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STAYS OF PROCEEDINGS AND TRANSNATIONAL INJUNCTIONS

Recent developments in the Conflict of Laws in the UK have shown an increasing tendency for the focus of litigation to shift from the substantive issues to jurisdictional questions. This has involved applications by defendants for a stay of proceedings or, in the case of pending litigation abroad, for the defendant in that foreign action, to seek an injunction in the forum to prevent the foreign plaintiff from pursuing those proceedings. In the latter case, needless to say, that foreign plaintiff must be amenable to the jurisdiction of the forum. In either case the defendant is seeking, in interlocutory proceedings, a 'quick-fix' resolution of the dispute in his favour.

The attraction to a defendant of defeating the plaintiff's action by resort to this summary procedure can be quite overwhelming. The facts of *Spiliada Maritime Corporation v Cansulex Ltd*[1] and a related action, known as the *Cambridgeshire* case provide a good illustration of the cost advantages to a defendant of winning through the use of interlocutory proceedings. In the *Cambridgeshire* case, the trial judge Staughton J 'recorded in his judgment . . . that there was no less than 15 counsel engaged (in the action); that each was equipped with 75 files; and that the then estimate for the length of the trial was six months'.[2] The economics of modern commercial litigation, more than ever before, dictate that there is for defendants an enormous advantage in winning by way of an interlocutory proceeding, even if that involves appeals to the High Court, the House of Lords or the Privy Council.

A necessary ingredient to that incentive is the existence of uncertainty as to the outcome of such proceedings. If the outcome of an application for a stay of proceedings, for instance, is certain, then the losing party will not pursue the matter to a hearing, and far less to an appeal. As the law shifts from one set of criteria, governing the grant of a stay of proceedings or an injunction, to a new set of criteria, then there is during this interregnum a period of uncertainty as to what the applicable law is. In Australia, in relation to both of these remedies, we are in an interregnum period. Assuming, therefore, that the Australian Courts attract large commercial litigation, we should see, in the short term, a mushrooming of these sorts of interlocutory proceedings.

History and international experience indicate that the rules governing these remedies pass through long periods of stability to relatively short periods of instability, and then return to a position of stability. Through each of these three phases, the applicable rules undergo significant transformations. The intermediate phase first witnesses a situation of uncertainty as to what the new rules are. That development is then followed by an adoption of a set of rules which prove to be unstable, and like

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1 [1986] 3 WLR 972.

2 Ibid 977.

unstable nuclear particles they quickly break down. Eventually from that debris emerges a new set of rules which possess much more enduring qualities. The recent developments as to the rules governing both stays of proceedings and transnational injunctions, in England, illustrate this evolutionary process. Those developments, together with very recent developments in Australia, illustrate the incapacity of a judicial system to expedite this process of protracted change by learning from the experiences of the judiciary in other countries.

This phenomenon of reliving other people's mistakes, and not learning from their experience, is a great boon to the legal profession. Firstly, it means that the judiciary in Australia, for instance, will not move rapidly from one stable position to another, which if they did, would involve a minimum outbreak of judicial uncertainty as to what the governing rules ought to be. A lengthy interregnum is, for the legal profession, good for business. Secondly, experience strongly suggests that there are only a few stable positions which can be adopted once the old position has been abandoned, therefore, the legal profession in Australia, for instance, has something of a crystal ball. By looking at the position that the courts in another country have adopted, given that they have already undergone a period of transformation, one can then see the likely direction which Australian courts will follow.

Experience has also demonstrated that the rules governing stays of proceedings and transnational injunctions do not have a close conceptual relationship. Consequently, I will deal with each of these seriatim. Having concluded a survey of developments in those areas, I will then turn to look at the interstate position. Subject to certain modifications, once a stable regime is in place, with respect to the questions concerning stays of proceedings and transnational injunctions, in the international sphere, those same rules will apply to the interstate position, subject of course to the cross-vesting legislation.

Stays of Proceedings:

To put the evolution of the rules governing stays of proceedings in Anglo-Australian law into its appropriate context, one must first look at the underlying rationales which have supported the successive legal regimes which have evolved in different jurisdictions. The starting point is the natural and understandable perceptions and inclinations of judges. Judges believe that, within their own courts, the judicial system administers a very high standard of justice. This can hardly be regarded as a criticism.

It would be a little shattering to find that judges did not believe their courts maintained very high standards in the administration of justice. In addition, judges lack as intimate an understanding of the standards of justice which are administrated in foreign courts as they do of the standards administered in their own courts. By virtue of a combination of a sense of their own superiority and natural chauvinism, this knowledge vacuum concerning the quality of justice in foreign courts will be filled with the supicion that a lower standard of justice will be delivered abroad, as compared with that which is delivered at home.

Together with this perception, there is a strong inclination for judges to encourage litigation which elevates the importance and prestige of their own jurisdiction. International litigation, in particular, enhances both the importance and prestige of the jurisdiction in which it is conducted. Thus

this combination of perceptions and inclinations, consciously or unconsciously, encourages judges to allow the continuation of litigation brought by a foreign litigant in an action in the forum, so long as the jurisdiction of the forum can be properly invoked. Few judges are ever willing to articulate such assumptions. Lord Denning, however, has proven to be a notable exception. In a now famous passage from his judgment in *The Atlantic Star*,[3] his Lordship said:

> 'No one who comes to these courts asking for justice should come in vain . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.'

This chauvinistic sentiment and conscious or unconscious bias was rationalised on the basis that once a litigant could properly invoke the jurisdiction of the forum, he had a legal right to have his case proceed to judgment. To confer upon judges a discretion as to whether to allow a plaintiff to proceed, a discretion which is defined by reference to vague and imprecise criteria, constitutes an unjustifiable encroachment on the rights of the plaintiff.[4] This view led to a very narrow formulation of when a stay of proceedings would be granted. The traditional rule was stated by Scott LJ in *St Pierre v South American Stores (Gath & Chaves) Ltd.*[5] His lordship stated the rule as follows:

> '(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's courts must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.'

Under the application of this formulation what constituted oppressive or vexatious litigation, or litigation which was an abuse of the process of court, was very narrowly defined.

If the formulation enunciated in *St Pierre* were to be adopted by all jurisdictions, then it could survive so long as global disputation, as between individuals and companies, was compartmentalised and confined within the territorial boundaries of different jurisdictions. Once, however, the pool of international disputation, as between individuals and companies, reached a critical size, very real problems would emerge. Under the above formulation, if it applied to all jurisdictions, plaintiffs would be encouraged to forum shop, that is sue in the forum which maximises the largest return, or which

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3 [1973] QB 364 at 381-382.

4 Most recently, this view was forcefully expressed by Brennan J in *Oceanic Sun Special Co Inc v Fay* (1988) 79 ALR 9 at 39-40.

5 [1936] 1 KB 382 at 398.

minimises the costs of litigating, or which provides the best combination of both.

Two consequences would flow from this. One, putting to one side the possibility that different forums will compete amongst themselves for international litigation, then the forum which is to plaintiffs the most attractive will be inundated with foreign litigation.[6] This will constitute a major drain on the judicial resources of that forum, and it will tend to crowd out local litigation. In short, it will be a cost to both the taxpayers and the domestic litigants of that forum. Two, defendants who are amenable to the jurisdiction of the forum most attractive to plaintiffs, and who conduct their affairs principally in another jurisdiction, will find that the costs to them of being held liable to the plaintiff in that forum are considerable higher than the anticipated costs of being held liable in the forum in which they conduct their affairs. Eventually, these additional costs will be visited upon not only particular defendants who ordinarily conduct their affairs outside the forum, but also on the community in which they do business. These additional costs may be passed on to the community in the form of higher prices, in the case of some businesses, or they may be passed on to the community in the form of increases in insurance premiums.

