Judicial chauvinism or respect for comity: Is it time to bury the anti-suit injunction?

Thesis Submitted for Award of Degree of Doctor of Philosophy in the Faculty of Law, Monash University.

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### Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>Summary</strong></td>
<td>v</td>
</tr>
<tr>
<td></td>
<td><strong>Acknowledgments</strong></td>
<td>vii</td>
</tr>
<tr>
<td></td>
<td><strong>Statement of Authorship</strong></td>
<td>viii</td>
</tr>
<tr>
<td></td>
<td><strong>Library Release Authorisation</strong></td>
<td>ix</td>
</tr>
<tr>
<td></td>
<td><strong>Table of Cases</strong></td>
<td>x</td>
</tr>
<tr>
<td></td>
<td><strong>Chapter 1</strong> Anti-suit injunction: origins and development</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1.1 Introduction</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>1.2 Origins and development</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>(a) The jurisdiction is to be exercised as the 'ends of justice' require it.</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>(b) <em>In personam</em> – the order is directed not against the foreign court but against the parties.</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>(c) The party must be amenable to the jurisdiction of the court.</td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>(d) The jurisdiction must be exercised with caution.</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>1.3 Summation</td>
<td>26</td>
</tr>
<tr>
<td></td>
<td><strong>Chapter 2</strong> The discretion to stay: from abuse of process to <em>forum non conveniens</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2.1 Introduction</td>
<td>28</td>
</tr>
<tr>
<td></td>
<td>2.2 Abuse of process</td>
<td>29</td>
</tr>
<tr>
<td></td>
<td>2.3 The Scottish doctrine</td>
<td>39</td>
</tr>
<tr>
<td></td>
<td>2.4 Transition to <em>forum non conveniens</em></td>
<td>42</td>
</tr>
<tr>
<td></td>
<td>(a) The Atlantic Star</td>
<td>42</td>
</tr>
<tr>
<td></td>
<td>(b) MacShannon v Rockware Glass</td>
<td>47</td>
</tr>
<tr>
<td></td>
<td>(c) The Abidin Daver</td>
<td>48</td>
</tr>
<tr>
<td></td>
<td>(d) Spiliada Maritime Corporation v Cansulex</td>
<td>49</td>
</tr>
<tr>
<td></td>
<td>2.5 United States of America</td>
<td>57</td>
</tr>
<tr>
<td></td>
<td>2.6 Canada</td>
<td>75</td>
</tr>
<tr>
<td></td>
<td>2.7 New Zealand</td>
<td>76</td>
</tr>
<tr>
<td></td>
<td>2.9 Summation</td>
<td>77</td>
</tr>
</tbody>
</table>
### Chapter 3  The discretion to stay: Australian variations

- **3.1 Introduction**
- **3.2 Cigna – the facts**
- **3.3 Background**
  - (a) The objective effect
  - (b) Plaintiff’s right to choose
  - (c) Substantive law of the forum
  - (d) Connecting factors
  - (e) Availability of an alternative forum
  - (f) Personal and Juridical Advantage
  - (g) Service ex juris
- **3.4 Cigna – analysis**
  - (a) Local forum cases
  - (b) Lis alibi pendens
  - (c) Related proceedings
  - (d) Dominant purpose
- **3.5 Summation**

### Chapter 4  Anti-suit injunction: two United States approaches

- **4.1 Introduction**
- **4.2 The ‘strict’ or ‘comity’ approach**
- **4.3 The lax approach**
- **4.4 Summation**

### Chapter 5  Anti-suit injunction: Anglo-Australian approaches and the triumph of vexation and oppression

- **5.1 English development of the law**
  - (a) Castanho v Brown & Root (UK) Ltd
  - (b) The Laker litigation and subsequent cases
  - (c) Advantage
  - (d) Connection with the jurisdiction
- **5.2 Cigna and the Australian approach**
  - (a) Inherent jurisdiction
  - (b) Equitable jurisdiction
- **5.3 Summation**

### Chapter 6  Anti-suit injunction: enforcement of contractual rights

- **6.1 Background**
- **6.2 The Angelic Grace: the paradigm case**
- **6.3 Boundaries of the paradigm**
  - (a) ‘Distance travelled’ by the foreign court
  - (b) Submission to the foreign court
  - (c) Error or negligence
  - (d) ‘Strong cause’ or ‘good reason’
6.4 Summation

Chapter 7 Future hopes

Bibliography

Appendices


Summary

This dissertation involves an examination of the way in which Australian Courts currently exercise their discretion to either stay matters proceeding within their own jurisdiction (following modified principles of forum non conveniens), or by attempting to restrain persons amenable to their jurisdiction from commencing or continuing with proceedings before the courts of other countries, by issuing what are known as anti-suit injunctions.

