law 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*. In contrast, where an 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.[179] Civil law systems place the principle of comity above the Anglo-common law principle of closest connection and appropriateness. These jurisprudential differences create a tension between the interests and the dignity of the litigants. This is illustrated in the case of *De Dampierre v De Dampierre*,[180] where 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, as she would gain more financially than in France. The UKHL stayed the proceedings as France was the most appropriate forum, because the wife had voluntarily severed her connections with

174 *Irragori v United States Techs Corp* 274 F.3d 65, 69 (2nd Cir. 2001).
175 Fentiman (n 9) 805.
176 Forsyth (n 5) 184.
177 Hartley (n 145) 225.
178 ibid.
179 ibid.
180 [1987] 2 All ER 1 (*De Dampierre*).

English jurisdiction when she left the UK and did not return.[181] The court referred to the 'legitimate personal or juridical advantage' as considered in *Spiliada*[182] and came to the conclusion that it should not be deterred from granting the stay because the plaintiff would be deprived of this advantage, but only 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.[183]

Former Chief Justice of the South African Constitutional Court, 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.[184] 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 a 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 engaged in civil litigation.

Proposed Revision of the Doctrine of *Forum Non* Conveniens

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.'[185] This approach has been lauded by some as 'superior' to the haphazard and formalistic approach followed by the first leg of the *Spiliada* test.[186] This approach is backed by, for example, a list of twenty-five factors drawn up by a Californian court to be considered when dealing with a *forum non conveniens* inquiry.[187]

181 ibid 6.
182 *Spiliada* (n 1) 859–861.
183 *De Dampierre* (n 180) 6.
184 Pius Langa, 'Transformative Constitutionalism' (2006) 17 SLR 351 355.
185 *Irragori* (n 174) 839.
186 Jared Ham, '(Br)exit Strategy: The Future of the *Forum Non Conveniens* Doctrine in the United Kingdom after "Brexit"' (2020) 52 Cornell ILJ 717 725.
187 *Great Northern Ry Co v Superior Court*, 12 Cal App 3d 105 (1970); *Church of Sudan v Talisman Energy Inc* 224 SDNY (2003).

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.

Section 6(1) of the European Convention

Arzandeh proposes two suggestions for the development of the *Spiliada* test. The first entails the UK returning to their Anglo-common law model of *Spiliada*—with the courts abolishing the second leg of the *Spiliada* inquiry, thereby turning back to the 'purer' Scottish model of *forum non conveniens*. This would simplify the doctrine by reducing it to a factual inquiry weighing the connecting factors to determine the most appropriate forum.[188] 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.[189] 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 issue of substantive (in)justice was ever raised, the Scottish courts could have been forced to develop the doctrine further.[190] 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,[191] 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.[192] 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

188 Arzandeh (n 121) 103–104.
189 ibid 104.
190 ibid.
191 ibid 105.
192 Convention of 20 March 1952 for the Protection of Human Rights and Fundamental Freedoms.

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 regardless, it would amount to a breach of the contracting state's European Convention obligations.[193] Unlike *Spiliada*, a 'real risk' under Article 6(1) has never been properly defined, although 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 narrowly defines the concept of injustice in the receiving state.[194] *Othman (Abu Qatada) v The United Kingdom*[195] 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 'flagrant denial of justice.'[196] 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.'[197] 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.[198] In

193 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.

194 Arzandeh (n 121) 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).

195 C-8139/09 (*Othman*).

196 ibid 258.

197 ibid.

198 ibid.

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.[199] A direct effect manifests where a contracting state is directly responsible, due to an act or omission, for a breach of a Convention right,[200] better known as a 'domestic case.'[201] 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.[202] The indirect cases are known as 'foreign cases.'[203] 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.[204] In private international law, it is not a person who 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 is arguably the same.[205]

Article 6 concerns are raised in three instances under *forum non convenien*s in English courts: when there has been a denial in access, a breach abroad or a delay in trial.[206] 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 the UK's Article 6 rights. Article 6 requires a trial somewhere, domestically or abroad, that is held in accordance with Article 6.[207] This does not mean that a litigant has an 'unfettered choice' of forum under Article 6.[208] Therefore, as long as the proceedings are stayed to a forum where 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

199 James J Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007) 56 ICLQ 1 2.

200 *R (Razgar) v Special Adjudicator* [2004] UKHL 27 para 41 (*Razgar*).

201 *R (Ullah) v Special Adjudicator* [2004] UKHL 26 para 7 (*Ullah*).

202 ibid 9.

203 ibid.

204 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.

205 Fawcett (n 199) 4.

206 ibid 9.

207 ibid.