Making your forum the most attractive to international plaintiffs has in-built costs for both the people of that forum and people in other jurisdictions as well. This development, like so many, has winners and losers, only in this case the number of losers will eventually greatly exceed the small number of winners. The domestic and international resentment which this will give rise to renders that kind of development ultimately unsustainable.

For this development to be realised there must exist a sufficiently large enough pool of floating plaintiffs and defendants. That is the defendants must be amenable to many jurisdictions and have sufficient assets in each, and the plaintiffs must be able to overcome the obstacle of distance, either by virtue of the close proximity to foreign jurisdictions, or by virtue of the advancements in the technologies of transport and communications. It is reasonable to suppose that there has existed a sufficiently large enough pool of floating litigants, for a long enough time to render the rule, like that enunciated in *St Pierre*, to be no longer sustainable. This raises the question of whether it is possible to have a rule like that, and still continue to be attractive to foreign litigants, without giving rise to pressures which the courts could not resist in the long term. Before dealing with that question one point is worth mentioning in passing in a country like Australia, which due to its relative size and geographical isolation, has not had to confront this problem of being inundated by foreign litigants.

In the case of England, the situation is very different. It is and has been for a very long time an attractive forum for foreign litigants. How has it managed to avoid the inherent costs of that kind of situation? The answer

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6 In the US, one of the principal factors which the courts take into account when applying the doctrine of *forum non conveniens* is the extent of the administrative burden which litigation will place on the forum, particularly when there is congestion in overcrowded courts. See *Gulf Oil Corporation v Gilbert* (1947) 330 US 501 at 508, and *Piper Aircraft Co v Reyno* (1981) 454 US 235 at 252.

probably lies in the reason as to why it has been so attractive to foreign litigants for such a long time. The City of London has been the world's largest financial and commercial centre for a very long time. Of course today it no longer enjoys that unique position. In more recent times it has had to share prominence in the world of finance and commerce with other dominant centres, such as New York and Tokyo. The world of international finance and commerce, like all other human activities, must be subject to rules and regulations so as to facilitate their orderly functioning. As there does not exist a supra-national rule-making body capable of doing this in a comprehensive manner, the task has had to be performed by the national courts of the country which can exert the most influence in international finance and commerce. Traditionally, that country has been Britain because of the former dominance of the City of London.

By assuming a prominent role in the regulation of international finance and commerce, the courts in England have incurred costs that have had to be borne by the British taxpayer. However, those costs are more accurately characterised as infrastructural costs associated with the maintenance of the world's largest financial and commercial centre, and are readily offset by the invisible export earnings which such a centre generates. Furthermore, the attraction of foreign litigants to English courts in the fields of international finance and commerce has not been due to the fact that the returns on litigating there are greater than elsewhere, or that the costs of so doing are less than elsewhere, but rather because those courts are the natural forum for the bringing of that kind of dispute. That is to say, when a dispute emerges in the areas of international finance or commerce, particularly when the parties have come from different countries, irrespective of whether either party is English, historically the natural tendency has been to have recourse to English courts.

Therefore, in assuming this role of international regulator, English courts have not necessarily visited upon other countries higher liability costs than would otherwise eventuate. Indeed, in order to maintain its position as an international regulator, English courts have had to be mindful of observing the limitation on the level of costs which the international community can afford. Even where liability costs are higher than they would have been in the local forum, that additional cost burden can be fairly described as the costs of doing business in the international marketplace.

The historic role which English courts have assumed within the international community in the fields of trade, finance and commerce provides its own special justification for adopting a rule like that which was enunciated in *St Pierre*. Furthermore that rule did not stand alone. It was carefully circumscribed by other rules, so that whilst a plaintiff in an international dispute involving trade, finance or commerce had ready access to English courts, other plaintiffs did not. Broadly speaking, civil litigation can be divided into three compartments: property disputes, actions in contract and actions in tort. With respect to property cases, if the action involved the title to or possession of foreign land, then an English Court would refrain from exercising jurisdiction under the *Mocambique* rule.[7] If the property consisted of a ship, then since that was an integral part of international trade, English courts were only too eager to encourage such

7 See *South Africa Co v Companhia de Mocambique* [1983] AC 602.

litigation. Most other proprietary actions are normally characterised as actions in tort.

With respect to torts actions, English courts discouraged suits on a foreign tort through the rule in *Phillips v Eyre*,[8] which required that the foreign tort be both actionable under the *lex fori* and not justifiable under the *lex loci delicti*. The effectiveness of this double requirement as a bar to forum shoppers was seriously compromised by the Court of Appeal decision in *Machado v Fontes*.[9] However that decision was eventually overturned by a majority of three to two in the House of Lords decision in *Chaplin v Boys*.[10]

By contrast with tort and property, English courts have been very receptive to actions in contract. If English courts lacked *in personam* jurisdiction over the defendant, so long as the contract was either made or breached in England, or it was governed by English law, then service of process on the defendant outside the jurisdiction could be effected. Apart from such limitations as sovereign immunity, the only restriction on the exercise of this jurisdiction was if the contract contained an exclusive jurisdiction clause. Needless to say, the law of contract is at the very heart of the regulation of transactions in trade, finance and commerce. Thus behind the open door policy enunciated in *St Pierre* were a series of selective filters designed to separate out the international litigation which English courts wanted to adjudicate upon from all the rest in which it had no interest. The only forum shoppers which English courts were prepared to encourage were those suing on a contract governed by English Laws.

In particular, English courts showed no interest in encouraging forum shoppers in actions in tort. Actions on a foreign tort, however, created special problems for English courts in devising a rule which would discriminate between those plaintiffs who had a real and substantial connection with England and those plaintiffs who resorted to English courts, either as a matter of personal or litigious convenience, or who sought a windfall gain in a higher award of damages than they could reasonably expect from the natural forum. Despite efforts to fine tune the rule in *Phillips v Eyre*, in such cases as *Chaplin v Boys*, they were unable to screen out all the unwelcome litigants. Finally, they had to resort to a more omnibus approach and by slow and painful steps they eventually embraced the doctrine of *forum non conveniens*.

The modern developments began with *The Atlantic Star*.[11] The leading speech of the majority was made by Lord Reid who favoured a much more liberal interpretation of the terms 'vexatious' and 'oppressive', as they appeared in the formulation of the rule in *St Pierre*, than that which the courts had hitherto been prepared to ascribe to those words. In *MacShannon v Rockware Glass Ltd*,[12] the House of Lords moved further away from *St Pierre* with Lord Diplock's reformulation of the rule. He stated:

> '(2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must

8 (1870) LR 6 QB 1.
9 [1897] 2 QB 231.
10 [1971] AC 356.
11 [1974] AC 436.
12 [1978] AC 795.

> satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience and expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.'[13]

In *MacShannon* it was assumed that if the plaintiff could get a higher award of damages in England than in the alternative forum, that constituted a legitimate juridical advantage. However, on the facts of *MacShannon* there was no evidence that the plaintiff would receive a higher award of damages in England, than he would have received in the natural forum, being Scotland. Hence under the new formulation, a forum shopper, in pursuit of a windfall gain in damages from an English Court would not be turned away. This fact largely undermined the whole reason for changing the rule in the first place.[14] In *The Abidin Daver*[15] Lord Diplock cast serious doubts on the continued viability of that reformulation of the rule, and hinted strongly that he would be prepared to sever all links with the past by embracing the Scottish doctrine of *forum non conveniens*.[16] In 1986, in *Spiliada*, that is what happended.