It is argued that while the first measure is entirely appropriate, and consistent with principles of judicial comity, the second, in all but rare circumstances, is not. It is argued that a judicial device by which the courts of one country attempt to interfere with the workings of the courts of another (and this is the reality no matter the words with which courts have been wont to dress is up) is anachronistic.

The dissertation traces the development of both measures and finds that, despite their different origins, the evolution of the jurisprudence in relation to each has been very much interrelated. It is observed that the courts of most common law jurisdictions have always been concerned to restrain the employment of anti-suit injunctions, even after adopting forum non conveniens principles to make it easier to find in favour of a stay of the local jurisdiction. Reference is made, however, to decisions of some Circuits of the US Court of Appeals, which have taken a different approach and will readily grant injunctions to stay foreign proceedings which they deem to be duplicative of those in the home jurisdiction. It is argued that this approach is anachronistic — although it is noted that it has not been followed in other common law jurisdictions.

Although this dissertation is directed at an analysis of the Australian situation, it includes extensive reference to the development of the law in England, as well as the other major common law jurisdictions, particularly the United States of America. Reference is also made to the moves, currently underway, to address the issue of recognition of foreign jurisdiction through the medium of an international convention.
Starting from the standpoint of questioning the commonsense of the decision of the High Court of Australia in *CSR Ltd v Cigna Insurance Australia Ltd and Others*, this dissertation finds that, in fact the decision in that instance was the only correct one. This was so both with respect to both the decision to stay proceedings in the local forum (New South Wales) and *not* to restrain those proceeding in the foreign forum (New Jersey).

With respect to restraint of local proceedings, although the outcome in *Cigna* was correct, the reasoning of the High Court in this respect has required continual adaptation in order to meet different circumstances and has led to some internally inconsistency. Although the variation from the English approach following *Spiliada* is, as the Court has admitted, slight, it has led to a difference in likely outcome on occasion. The likelihood of such difference between English and Australian Courts in this area has, however, been further reduced following the recent decisions of the House of Lords in *Connelly* and *Lubbe*. The only thing that can be said with certainty in this respect is that the law will undoubtedly continue to develop in both jurisdictions.

The law is stated as available to me on 30 July 2001.

Nicholas Pengelley
Acknowledgments

I wish to thank my supervisors, Messrs Richard Garnett and Judd Epstein, for their support and encouragement both during the period of my LLM candidature and during the period of my research for and writing of this thesis.

I also acknowledge the support, encouragement and understanding of my wife, Natalie, and the debt I owe to the magnificent staff of Monash University Law Library with whom I was fortunate to work for six years.

Nicholas Pengelley
Statement of Authorship

This thesis contains neither material which has been accepted in satisfaction of any of the requirements for the award of any other degree, diploma of similar qualification in any institution of tertiary education nor, to the best of my knowledge and belief, any material previously published or written by another person, except where due acknowledgment is made in the text.