208 *OT Africa Line Ltd v Hijazy (The Kribi)* [2001] 1 Lloyd's Rep 76 para 42 (*Kribi*).

granted.[209] Under Article 6 a litigant has the 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?[210] In his opinion on *Owusu v Jackson & Others* [211] Advocate-General Leger stated that *a forum non conveniens* inquiry would likely prolong proceedings significantly, and could be seen as incompatible with Article 6 of the European Convention.[212] 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,[213] 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 in turn denied them a fair trial.[214] 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 not already reached on application of *Spiliada* principles.'[215] 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 of a 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.[216] This may be due to the difference in standards of what a court considers an injustice in private international law and an injustice 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 will breach Article 6. Under such circumstances a court may be in breach of Article 6 under the indirect effect doctrine.[217]

209 Fawcett (n 199) 9.
210 ibid.
211 C-281/02 (ECJ) (*Owusu*).
212 Case C-281/02 Opinion of Advocate General Léger delivered on 14 December 2004 para 270.
213 Fawcett (n 199) 9.
214 *Lubbe* (n 6) 1561.
215 ibid.
216 Fawcett (n 199) 10.
217 ibid 11. If the *Lubbe* case were decided today, the Supreme Court would be in breach of the UK's obligation under s 2 of the Human Rights Act 1998 to take into account relevant decisions of the

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.[218] 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.'[219] Other courts, such as the Court of Appeal in *Dow Jones & Co Inc v Yousef Abdul Latif Jameel*,[220] 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 private international law rule) 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.[221]

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 cases dealing with section 6 of the European Convention.

The South African Constitution is known to be an international law-friendly constitution.[222] Section 39 of the Constitution states that when interpreting the Bill of Rights, a court must consider international law,[223] and may consider foreign law.[224] 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.[225] Furthermore, customary international law is considered law in the Republic except where it is in conflict with the Constitution or an

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.

218 ibid 10.

219 ibid.

220 [2005] EWCA Civ 75 (*Dow Jones*).

221 Fawcett (n 199) 37.

222 Dire Tladi, 'Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga' (2016) 16 AHRLJ 310 311.

223 The Constitution (n 106) s 39(1)(a).

224 ibid s 39(1)(b).

225 ibid s 233.

Act of Parliament.[226] 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 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[227] 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,[228] 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,[229] due to the apparent inference of section 34 from the European Convention.[230]

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.[231] 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.[232] 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.[233] 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*,[234] the Land Claims Court dealt with a case concerning persons with the right of security of tenure in terms of the Extension of

226 ibid.
227 Geoff Budlender, 'Access to Courts' (2004) SALJ 339.
228 ibid.
229 *S v Makwanyane* 1995 (3) SA 391 (CC) 35.
230 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 45; Budlender (n 227) 339.
231 As per the European Court in *P, C and S v United Kingdom* (2002) 35 EHRR 31 89 91.
232 Budlender (n 227) 339 340.
233 *Airey* (n 217) 24.
234 2002 (2) SA 733 (LCC) (*Nkuzi*).

Security of Tenure Act[235] and the Land Reform (Labour Tenants) Act.[236] 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 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.'[237] 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 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.'[238] 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.[239] Access to justice is realised through the judicial branch 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,[240] which often suffers because of socio-economic inequality. Just as the Constitution and the doctrine of transformative constitutionalism should not become a tool of the rich,[241] 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.[242]

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.[243] 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.

235 Extension of Security of Tenure Act 62 of 1997 (ESTA).
236 Land Reform (Labour Tenants) Act 3 of 1996.
237 *Nkuzi* (n 234) 4.
238 The Constitution (n 106) s 35(3)(d).
239 ibid s 10.
240 Langa (n 184) 355.
241 ibid.
242 ibid 355.
243 Case C-281/02 Opinion of Advocate General Léger delivered on 14 December 2004 para 270.

Forsyth identifies possible Article 6 concerns under *forum non conveniens*[244] that may well arise under section 34 of the Constitution. Firstly, 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*, which removes much of the judicial discretion and facilitates legal certainty. Where a South African court stays proceedings in favour of a foreign court, thereby transferring the action elsewhere, would 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 takes place.[245] 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 justify the refusal of a stay.[246]

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 believe that Article 6 offered any relief that was not already available under *forum non conveniens*.[247] 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).[248] 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.'[249] This opposes Robertson's assumptions that any attempt to refine the *Spiliada* is futile in the face of the self-evident closest connected forum and impartial trial judges,[250] as it necessitates a factual,

244 Fawcett (n 199) 9.
245 ibid.
246 *Lubbe* (n 6) 1561.
247 ibid.
248 Fawcett (n 199) 10.
249 Robertson (n 128) 414.
250 ibid.

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.

Conclusion

Forum non conveniens is undoubtedly part of South African law.[251] 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.[252] This is considered a more acceptable and practical 'middle ground'[253] between the diverging alternatives of maintaining the *Spiliada* test as it currently stands or completely doing away with the second leg of the *Spiliada* 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 would be the most appropriate (as per the first leg of the *Spiliada* inquiry). If the defendant cannot discharge this burden, the stay would be rejected, and the dispute will be heard in a South African court. Should the defendant be 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 another jurisdiction.

In the case of serving outside of the jurisdictional border of South Africa, the court should only grant 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.[254]

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 the experience of both the judiciary 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.

251 Schoeman (n 81).

252 Arzandeh (n 121) 109.

253 ibid.

254 See Arzandeh (n 121) 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.

The narrowing of the court's discretionary powers under the second leg would render the application of a revised *Spiliada* test more predictable, as courts would not easily depart from findings made under the first leg of the *Spiliada* inquiry.[255] 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[256] 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'[257] of what exactly constitutes an infringement. This means that the application of the reformed *Spiliada* test would not be without its own 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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255 ibid 111.
256 ibid.
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Legal Jurists

Voet 2.1.1.

Voet 2.4.1.