In *Spiliada*, the leading speech was delivered by Lord Goff of Chieveley who adopted the doctrine of *forum non conveniens* as originally stated in Scottish Law by Lord Kinnear in *Sim v Robinow*.[17] His Lordship stated, in relation to an application for a stay of proceedings, that:

> 'The plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.'

Lord Goff slightly restated this principle as follows:

> '(a) The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.'[18]

Subsequently in Lord Goff's speech, it became apparent that the appropriate forum was what he regarded as the natural forum.[19] Thus, if the

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13 Ibid at 812.

14 In *Piper Aircraft Co v Reyno* (1981) 454 US 235 Marshall J, who delivered the majority opinion commented on the effect of placing undue importance on depriving a plaintiff of a legitimate juridical advantage when he said 'In fact, if conclusive or substantial weight were to be given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless'. See at 250.

15 [1984] 1 AC 398.

16 Ibid at 411. See also *Spiliada* [1986] 3 WLR 972 at 985.

17 (1892) 19 R 665 at 668.

18 See *Spiliada* [1986] 3 WLR 972, at 985.

19 Ibid at 986. At one point His Lordship used the expression 'natural or appropriate forum'. At another point, His Lordship noted the possibility that there may not be a natural forum, either because all the relevant factors inconclusively point to different jurisdictions, or, in the case of certain actions in Admiralty involving collisions at sea, no jurisdiction exists which can be properly described as the natural forum.

natural forum was not England, that created a strong presumption in favour of granting a stay of proceedings. The natural forum was the forum in 'which the action had the most real and substantial connection'.[20] The factors which his Lordship enumerated as identifying the forum which had the most real and substantial connection were: considerations of convenience and expense, which law governed the transaction, and the respective residence of the parties and the place in which they carried on business.[21]

Preference for the natural forum may be outweighed, in the case where the plaintiff possessed 'a legitimate personal or juridical advantage', such as where, *inter alia*, the forum offered the plaintiff a higher award of damages, a more generous procedure with respect to discovery, a power to award interest, or a more generous limitation period.[22] However, these factors ought not to be regarded as decisive, unless the plaintiff would be deprived of substantial justice if the dispute was litigated in the natural forum.[23]

Finally, on the question of the burden of proof, his Lordship drew a distinction between cases where the plaintiff had invoked the jurisdiction as a matter of right, namely, in cases of *in personam* jurisdiction, and cases where leave had to be granted to enable service outside the jurisdiction. In the former case, the burden of proof rests on the defendant to show that a stay of proceedings should be granted, and that 'the court will hesitate to disturb the plaintiff's choice of forum . . . unless the balance is strongly in favour of the defendant . . . '.[24] In the latter case, the situation is reversed, the burden of proof rests on the plaintiff to show why leave should be granted, and that burden will only be discharged where the plaintiff can show that English is clearly the appropriate forum.[25]

In cases where the defendant has successfully discharged the burden of showing that the alternative forum is the more appropriate one, the burden then shifts to the plaintiff to show that 'there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country'.[26] That is the plaintiff must show that he will be deprived of a legitimate personal or juridical advantage in circumstances which would constitute a denial of substantial justice.

Putting to one side those rare cases where the court could not identify a natural forum, whether a stay of proceedings would be granted depended on whether England was the natural forum. If it was the natural forum, then the application for a stay would be denied. If it was not, a stay would be granted, unless that would deprive the plaintiff of 'a legitimate personal or juridical advantage' in circumstances which amounted to a denial of substantial justice. The burden of proof shifted from the defendant to the plaintiff, depending on whether the jurisdiction of the forum was invoked

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20 Ibid at 987. In which His Lordship adopted the language of Lord Keith of Kinkel in *The Abidin Daver* [1984] AC 398 at 415.
21 Ibid at 987.
22 Ibid at 991.
23 Ibid.
24 Ibid at 986. These passages were quoted with approval from Scoles & Hay, *Conflict of Laws* (1982), at 366 and Castel, *Conflict of Laws* (1974) at 282.
25 Ibid at 990.
26 Ibid 985-986.

as of right, or whether the plaintiff could only invoke the jurisdiction of the forum by seeking leave to serve process outside the jurisdiction. Subject to these qualifications, the central question was whether England was or was not the natural forum.

Unlike the rule stated by Lord Diplock in *MacShannon*, questions of convenience and expense no longer featured as dominant considerations, but were relegated to a role which was subservient to the principal issue of what was the natural forum. Similarly, the issue of the existence of 'a legitimate personal or juridical advantage' was subsumed under the rubric of whether to deny a plaintiff such advantages constituted a denial of substantial justice. All of this was in accord with the basic premises which underpinned the doctrine of *forum non conveniens*, namely what was 'more suitable for the interests of the parties and the ends of justice'.

Developments in the US:

As early as 1817, courts in the US were prepared to exercise a discretionary power to stay or dismiss proceedings when the continuation of the action in the forum would be inappropriate.[27] However, except in a case involving the exercise of a statutory power of a discretionary nature to stay or dismiss proceedings, this power was only exercised in admiralty or equity cases until 1947.[28] In that year the US Supreme Court handed down its decision in *Gulf Oil Corporation v Gilbert*.[29] By a majority of 5 to 4, the Supreme Court adopted the doctrine of *forum non conveniens*. That ruling of the Supreme Court was only binding on Federal courts.[30] *Gulf Oil* concerned a tort claim arising out of an accident in Virginia, which had been brought in the diversity jurisdiction of the Federal Court for the southern district of New York.

In *Gulf Oil*, there was no suggestion that the doctrine only applied interstate. Furthermore, all doubt on this issue was removed in the US Supreme Court decision of *Piper Aircraft Co v Reyno*.[31] That case involved a tort claim which arose out of an aeroplane accident occurring in Scotland. In a number of respects, the US doctrine of *forum non conveniens* differs significantly from the doctrine as formulated in *Spiliada*.

In the US, the exercise of this discretion is governed by a balancing test,[32] in which the scales are tipped in favour of the plaintiff's choice of forum. The degree to which deference is shown towards the plaintiff's choice of forum varies depending on whether the plaintiff resides within the forum or is a foreigner. In the latter case, it is said that the presumption that the

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27 See *Gardner v Thomas* (1817) 14 Johns 134 (NY). An historical overview of US developments in this area is set out in R Braucher 'The Inconvenient Federal Forum' (1947) 60 *Harvard Law Review* 908.

28 See the dissenting judgment of Black J in *Gulf Oil Corporation v Gilbert* (1947) 330 US 501, at 513.

29 Ibid.

30 Given the limited appellate jurisdiction of the US Supreme Court, it cannot formulate general principles of common law. See *Erie Railroad Co v Tompkins* (1938) 304 US 64. It can, however, state what the procedural rules which govern actions brought in Federal courts are. Although the point has not been authoritatively decided, it is assumed that the applicability of the *forum non conveniens* doctrine is a question of procedure rather than substance.

31 (1981) 454 US 235.

32 See supra n 28 at 507-510. See also *Piper Aircraft* at 241.

plaintiff's choice of forum is one motivated by considerations of convenience is much weaker.[33] Furthermore, in the case of a foreign plaintiff, the suspicion that he or she is engaging in a forum-shopping exercise is much greater.[34] Unlike the position in *Spiliada*, there are no rigid rules as to who has the burden of proof and in what circumstances that burden will be shifted. Whilst deference is shown to the plaintiff's choice, all that the defendant need do is 'provide enough information to enable the District Court to balance the parties' interests'.[35]

In the exercise of this discretion, paramount importance is placed on retaining flexibility when applying this balancing test.[36] Thus while a number of factors have been identified as being relevant, they are neither exhaustive nor does any one carry necessarily greater weight than any other.[37] Those factors have been divided into two categories, one is private and the other is public.