Nicholas Pengelley
### Table of Cases

<table>
<thead>
<tr>
<th>Case Title</th>
<th>Year</th>
<th>Volume</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abidin Daver, The</td>
<td>[1984]</td>
<td>AC</td>
<td>398</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>34,44,48-49,50,52,134,157</td>
</tr>
<tr>
<td>Adams v Cape Industries plc</td>
<td>[1990]</td>
<td>Ch</td>
<td>433</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>205</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>76</td>
</tr>
<tr>
<td>Agro Co of Canada Ltd v 'Regal Scout'</td>
<td>(1983)</td>
<td>148 DLR (3d)</td>
<td>412</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>210</td>
</tr>
<tr>
<td>Aguinda v Texaco</td>
<td>2000 WL 122143 (SDNY January 31, 2000)</td>
<td></td>
<td>71,72</td>
</tr>
<tr>
<td>Air Crash Disaster Near New Orleans, La., In re. 821 F2d 1147</td>
<td>(5th Cir, 1987)</td>
<td></td>
<td>68</td>
</tr>
<tr>
<td>Airbus Industrie GIE v Patel</td>
<td>[1999]</td>
<td>1 AC</td>
<td>119</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>3,15,16,137,143,149,153,156,157,162-170,185,187,188,214,219,221,222,225</td>
</tr>
<tr>
<td>Akai v PIC</td>
<td>[1996]</td>
<td>188 CLR</td>
<td>418</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>189-190,192,209-212,218</td>
</tr>
<tr>
<td>Akai v PIC [1999]</td>
<td>1 Lloyds Rep</td>
<td>(English Commercial Court)</td>
<td>90</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>25,204,206,207,210-212,213,216,217,222,241</td>
</tr>
<tr>
<td>Aldington Shipping Ltd v Bradstock Shipping Corp and Marbrnaft GmbH</td>
<td>(The Waylink and Brady Maria) [1988]</td>
<td>1 Lloyds Rep</td>
<td>475</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>77</td>
</tr>
<tr>
<td>Alfred C Toepfer International GmbH v Molino Boschi Srl</td>
<td>[1996]</td>
<td>1 Lloyds Rep</td>
<td>510</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>203-204,206</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>197-199,204,217,219</td>
</tr>
<tr>
<td>Allendale Mutual Insurance v Bull Data Systems, Incorporated</td>
<td>10 F3d 425 (7th Cir, 1993)</td>
<td></td>
<td>131-136</td>
</tr>
<tr>
<td>Amchem Products Inc v British Columbia (Workers' Compensation Board)</td>
<td>[1993]</td>
<td>1 SCR</td>
<td>897</td>
</tr>
<tr>
<td>Amin Rasheed Shipping Corp v Kuwait Insurance Co</td>
<td>[1984]</td>
<td>AC</td>
<td>50</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>134,156-157</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>26,190-191,192,193,194ff,213,214,215-216,217,218,219,241</td>
</tr>
<tr>
<td>Apple Corps Ltd v Apple Computer Inc</td>
<td>[1992]</td>
<td>RPC</td>
<td>70</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>192,193</td>
</tr>
<tr>
<td>Arab Monetary Fund v Hashim &amp; Others (No.6) (Unreported, Chancery Division, 14 July 1992)</td>
<td></td>
<td></td>
<td>154-155,156</td>
</tr>
<tr>
<td>Armstrong v Armstrong and the Duke of Orleans</td>
<td>(1892)</td>
<td>P</td>
<td>98</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>20,183</td>
</tr>
</tbody>
</table>
Athenee, The (1922) 1 Lloyds Rep 6
98
Atlantic Emperor, The [1992] 1 Lloyds Rep 624
204-205
12, 19, 33, 42-47, 48, 50, 84, 85, 86-87, 90, 124, 139-140, 141, 142, 150, 152, 187
Banco Atlantico SA v British Bank of the Middle East [1990] 2 Lloyds Rep 504
157
Bank of Tokyo v Karoon [1987] 1 AC 45
19, 141, 147-148, 177-178, 179-180, 182-183, 188
Barbajacs Bank plc v Homan and others [1993] BCLC 680
25
Baroda v Wildenstein [1972] 2 QB 283
36, 44, 97
Beauchamp v Huntley (1822) Jac 546
20
Beckford v Kemble (1822) 1 Sim & St 7; 57 ER 3
10
Bethell v Peace 441 F2d 495 (5th Cir, 1971)
127-128, 130
Binkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia [1992] 2 SLR 776
76
65
Bouygues Offshore SA v Caspian Shipping Co [1998] 2 Lloyds Rep 461
209, 217
Breadalbane v The Marquis of Chandos (1837) 2 My & C 711
20
191-192, 210
Bridgeway Corporation v Citibank 201 F3d 134 (2d Cir, 2000)
72
British Airways Board v Laker Airways Ltd [1985] 1 AC 58
8, 15, 19, 118-123, 134, 143-145, 155, 201
British South Africa Co v Companhia de Mozambique [1893] AC 602
68
Bunbury v Bunbury (1839) 1 B 318
20
Bushby v Munday, Cloves and Cracroft (1821) 5 Madd 297
10, 16, 17, 18, 20, 31, 32, 138, 147, 199
Camilla Cotton Oil v Granadex SA [1976] 2 Lloyds Rep 10
108
Canada Malting Co. Ltd v Paterson Steamships Ltd 285 US 413 (1932)
57
Cargill, Inc v Hartford Accident and Indemnity Co 531 F Supp 710 (D. Minn, 1982)
137
Carron Iron Co v Maclaren [1855] 5 HLC 416
17-18,20,21,22,31,32,138,147,193
19,22-23,139,140,141-143,144,146,150,151,158,159,160,161,193,201
Castro v Murray (1875) LR 10 Ex 213
30,35
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334
201-202
Chapman, Re (1872) LR 15 Eq 77
23
China Trade & Development Corporation v MV Choong Yong 837 F2d 33 (2d Cir, 1987)
118,123,125,128,120,137
Christian v Christian (1897) 67 LJP 18
183
Christianborg, The [1885] 10 PD 141
35
Clements v Macaulay (1866) 4 MacPherson 583
39,40,41
Club Mediterranee NZ v Wendell (1989) 1 NZLR 216
76
Cohen v Rothfield [1919] 1 KB 410
23,36,183,193
Commonwealth Bank of Australia; Ex part Lloyds (Unreported [1999] VSC 262, 29 July 1999)
212-213
Commonwealth Bank of Australia v White (No.3) (Unreported [2000] VSC 259 (20 June 2000)
213,224
126
Compagnie Des Messageries Maritimes v Wilson (1954) 94 CLR 577
209
Conagra v Lief Investments (1997) 141 FLR 124
110
Connelly v D.P.P. [1964] AC 1254
29
55,68,92,111,113,221
Connolly Brothers Ltd, In re [1911] 1 Ch 732
20
Contact Lumber Co v P.T. Moges Shipping Co. Ltd. 918 F2d 1446 (9th Cir, 1990)
62
Fournier v The Ship "Margaret Z" [1997] 1 NZLR 629

Gau Shan Co. Ltd v Bankers Trust Co 956 F2d 1349 (6th Cir, 1992)


Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536

Guidi v Intercontinental Hotels Corp 203 F3d 190 (2d Cir, 2000)

Harbour Assurance Co (UK) Ltd v Kansa General Insurance Co. Ltd [1993] 1 Lloyds Rep 455

Harrods (Buenos Aires) Ltd, Re [1992] Ch 72


Henry v Henry (1996) 185 CLR 571

Hilton v Guyot 159 US 113 (1894)

Hollandia, The [1983] 1 AC 565

Huddart Parker Ltd v The Ship "Mill Hill" (1950) 81 CLR 503

Hughes v Cornelius (1680) 2 Shower 232

Hyman v Helm (1883) 24 ChD 531

International Pulp & Co, Re (1896) 3 ChD 594

Janera, The [1928] P 55


Kaepa Inc v Achilles 76 F3d 624 (5th Cir, 1996)

KC v Shiley Incorporated (Unreported, Federal Court of Australia, 12 August 1997)

Kennedy v Earl of Cassilis (1818) 2 Swans 313; 36 ER 635

Koster v Lumbermens Mut Cas Co 330 US 518 (1947)
Kutchera v Buckingham International Holdings Ltd [1988] IR 66
Laker Airways v Sabena, Belgian World Airlines 731 F2d 909 (DC Cir, 1984)
Leigh and Mardon P/L v PRC Inc (1993) 44 FCR 88
Lett v Lett [1906] 1 IR 816
Lewis Construction Co P/L v Tichauer S.A. [196] VR 341
Liddell's Settlement Trusts, In re [1936] Ch 365
Logan v Bank of Scotland (No.2) (1906) 1 KB 141
London, The [1931] P 14
Longworth v Hope (1865) 2 M 1049
Lord Portarlington v Soulby (1834) 3 My & K 104; 40 ER 40
Love v Baker, Roll and Clutterbuck [1665] 1 Chan Cas 67; [1665] 2 Freeman 125
Lubbe v Cape P.L.C. [2000] 1 WLR 1545
Lucille Bloomfield, The [1964] 1 Lloyd's Rep 324
Mabo v Queensland [No.2] (1992) 175 CLR 1
McHenry v Lewis (1882) 22 ChD 397
Maclaren v Stainton (1855) 26 LJ(Ch) 332
M'Morine v Cowie (1845) 7 Dunlop 270
MacShannon v Rockware Glass [1978] AC 795
Madrid, The [1937] P 40
Maritime Insurance Co Ltd v Geelong Harbour Trust Commissioners (1908) 6 CLR 194
Maxwell Communications Corporation plc (No.2), Re; Barclays Bank plc v Homan & Ors [1992] BCC 757
154-155,161
Mediterranean Shipping Co. SA v Atlantic Container Line AB (Unreported, Court of Appeal, December 3 1998)
215-216
136-137
144-145,155,156,161,167
Mike Trading and Transport Ltd v R.Payman &Fratelli (The ‘Lisboa’) [1980] 2 Lloyds Rep 546
193,200
Missouri Steamship Co, Re (1889) 42 ChD 321
211
Monte Urbasa, The [1953] 1 Lloyds Rep 587
42
Moore v Moore (1896) 12 TLR 221
183,184
Morguard Investments Ltd v De Savoye [1990] 3 SCR 1077
172
Mostyn v Fabrigas (1775) 1 Cowp 161; 98 ER 1021
135
Muduraglu Ltd v TC Ziraat Bankasia [1986] 1 QB 1225
157
124
National Mutual Holdings v Sentry Corporation (1989) 22 FCR 209
10-11,178-179
North Carolina Estate Co Ltd, In Re the (1889) 5 TLR 328
20,23
Norton’s Settlement, In re [1908] 1 Ch 471
36
Oceanic Sun Line Special Shipping Company Inc v Fay (1988) 65 CLR 197
33,37,39,56,80,83-84,85-87,88,92,93,94,95-96,98,99,100,102,109,111,113,124,182,189,216,224
Patrickson v Dole Food Co. (D.Haw, September 9, 1998)
74-75
Pena Copper Mines v Rio Tinto (1911) 105 LT 846
193
Penn v Lord Baltimore (1750) 1 Ves. Sen. 444
10