Those private factors which have so far been enumerated are:

1. The ease of access to sources of proof.
2. The ability to require the compulsory attendance of witnesses.
3. The cost of calling witnesses.
4. The desirability and the availability of a view.
5. The enforceability of any judgment which may be awarded.[38]

Those factors which come within the public domain are:

1. The need to avoid adding further congestion to the case load of courts which have already overcrowded lists.
2. In the US, where trial by jury is commonplace, juries should not be burdened by a protracted trial concerning a dispute involving a fact situation which is geographically far removed from the forum.
3. Unnecessary complications involving either or both the choice of law or the application of foreign law should be avoided.[39]
4. As it was succinctly put in *Gulf Oil v Gilbert*, 'There is a local interest in having localized controversies decided at home'.[40] This factor involves weighing up the competing public interests of the alternative forum and the forum in the resolution of the dispute. To put it another way, which of the two forums has the greater governmental interest in the outcome of the controversy?[41]

In *Piper Aircraft Co v Reyno*, the Supreme Court made it abundantly clear that the mere forfeiture by the plaintiff of a legitimate juridical advantage, if a stay of proceedings is granted or the action is dismissed, will not be sufficient to prevent such a course of action from being pursued.[42] If, however, to deny the plaintiff such an advantage would deprive him or her of either an adequate or satisfactory remedy in the alternative forum, then the application to stay the proceedings or dismiss the action would be

33 See *Piper Aircraft* at 255-256.
34 Ibid at 242.
35 Ibid at 258.
36 Ibid at 249-250.
37 Supra n 28 at 508.
38 Ibid at 508.
39 Ibid at 508-509.
40 Ibid at 509.
41 See, for example, *In re Union Carbide Corp Gas Plant Disaster* (1986) 634 F Supp 842, at 862-864.
42 Supra n 31 at 247-254.

refused.[43] This is obviously analogous to the position developed in *Spiliada*, when the forum will refuse to grant a stay of proceedings if the grant of such a stay would constitute a denial of substantial justice. However, unlike the position in *Spiliada*, the burden is not on the plaintiff to show that there would be a denial of substantial justice in the alternative forum, but rather it rests on the defendant to show that the alternative forum is an adequate one. Thus, if it is unclear whether the plaintiff has a comparable cause of action in the alternative forum, the action will be allowed to proceed.[44]

In the US the single most important factor in determining whether the action will be stayed or dismissed is whether the plaintiff is resident in the forum.[45] In the case of a plaintiff who sues within his or her home forum, there is not only a presumption that the chosen forum is one of convenience, but also that he or she is entitled to seek a remedy in that court by virtue of the fact that it is the forum which, as a taxpayer, he or she supports.[46] In the case of a resident plaintiff, only factors concerning the relative convenience of the parties are relevant in the exercise of the discretion, under *forum non conveniens*. Public interest factors have no part to play.[47] Only in the case of foreign plaintiffs do the questions concerning the allocation of judicial resources, the difficulties involving choice of law and the application of foreign law and competing governmental interests assume importance.

The Position in Australia:

In *Oceanic Sun Line Special Shipping Co Inc v Fay*[48] the High Court was presented with its first opportunity to determine its position on the applicable rules governing stays of proceedings since the developments which had begun in England in the case of *The Atlantic Star*. In *Oceanic v Fay*, the plaintiff was injured whilst on a tourist vessel in Greek waters. The ship was registered in Greece and its port of departure and destination were also in Greece. Initially the plaintiff sued the defendant in New York, however the defendant had the action stayed in that jurisdiction under the *forum non conveniens* doctrine. The plaintiff then sued in the Supreme Court of NSW by obtaining leave to serve outside the jurisdiction on the basis that he had suffered injury from the tort in NSW.[49] The defendant moved to have the action stayed. The application for a stay failed at first instance. On appeal to the NSW Court of Appeal, by a majority of two to one, the appeal was dismissed, Kirby P dissenting. Before the High Court the appeal was again dismissed by a majority of three to two, Wilson and Toohey JJ dissenting.

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43 Ibid at 254-255.

44 Ibid at 255 fn 22.

45 See *Koster v Lumbermans Mut Casualty Co* (1947) 330 US 518 at 524 per Jackson J, who delivered the opinion of the Court, and at 534-535 per Reed J, who dissented.

46 Ibid.

47 Ibid at 535.

48 (1988) 79 ALR 9. Professor Pryles in 'Judicial Darkness on the Oceanic Sun' (1988) 62 *Australian Law Journal* 774 has provided a critical and comprehensive analysis of *Oceanic v Fay*.

49 Under NSW Supreme Court Rules, service out was permitted if the plaintiff suffered injury 'wholly or partly' in NSW which was caused by a tort, 'wherever occurring'. See NSW Supreme Court Rules Pt 10, r1(e). The plaintiff had been hospitalised, subsequent to the accident, *inter alia*, in NSW.

In their joint dissenting judgment, Wilson and Toohey JJ adopted the doctrine of *forum non conveniens* as formulated by Lord Goff in *Spiliada*. They identified the courts of Greece as having the most real and substantial connection with the dispute, and held that since the plaintiff had failed to demonstrate he would be deprived of a legitimate personal or juridical advantage if he was required to pursue his action in Greece, such that there would be a denial of substantial justice, then the application for a stay should be granted.

Brennan J adopted the traditional view as set out in *St Pierre*, and construed the words 'vexatious' and 'oppressive' narrowly, in accordance with convention. Needless to say His Honour rejected the application for a stay of proceedings.

Deane and Gaudron JJ, adopted different variants of a more liberal definition of the principle stated in *St Pierre*. According to Deane J, litigation was either 'vexatious' or 'oppressive', if the forum was an inappropriate one. However, the mere fact that there existed another forum which was more appropriate, was not sufficient to indicate that the litigation was either 'vexatious' or 'oppressive'. An inappropriate forum is one in which 'the action has no significant connection at all with the territorial jurisdiction of the court in which it is instituted . . . '.[50] His Honour took the view that the Supreme Court of NSW was an appropriate forum, and therefore rejected the application for a stay of proceedings.

Gaudron J also redefined the terms 'vexatious' and 'oppressive' to refer to actions which are brought within an inappropriate forum. However, the test of what constituted an inappropriate forum was whether 'the rights and liabilities of parties fall entirely for determination by the application of foreign substantive law the selected forum will on occasions be an inappropriate forum . . . '.[51] Her Honour stated that the combination of two factors strongly favoured a stay of proceedings. These were whether the substantive issues would be resolved exclusively by reference to foreign law, wherein the forum merely provided the procedural framework for the application of that foreign law, and in addition whether the choice of the forum is motivated by seeking certain procedural advantages offered by the forum, in circumstances where there is 'no (or insufficient) connection between the plaintiff and that forum to vest in the plaintiff any reason to expect that the advantages sought should be available to him or her'.[52]

In interlocutory proceedings, it was not necessary to make a final determination as to whether foreign law would entirely determine the substantive issues. All that was necessary was to show that it was fairly arguable that the *lex fori* was applicable in determining at least some of the substantive issues.[53] Since one could fairly argue that NSW law would apply to some of the substantive issues, the application for a stay should be refused.