Peregrine Myanmar Ltd v Segal 89 F3d 41
62
Peruvian Guano Co v Bockwoldt [1883] ChD 225
34,36,38,101-2,182
Pfeiffer Pty Ltd v Rogerson (2000) 172 ALR 625
12,13,83
Philip Alexander Securities & Futures Ltd v Bamberger (Unreported, Court of Appeal, 12 July 1996)
199,214-215,216,217,219,222-223,224
Philips Medical Systems International B.V. v Bruetman 8 F3d 600 (7th Cir, 1993)
131
Phillips v Eyre (1870) LR 6 QB 1
83
60-61,62,63,66,68,77,148
202
56
64-67,74
68
Quo Vadis, The [1951] 1 Lloyds Rep 425
42
Reid-Walen v Hansen 93 F2d 1390 (9th Cir, 1991)
62,63,66,67
Republic of the Philippines v Westinghouse Electric Corp 43 F3d 65 (3d Cir 1995)
125-126
Rosler v Hilley [1928] Ch 250
28,97
Rowland v Gulfpac Ltd (Unreported, Queen's Bench Division, Rix J, 12 May 1997)
108
Royal Exchange Assurance and Others v Compania Naviera Santi, SA (The 'Tropaioforus (No.2)) [1962] 1 Lloyds Rep 410
21-22,23
Russell v Monroe (1886) 7 LR (NSW) Eq 50
36
Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpin Interlending GmbH [1997] 1 Lloyds Rep 179
206
Seattle Totems Hockey Club, Inc v National Hockey League 652 F2d 852 (9th Cir, 1981)
130-131
Settlement Corporation v Hochschild [1966] 1 Ch 10
193
Sim v Robinow (1892) 19 R 665
40,50
Simon Engineering PLC v Butte Mining PLC (No.2) [1996] 1 Lloyds Rep 91 160-161
Siromath P/L (No.3), Re (1991) 25 NSWLR 25 180
Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera S.A. [1979] AC 210 201
Smith Kline & French Laboratories Ltd v Bloch [1983] 2 All ER 72 115,161
Societe du Gaz de Paris v Armatuers francais (1925) SC (HL) 13 40-41
Society of Lloyd's v White (Unreported, Queen's Bench Division, Commercial Court, 3 March 2000) 212,213,217,218,222,241
South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" N.V. [1987] AC 24 14,145-147,148-149
Soya Margareta [1961] 1 WLR 709 42
St.Pierre v South American Stores (Gath & Chaves) Ltd [1936] 1 KB 382 37-38,46,47,84,85,86,140
Strauss & Company v Goldschmid (1892) 8 TLR 512 97
Svendbord v Wansa Estonian Shipping Co [1996] 2 Lloyds Rep 559 206
Syarikat Buniputra Kimanis v Tan Kok Voon [198] 3 MLJ 315 76
Tait, Ex p. (1872) LR 13 Eq 311 20
Thornton v Thornton (1886) 11 PD 176 38
Tracomin S.A. v Oil Seeds Co Ltd [1983] 1 WLR 662 1,196,205-206
Trendtex Trading Corporation v Credit Suisse [1982] AC 697 53
Ultisol v Bouygues [1996] 2 Lloyds Rep 140
206,207-208
Union Carbide Corp Gas Plant Disaster at Bhopal, India in Dec. 1984, In re. 89 F2d 195 (2nd Cir, 1987)
63-64
Unterweser Reederei GmbH, Re 428 F2d 888 (5th Cir, 1970)
118,127-128,130,207
Venning v Lloyd (1859) 1 De G.F. & J 193
20
Viro v The Queen (1978) 141 CLR 88
56,79
Vishnay Ajay, The [1989] 2 Lloyds Rep 558
157
Vita Food Products Inc v Unos Shipping Co Ltd [1938] 63 Lloyds Rep 21
211
Volvox Hollandia [1988] 2 Lloyds Rep 361
108
Voth v Manildra Flour Mills (1990) 171 CLR 538
3,29,37,80,83,87-88,89-92,93-95,96-97,98-99,100,102-103,105,106,107,111,112,113,
114,116,158,187,233
Wharton v May (1799) 5 Ves. Jr. 27
10
Young v Barclay (1846) 8 Dunlop 774
39

xix
Chapter 1

Anti-suit injunction: origins and development

1.1 Introduction

'The case is not a case about peanuts. It is about who shall decide a case about peanuts.'

So said Stoughton J in Tracomin S.A. v Sudan Oil Seeds Co Ltd,1 in the course of deciding whether a case that really was about peanuts should be heard in England or Switzerland. There are various ways in which a court may decide who shall decide a case about peanuts. The High Court of Australia summarised them thus in CSR Ltd v Cigna Insurance Australia Ltd and Ors2 (‘Cigna’):

The question whether a dispute as to legal rights should be litigated in the courts of one country or those of another is one that permits of resolution, if resolution is possible, by one court staying its proceedings in favour of the other or by it granting an anti-suit injunction restraining a person amenable to its jurisdiction from commencing or continuing proceedings in that other country.3

An anti-suit injunction (whether interlocutory or final) is one that restrains the plaintiff or prospective plaintiff in foreign proceedings from commencing or maintaining those proceedings. It exists, in the main, to counteract the exercise of jurisdiction by foreign courts that is, in the opinion of the home court, unnecessarily wide.

It should be pointed out that the anti-suit injunction is principally a creature of common law jurisdictions, its use almost entirely unknown in civil law jurisdictions, which have other methods for dealing with the allocation of jurisdiction and which therefore, as a rule, do not require parties first of all to litigate about where they shall litigate. Under the Brussels4 and Lugano5 Conventions the jurisdictional choice of parties is upheld as a paramount objective, as spelled out in the mandatory language of

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3 Ibid 389-390.
Article 17 of both Conventions. It should be said, however, that there are difficulties associated with the rigid application of this rule and uncertainties over aspects of its application, particularly in determining which court is properly seised first, a matter that is complicated by the variety of national approaches to that matter. The European model will be discussed further in chapter seven, in the context of alternative approaches.

The use of the anti-suit injunction, as may be imagined, has led to jurisdictional conflicts that have seen the courts of one country interfere to halt proceedings before the courts of another, at times overturning important public policies of that other country in doing so. Despite the fact that it is argued that, in doing so, courts act in personam, and that the action is not directed at the foreign court, the reality is otherwise. This is hardly a situation to be desired and it is the central contention of this dissertation that anti-suit injunctions should not be used except in very exceptional circumstances, specifically, only as spelled out by the International Law Association's Leuven/London Principles, in those instances where parties have made a clear bargain to pursue a particular course of action and that bargain has been manifestly breached by the law of both countries involved. The only way in which this will be achieved by common law jurisdictions is by the adoption of an international convention which establishes the rules for declining and allocation of jurisdiction. As also shall be discussed in chapter seven, such a convention is currently being negotiated under the auspices of the Hague Conference on Private International Law.