In *Oceanic v Fay*, the question arises whether there is a ratio. The test enunciated in *Spiliada* was accepted by two of the judges, but it was rejected by the other three. Likewise the test put forward in *St Pierre* was

50 Supra n 48 at 44.
51 Ibid at 59.
52 Ibid at 58.
53 Ibid at 59.

accepted by only one judge, and it was rejected by the remaining four. The two intermediate positions, adopted by Deane and Gaudron JJ, are inconsistent with the positions favoured by the other three. Furthermore, those two intermediate positions differ from each other quite substantially.

It is, therefore, difficult to accept that either of those positions could fairly be regarded as a common denominator of the collective views of all, or even a majority of the judges in *Oceanic v Fay*. The concluding statement of Wilson and Toohey JJ, was:

> 'It is apparent that the decision of the court, while resolving the immediate dispute between the parties, does not yield a precise and authoritative statement of the principles that should be applied in dealing with an application to stay proceedings. That statement must await another day.'[54]

That statement would appear to be a fair appraisal of the result in *Oceanic v Fay*.

Before considering the important substantial issues raised in *Oceanic v Fay*, there is one preliminary issue which deserves attention, and that is the facts of that case which exposed a potential weakness in the test laid down in *Spiliada*. To understand this issue there are additional facts which need to be mentioned. The contract of carriage between the plaintiff and defendant was completed, so far as the High Court was concerned, by reference to the documentation which had been presented by the defendant to the plaintiff in NSW. In the opinion of the High Court, that documentation amounted to a concluded contract of carriage for a pleasure cruise in Greek waters.[55]

The documentation amounted to the issue of an 'Exchange Order' by the defendant to the plaintiff in NSW. Prior to the cruise, that 'Exchange Order' was to be exchanged for tickets for that cruise. Those tickets contained exemptions clauses, plus an exclusive jurisdiction clause. Under the analysis stated above, the ticket did not form part of the contract of carriage. Consequently the plaintiff was not subject to either the exemption clauses nor was he subject to the exclusive jurisdiction clause. Putting to one side the exclusive jurisdiction clause, which for the purposes of the present analysis is irrelevant, had the defendant been subject to the exemption clauses his cause of action could have been defeated entirely or limited to a liability of no more than $US5000.

Under Australian law those exemption clauses were irrelevant, since they did not form part of the contract. If Greek law, on the contrary, determined that those exemptions clauses did in fact form part of the contract, the plaintiff would have been deprived of a legitimate juridical advantage, in that the clauses adverse to the plaintiff would have been included in the contract of carriage which would have either extinguished his claim or limited it to $US5000. Had either of those prospects eventuated, the plaintiff would have been denied, not only a legitimate juridical advantage, but also substantial justice from an Australian legal perspective. Under Australian law those exemption clauses would not have formed part of the contract, and, if they had, they, very arguably would

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54 Ibid at 25.

55 See ibid at 15 per Wilson and Toohey JJ, at 31 per Brennan J, at 52 per Deane J, and at 55-56 per Gaudron J.

not have formed valid terms of the contract, in that the contract had been made in NSW, and it was therefore subject to the *Contracts Review Act* 1980 (NSW). Under that Act, the Courts of NSW have the power to strike down provisions of a contract which are unjust. In the circumstances of *Oceanic v Fay*, it was very arguable that those exemption clauses and the exclusive jurisdiction clause contravened the *Contracts Review Act* 1980.[56]

As Brennan J noted 'there is no evidence one way or the other'[57] as to whether those exemption clauses would have been included in the contract under Greek law. Presumably, neither party was able to obtain expert evidence on what attitude a Greek court might take to such clauses. However, the test in *Spiliada* is clear, that once the defendant establishes that the forum is not the more appropriate forum, the burden of proof shifts to the plaintiff to show that he would be denied not only a legitimate personal or juridical advantage, but also, in depriving him of such an advantage he would be denied substantial justice. In the judgment of Wilson and Toohey JJ, since the plaintiff had failed to discharge that burden he could not resist a stay of proceedings.[58]

When *Oceanic v Fay* was heard in the NSW Court of Appeal, Kirby P, who dissented, took a similar view to that of Wilson and Toohey JJ.[59] However, in granting a stay of proceedings His Honour did so on the condition, *inter alia*, that:

> 'Likewise, if the limitation upon recovery applies, and there is no basis in Greek law for relief from it, the sum payable to the respondent will be pitifully small. Security should nevertheless be given in an appropriate amount, as a term of the stay. That amount should be agreed between the parties. In default of agreement its terms would be settled by the Court.'[60]

Although it is debatable, it would appear that this condition is designed to overcome the effect of the exemption clauses, if they were to operate under Greek law. In order to effectively overcome the possible operation of those clauses, the quantum of damages would have to be determined either by agreement between the parties or by the Court in NSW. If that is the effect of the condition stated above, then the situation contemplated by granting a stay subject to that condition, is to have liability determined in Greece and the quantum of damages determined in NSW. To split up the trial of the action in this manner would lead to an absurd inconvenience.

If one looks at the proposed order of His Honour, the provision of security is limited to 'the payment of any judgment obtained by the said Fabian Roscoe Fay in the courts of Athens, Greece'.[61] According to this wording, both liability and quantum would be determined by a Greek court. This overcomes the problem of having the trial of the action split between the two forums. It does not overcome the problem of the exemption clauses either excluding or limiting liability under Greek law.

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56 See the judgment of McHugh JA, with whom Glass JA agreed, in *Oceanic Sunline Special Shipping Co Inc v Fay* (1987) 8 NSWLR 242 at 267.
57 See supra n 48 at 40.
58 Ibid at 24.
59 Supra n 56 at 262.
60 Ibid at 263.
61 Ibid at 264.

The solution to the problem posed by those exemption clauses would not appear to have been solved by subjecting the stay to the condition suggested by His Honour. However His Honour touched upon another solution to that problem when he stated, in relation to Lord Goff's guidelines in *Spiliada*, '. . . those which refer to shifting the onus in such applications, may not be adopted in Australia . . .'.[62] On the facts of *Oceanic v Fay*, it is the rules concerning the burden of proof which impose a real hardship on the plaintiff if the action were to have been stayed, since the plaintiff presumably was unable to gather evidence as to what effect, if any, would be given to those exemption clauses in a Greek court.[63] For the purposes of this analysis I will not confuse the issue with the distinction between cases wherein the plaintiff invokes the jurisdiction of the forum as of right, and those in which he can only serve process with the leave of the court. Were the burden which is shifted to the plaintiff to be a merely evidentiary burden, then the plaintiff need only identify a real possibility that Greek law would give effect to those exemption clauses in order to show that he is deprived of a legitimate juridical advantage which amounts to a denial of substantial justice.

Whilst that modification to the rules governing the burden of proof, as set out in *Spiliada*, may have accomplished a just result on the facts of *Oceanic v Fay*, one may well need the assistance of a crystal ball to determine whether that modification would work satisfactorily in other cases. The telling point that those rules as to the burden of proof reveal is, that as the ink was drying in *Spiliada*, the test formulated therein was found wanting on the facts of *Oceanic v Fay*.

The injustice of staying the proceedings in *Oceanic v Fay*, in circumstances where the court is uncertain of the effect which might be given to those exemption clauses, is seen by contrasting the rules governing single forum and double forum cases. Those rules which distinguish between the two types of cases can only have a practical effect in the arena of transnational injunctions, rather than stays of proceedings. Where there is only one forum in which a plaintiff can sue the defendant, an English court will only enjoin the plaintiff from suing in that one available forum, if, under English law, the defendant has a legal or equitable right not to be sued by the plaintiff in the circumstances of that case.[64]

If the exemption clauses either exclude liability completely or limit it to $US5000 in Greece, the plaintiff is, for all practical purposes, confined to a single forum, namely NSW, in seeking adequate compensation as against the defendant.[65] If it transpired that *Oceanic v Fay* was a single forum case,

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62 Ibid at 261. In *Bankinvest AG v Seabrook and Ors* [1988] 14 NSWLR 711 at 727 Rogers A-JA, with whom Street CJ agreed, firmly rejected the proposition that there ought to be any rules concerning who has the burden of proof under the cross-vesting legislation. Kirby P reserved judgment on this point. See at 716-717.

63 In the US, in such a case where it is unclear what law would be applied in the alternative forum in circumstances which may amount to depriving the plaintiff of an adequate remedy the proceedings would not be dismissed or stayed. See *Piper Aircraft Co v Reyno* (1981) 454 US 235 at 254 fn 22.

64 See *British Airways Board v Laker Airways Ltd and Anor* [1984] 3 All ER 39 at 46.

65 It may be thought that this is no different than if the action is statute barred in the more appropriate forum, a situation which was discussed in *Spiliada* at 992-993. However, there is one very important distinction between the two cases, where the claim can be defeated or severely limited in terms of adequate compensation by exemption clauses, then unlike the position in relation to a statute of limitations, once the claim emerged, it could only be properly litigated in a single forum.

then, before the defendant could successfully seek a stay of proceedings he, by analogy with the cases on transnational injunctions, would need to identify some legal or equitable right not to be sued in NSW. To be more specific, he would have to show that it would be unconscionable to allow the action to proceed in NSW. In *Oceanic v Fay*, there was no suggestion that it would be unconscionable to allow the action to proceed.

Given the special facts which emerged in *Oceanic v Fay*, it is submitted that the decision of the majority was the correct one. In the majority judgments in the High Court the analysis proceeded from the initial premise that if the jurisdiction of the court is regularly invoked, the plaintiff was entitled to proceed to judgment. This analysis paid no attention to whether that jurisdiction was invoked as of right or whether leave was required before process could be served on the defendant.[66] Fundamental to this analysis is the unquestioned assumption that a plaintiff, other than in well-defined and exceptional circumstances, has a right of this nature. There is no discussion of the basis of this right.

Given that both the court and its jurisdiction are established under statute, and the invocation of its jurisdiction is governed by rules made under statute, then the right to invoke the jurisdiction is statutory in nature and is necessarily circumscribed by the provisions of the statute which create it. Since the statute clearly confers a power to stay proceedings, as part of the inherent jurisdiction of the court, it is too simplistic to uncritically assume that there exists some inalienable right which can only be compromised in extreme circumstances. It is undoubtedly true that when some litigants invoke the court's jurisdiction, they do so in circumstances in which it can fairly be described that they have a right to do so. At the other end of the spectrum, there are circumstances in which the invocation of the court's jurisdiction by a litigant cannot be so described. What is the line of demarcation between these two extremes?

Putting to one side the case where the litigant is pursuing an action which is either frivolous, vexatious, oppressive or which involves an abuse of the process of the court, that litigant must be entitled to have a fair hearing of his complaint in some judicial forum. The overwhelming majority of litigants must have a right to seek a fair adjudication of the merits of their claim. To put it another way, where a litigant has a legitimate grievance, that litigant must have a commensurate right to seek judicial redress of that grievance, on the assumption that the grievance is well founded. The difficulty arises when the litigant, *prima facie*, has a legitimate grievance, but has chosen the wrong forum in which to seek an appropriate redress of that grievance. Whilst the right to seek redress of a legitimate grievance cannot be doubted, the right to seek such redress in any forum whatsoever whose jurisdiction he can invoke, is, at the very least, highly questionable. Conversely, the right to receive redress in the appropriate forum cannot be doubted.

Thus the right to seek redress of either a legitimate grievance, or a *prima facie* legitimate grievance, carries with it a right to seek judicial redress. Such a right does not carry with it a right to seek judicial redress in any

66 In Professor Pryles' article 'Judicial Darkness on the Oceanic Sun' (1988) 62 *Australian Law Journal* 774, he is particularly critical of Brennan J for failing to observe this distinction. See at 790.

court whatsoever. The issue reduces itself to this question: what forum or forums is the litigant entitled to seek judicial redress of his alleged grievance? If the forum which the litigant chooses is the natural forum for the resolution of such disputes, it can hardly be doubted that that forum is one in which the litigant has a right to seek redress. Alternatively, if the forum is not the natural forum, but is one which will not deny the litigant substantial justice, whereas the natural forum would deny that litigant substantial justice, then that litigant is entitled to seek redress in that forum which will not deny substantial justice, so long as it is an appropriate forum.

If a litigant invokes the jurisdiction of a forum which does not fall within either of those two categories described above, then it is difficult to see upon what basis it can be said that the litigant has a right to pursue his proceedings in that forum, particularly where there is another forum which is the natural forum. If one looks at the statute which establishes the court, defines its jurisdiction and the rules made thereunder which govern the invocation of that jurisdiction, then one cannot find any textual support for such a right. Thus, if such a right does exist then it must, therefore, be derived from the general concepts of justice. In the case of a litigant who is pursuing an action in a forum which does not fall into either of those two categories described above, then again it is hard to see how the general concepts of justice can assist a litigant in establishing a right to proceed in that forum.

Putting to one side the finer details as to who should have the burden of proof, the test laid down in *Spiliada* recognises the importance of both the natural forum and other appropriate forums in which there will not be a denial of substantial justice. That test, therefore, provides us with a sound guidance as to when actions should be stayed and when they should not be stayed. Whilst that test cannot be regarded as being ultimately definitive, it, nevertheless, provides a very useful guide to the traveller in these murky regions.

Before leaving this topic one further observation should be made. For the reasons which are set out at the beginning of this article, the doctrine of *forum non conveniens* becomes a necessity in those jurisdictions which attract a large volume of foreign litigation. Unlike the position in either England or the US, Australia has not been, in the past, a focal point of foreign litigation. Unless that situation changes, it cannot be said that there is a necessity for the courts, in Australia, to develop such a doctrine. As to the desirability of developing such a doctrine, that is ultimately a matter of personal preference.

This article will now turn to the flip-side of stays of proceedings, namely, transnational injunctions.

Transnational Injunctions:

As far back as 1821, English courts have claimed the power to issue injunctions restraining a party from pursuing proceedings in a foreign court.[67] Since that time English courts have sporadically used this power until recently. The 1980's has witnessed a rash of such injunctions being

67 See *Bushby v Munday* (1821) 5 Madd 297.

granted by Divisional judges of the High Court, by the Court of Appeal and, now quite recently, by the Privy Council. In Australia, the Federal Court and the Family Court have also issued injunctions preventing a party from pursuing state court proceedings. These injunctions have not been confined to restraining a party from pursuing a claim in a foreign court.

They have been issued to prevent a party from pursuing interlocutory proceedings abroad, in respect of an action being brought in England.[68] An injunction was granted to prevent a bank within the forum from answering a subpoena *duces tecum* issued by a foreign court.[69] This type of injunction has also been used to prevent a party from pursuing foreign arbitration proceedings.[70] With one exception, in recent times, the foreign court has been a court in the US.

As is often the case, we are once again indebted to Lord Denning MR for a clear and succinct articulation of English prejudices concerning American civil litigation procedures and practises. In *Smith Kline & French Laboratories Ltd* and *Ors v Bloch*[71] his Lordship stated:

> 'As a moth is drawn to light so a litigant is drawn to the United States. If he can get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case 'on spec' as we say, or on 'contingency fee' as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40% of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side . . . There is also in the United States a right to trial by jury. They are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take 40% before the plaintiff gets anything. All of this means that the defendant can be readily forced into a settlement'.[72]

When judges see their fellow citizens, be they individuals or companies, being held ransom by another citizen in a foreign court, it is natural that they are inclined to spring to the defence of the hostage. By acting *in personam* against the foreign plaintiff, who is amenable to the jurisdiction of the forum by way of punishment for contempt, the forum can avoid a direct confrontation with the foreign court and pretend that it is not encroaching upon its judicial sovereignty. Where the forum regards itself as either the natural forum or the only appropriate forum in relation to a particular dispute, it is tempted to vicariously stay foreign proceedings, in respect thereof, by the use of this type of injunction. If that injunction should follow hard on the heels of a refusal by the foreign court to stay its own proceedings, then one has more than judicial chauvinism, one has judicial conflict.

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68 See the Court of Appeal decision in *South Carolina Insurance Co v Assurantie Maatschappij de Zeven Provincien NV* [1985] 2 All ER 1046. On appeal to the House of Lords the decision was overturned. See [1987] 1 AC 24.

69 See *A AG and Ors v A Bank* [1983] 2 All ER 464.

70 See *Tracomin SA v Sudan Oil Seeds Co Ltd and Anor (No 2)* [1983] 3 All ER 140.

71 [1983] 2 All ER 72.

72 Ibid at 74.

Whilst it is is antithetical to the concept of international comity that the power to grant such injunctions should exist, in the real world the right to the acquisition and exercise of such a power cannot be doubted. The facts and analysis of *Laker Airways Ltd v Sabena Belgian World Airlines*,[73] in the US Court of Appeal for the District of Columbia, demonstrates this point very well. In that case Laker was bringing an antitrust suit against a number of IATA Airlines for conspiring to put it out of business. Since the turn of this century, US commercial law and policy was strongly opposed to businesses engaging in predatory market practices, such as setting prices so low as to wipe out a competitor, even if it meant sustaining net losses in doing so. British commercial law and policy, in contrast, found such conduct perfectly acceptable, and quite beyond judicial reproach. British Airways had obtained an injunction against Laker in the English High Court to prevent Laker from pursuing its antitrust action in the US. The injunction was confirmed by the Court of Appeal and was discharged by the House of Lords.[74] As the case was going up to the House of Lords, Laker sought injunctions against the remaining defendants in the US District Court designed to prevent them from following the example of British Airways.

Unless the District Court retaliated, its jurisdiction would have been totally undermined as one defendant after another sought the appropriate injunctions abroad. If a court were to carry international comity to the point where it would not be prepared to use these injunctions, even if only to protect its own legitimate jurisdiction, then there is no obstacle to judicial chauvinism. Therefore once judicial chauvinism emerges, judicial comity is powerless to stop it. Consequently, in order to effectively promote comity, courts must maintain the power to issue this type of injunction.

The House of Lords has never exhibited anything like the same enthusiasm for these injunctions as have lesser English courts. Over the course of this decade, it has formulated and then reformulated the rules governing the use which can be made of such injunctions in an attempt to arrive at a rapprochement with the US.

In *Castanho v Brown & Room (UK) Ltd and Anor*,[75] the House of Lords provided a definitive statement of when transnational injunctions could be granted. Lord Scarman, with whom the other Law Lords agreed, took Lord Diplock's formulation in *MacShannon*, of when a court should stay proceedings, and then simply inverted it. Thus the rule was:

> '. . . that to justify the grant of an injunction the defendants must show: (a) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, and (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction.'[76]

In that case, it was held that the prospect of a higher award of damages than that which could reasonably be expected in the forum constituted a

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73 (1984) 731 F 2d 909.
74 See *British Airways Board v Laker Airways Ltd and Anor* [1984] 3 All ER 39.
75 [1981] AC 557.
76 Ibid at 575.

legitimate personal or juridical advantage. This rule which complemented the then rule governing stays of proceedings treated the two remedies as if they were different sides of the same coin. Consequently, as Diplock's formulation began to become unstuck with respect to stays of proceedings, so did the rule in *Castanho*. It also had to confront other difficulties as well.

One, the Court of Appeal, whilst giving lip-service to it, would ignore it whenever it felt like doing so.[77] Two, as the House of Lords discovered in *British Airways v Laker*,[78] the formulation in *Castanho* omitted one important category of cases of when such injunctions should be granted, namely, when the defendant, under the *lex fori*, has a legal or equitable right not to be sued.[79] Finally, the issue of this kind of injunction amounted to an indirect interference with one of the sovereign functions of an independent nation state, and if that state were to retaliate, which was what happened in *Laker v Sabena*, then an impossible position could be created for both parties.[80] In *British Airways v Laker*, Lord Scarman qualified what he said in *Castanho* with the caveat that the power to issue such an injunction must be exercised with the considerable caution.[81]

A good illustration of when it would be appropriate to issue such an injunction on the basis that the defendant has a legal or equitable right not to be sued can be seen through a variation of the facts in *Breavington v Godleman*.[82] Suppose within the forum there exists a no-fault scheme which either curtails or eliminates common law liability for certain types of negligence actions. Suppose both the plaintiff and the defendant reside and are domiciled in the forum and the accident occurs within the forum. Let us finally suppose the defendant is amendable to an overseas jurisdiction in which a common law action for negligence will lie, and that jurisdiction has a reputation for awarding, in the words of Lord Denning, 'fabulous damages'. If the defendant is sued by the plaintiff in that overseas forum and the defendant unsuccessfully applies for a stay of proceedings in that forum, then it would be appropriate for the natural forum to enjoin that plaintiff from further pursuing his overseas action.

Not only does the defendant have a statutory right not to be sued, based on the no-fault legislation, but also that legislation embodies an economic policy, often of great significance, as to what the cost burden should be to producers for injuries sustained through the production and consumption of commodities. Fundamental to the operation of such legislation is a determination of how much of the costs of injuries, associated with certain economic activities, are to be borne by the producer. If an overseas forum imposes a greater cost burden than that contemplated by the legislation, it could undermine one of the basic public policies embodied in the legislation.

Such a case as this had strong parallels with injunctions which are issued in order to protect the jurisdiction of the forum. In both cases the overseas jurisdiction is encroaching upon one of the sovereign functions of the

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77 See *Tracomin SA* supra n 70, and *Smith Kline* supra n 71.
78 Supra n 50.
79 Supra n 40.
80 See supra n 49 at 927.
81 See supra n 50 at 56-57.
82 (1988) 80 ALR 362.

forum, in which case it is permissible for the forum to protect its sovereign interests, even if that involves encroaching upon the sovereign functions of that overseas forum. The paramount interest of any forum must be to protect the integrity of its system of government and the public policies emanating therefrom. The interests of international comity must necessarily be subordinate to that paramount interest.

The rules laid down in both *Castanho* and *British Airways v Laker*, however, permit the grant of such injunctions irrespective of whether there is a need to protect some paramount public interest of the forum.[83] Since the rule in *Castanho* was the reciprocal of the rule in *MacShannon*, there existed no distinction between stays of proceedings and granting transnational injunctions, despite the fact that the former promotes international comity, whilst the latter is opposed to it. Until recently, the only concession to international comity with respect to granting transnational injunctions was the qualification made in relation to the rule in *Castanho* by Lord Scarman in *British Airways v Laker* that, before granting such an injunction a judge should proceed with caution. In the absence of any detailed elaboration of this 'caution' requirement, it provided little guidance for judges at first instance. This was obviously quite unsatsfactory and it necessitated a fresh start as to what was the appropriate rule for the granting of such injunctions.

That new direction emerged in *SNIAS v Lee Kui Jak*.[84] This was an appeal from Brunei to the Privy Council in which the law of Brunei was regarded as indistinguishable, with respect to transnational injunctions, from that of England.[85] The judgment of the Judicial Committee was delivered by Lord Goff. In that case, the plaintiffs were respectively the widow and the estate of a fatal victim of a helicopter accident. The helicopter was owned and operated by Bristow Malaysia and it was manufactured by SNIAS. The accident was due to the accumulation of metal debris within the main gear box. In the service manual produced by SNIAS, it was recommended that once the quantity of metal particles covered an area of 50 square millimetres, the gear box should be returned to the factory to be refitted with a new component. The maintenance engineers read the description of the acceptable quantity as being an amount which would cover a square with sides of 50mm, which was 50 times greater than the acceptable level.

Yong Joon San, the fatal victim of the accident, earned in the year prior to his death $US1,800,000. Consequently, the liability for economic loss was enormous. The plaintiffs claimed $US20 million. The plaintiffs sued in Brunei, the place of the accident, they also sued in France, the principal place of business of SNIAS and they sued in Texas where, *inter alia*, SNIAS did business. Needless to say they sued both SNIAS and Bristow Malaysia in Brunei, but as Bristow Malaysia was not amenable to the jurisdiction of Texas, only SNIAS was sued in that forum. Having failed to obtain a stay of proceedings in Texas, SNIAS sought an injunction in Brunei to prevent the plaintiffs from continuing their proceedings in Texas. This injunction was sought, subject to a number of undertakings offered by SNIAS to the

83 Cf *Laker v Sabena* supra n 73.
84 [1987] 3 WLR 59.
85 Ibid at 70.

plaintiffs, so that the plaintiffs would not be deprived of any legitimate juridical advantages in forfeiting the opportunity of proceeding in Texas.

Lord Goff cast aside the rule in *Castanho* and looked for a common denominator amongst the English authorities which go back more than a century. That common denominator was the principle that an English court would grant such an injunction if it was the natural forum and if the foreign proceedings were either vexatious or oppressive, so long as the injunction would not injustly deprive the plaintiff of any advantages which he would derive from pursuing those foreign proceedings.[86] His Lordship resisted any temptation to define the words vexatious or oppressive, other than to state that foreign proceedings could not be so described if the plaintiff derives, as indicated, some just advantage in their continuance. Nevertheless, on the facts of this case, the argument that the foreign proceedings were vexatious or oppressive was tantamount to saying that those proceedings imposed a serious injustice to the defendant.[87] His Lordship expressly stated what the decision itself makes abundantly clear, that a quite different rule governs transnational injunctions compared to the position regarding applications for a stay of proceedings.[88]

Turning to the application of these principles to the facts of the case, His Lordship concluded that Brunei was the natural forum for reasons which are not material to this discussion. His Lordship also took the view that, given the various undertakings of the defendant which were incorporated as terms on which the injunction was to be granted, the plaintiffs would not be deprived of any legitimate advantage, such as would constitute an injustice to them by granting the injunction. Finally, His Lordship took the view that the foreign proceedings were oppressive to the defendant.

The reason lay in the fact that Bristow Malaysia was not amenable to the Texas jurisdiction, consequently SNIAS could not recover a contribution from them in third party proceedings in Texas. In order to recover such a contribution it could only be in proceedings in Brunei. That could leave SNIAS vulnerable to inconsistent findings as between the Texas and Brunei courts. Thus, if the Texas court held SNIAS liable as a tortfeasor, but the Brunei court did not, then it probably would not be able to recover contribution from Bristow Malaysia under the relevant legislation of Brunei.[89] This was perceived to have been a very harsh possibility for SNIAS, given the strong likelihood that SNIAS' liability would be very minor compared to that of Bristow Malaysia.

But the decision in *Lee Kui Jak* failed to consider upon what justification the proposition that foreign proceedings which are either vexatious or oppressive should be subject to an injunction rested. The issuance of such injunctions clearly violates international comity in that it is a flagrant, albeit vicarious, interference with the sovereign rights of another country. As indicated above, there are clearly conceivable situations where the denial of international comity is justified in order to advance or protect the public interest or policies of the forum. That is to say that the

86 Ibid at 71, 74.
87 Ibid at 80.
88 Ibid at 73.
89 Ibid at 78-80.

promotion of international comity is in the public interest and it is a part of public policy. However it is not a paramount public interest or policy. Consequently, it must bow to a superior public interest when there is such a conflict. It was on the basis of this analysis that the US Court of Appeals for the District of Columbia, in *Laker v Sabena*, was prepared to grant such an injunction.[90]

At no point in the judgment of Lord Goff is there any suggestion that foreign proceedings which are vexatious or oppressive are contrary to the public interest of the forum. Whilst the continuance of vexatious or oppressive proceedings within the forum are contrary to the public interest of the forum, in so far as they tend to bring the judicial process into disrepute, that analysis has no bearing on foreign proceedings which are vexatious or oppressive. The only public interest which foreign vexatious or oppressive proceedings contravene is the public interest of that overseas forum. Surely the protection of that foreign interest is a matter which comes within the exclusive domain of that overseas forum.

What the decision in *Lee Kui Jak* does is to place the private interest of the defendant on the same level as the public interest in promoting international comity. Although in some cases the private interests of litigants may coincide with the public interest, that is not invariably the case. In the absence of any discussion as to whether there was any coincidence between the private interests of the litigant and the public interest of the forum in the judgment of Lord Goff, one can only assume that His Lordship regarded the whole issue as irrelevant. The failure of the decision in *Lee Kui Jak* to address this issue at all leaves it exposed to serious criticism and thereby renders it dubious as a persuasive authority.

In concluding the discussion on transnational injunctions the following points can be made. One, any forum which has a genuine commitment to international comity would only issue such injunctions in extreme cases. However there may exist occasions which would justify the use of transnational injunctions. Two situations have been identified which would justify their use. One is where the forum uses the injunction in order to protect its own legitimate jurisdiction. The other is where the forum uses the injunction to protect a right of a defendant not to be sued when it is not only in the private interest of the defendant not to be sued, but also when it is in the public interest to protect that defendant from foreign suit. Parts one and two lead to a more general statement of principle. Since the promotion of international comity is in the public interest and since the issuance of these types of injunctions is antithetical to international comity, they can only be justified when the defendant can show that by their use, some superior and conflicting public interest requirement would either be protected or promoted.

Conclusion:

As noted at the beginning, prior to *The Atlantic Star*, the English approach to unwanted litigants was to use a series of specific rules. However, that was a regime of nothing but specific rules with no general rule as a rule of last resort or a rule which was designed to fill in the gaps created by the specific rules. Since *The Atlantic Star*, there has been a very

90 Supra n 73 at 937-939.

strong emphasis on developing and employing a general rule. This tendency to approach the solution of a diverse and complex range of specific problems by the use of a vaguely worded general rule is reflected in the recent approach to stays of proceedings and transnational injunctions. Nevertheless, an over-emphasis on generalities can be just as unsatisfactory as a myopic preoccupation with specifics.

Moreover, this movement from specifics to generalities can be seen as a cyclical process, in which the next development will see a return to more particularised solutions. A conclusion is not the place in which this point can be developed in any depth. So I will not attempt to do so, other than to make the observation that the current state of confusion in this whole area probably reflects the fact that there has yet to have evolved a balance between when to use specific rules and when to resort to general rules.