In 1987, the Judicial Committee of the Privy Council, in Societe Nationale Industrielle Aerospatiale v Lee Kui Jak ('Aerospatiale'), warning that the potential for jurisdictional conflict had increased significantly in recent years, endeavoured to set forth the principles which should henceforth govern the approach to anti-suit injunctions. Earlier that year, the House of Lords had confirmed the new English

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6 Note that, from 1 March 2002, the Brussels Convention will be replaced by the 'Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,' OJ L12/1 2001. (Hereafter the Brussels Regulation).

7 See the discussion of this issue and the solutions put forward in the report of Dr McLachlan to the International Law Association Conference (London 2000). Committee on International Civil and Commercial Litigation, Third Interim Report: Declining and Referring Jurisdiction in International Litigation. Hereafter 'the McLachlan Report'.

approach to stay of local proceedings on the grounds of inappropriateness of the forum
(forum non conveniens), in Spiliada Maritime Corporation v Cansulex Ltd
('Spiliada'). In 1990, in Voth v Manildra Flour Mills ('Voth'), the High Court of
Australia also pronounced on stay of local proceedings, but did not, at that time, consider the proper approach to the restraint of foreign proceedings by Australian
courts.

It was not until 1997, ten years after the decision in Aerospatiale, that the High Court
considered its position with respect to anti-suit injunctions, saying, in Cigna, that, 'The
proper approach to the resolution of jurisdictional conflict between Australian and
foreign courts is a matter of considerable importance'. With the decision in Cigna,
Australia has now joined the United Kingdom, United States and Canada in
attempting to clarify the principles governing anti-suit injunctions, and the question of
who should decide cases about peanuts, or anything else for that matter.

These and other recent developments in the national courts of the major common law
jurisdictions to be discussed, and certain moves on the international scene (to be
discussed in chapter seven), might be interpreted to indicate that the employment of the
anti-suit injunction is being restricted to certain very clear (and very few) instances.
Although this is not necessarily the reality, it is nevertheless an interpretation much to
be hoped for, as this dissertation will argue.

The world grows steadily more economically interdependent. Businesses, domestic
and international, need to be able to predict the likely outcome of their actions, and

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10 (1990) 171 CLR 538.
11 These English and Australian approaches will be explained and discussed during the course of this thesis.
13 Aerospatiale; Airbus Industrie GIE v Patel [1999] 1 AC 119.
14 The situation in the United States is complicated because the Supreme Court has not
pronounced on the issue and two quite different approaches have been adopted by several
Circuits of the US Court of Appeals. Further details are provided in chapter four of this
dissertation.
15 Amchem Products Inc v British Columbia (Workers' Compensation Board) [1993] 1 SCR
897; 102 DLR 4th 96.
16 See e.g., A. Seita, 'Preface to globalization and the convergence of values' (1997) 30 Cornell
International Law Journal 429, 429. 'As the twentieth century comes to a close ... [g]reater
therefore need a stable legal environment. This is more than ever the case with the advent of electronic commerce and the Internet economy. It is indeed questionable that continuance of a legal order under which litigants in a court in one jurisdiction may be ordered by a court in another jurisdiction to halt their proceedings, at the behest of another party, sometimes on the grounds that the very existence of their separate but duplicate proceedings is vexatious, should be allowed to continue.

The *Cigna* case involved the question of whether litigation between giant insurance and mining companies should take place in New South Wales, Australia or in New Jersey, United States of America. Rolfe J, at first instance in the Supreme Court of New South Wales, held that they should take place in New South Wales and he issued an anti-suit injunction to halt the American proceedings. A majority of the High Court of Australia (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) disagreed with his findings and allowed the appeal from his decision.

The facts of the case will be fully outlined in chapter three, however, for the purposes of establishing the argument that will be pursued in this dissertation, it should be stated that a reading of the judgments of Rolfe J at first instance, and the minority dissenting judgment of Brennan CJ in the High Court, is initially quite persuasive in support of the view that the New South Wales proceedings should *not* have been stayed and that an injunction *should* have been issued to halt those underway in New Jersey (assuming that one ignores for the moment arguments against the employment of the anti-suit injunction as being an unjustified interference in the processes of another court). The list of factors in support of this view is an impressive one; it covers more than four pages in the report of the case in the *Commonwealth Law Reports* where they were summarised by Chief Justice Sir Gerard Brennan. Both parties were within the local (New South Wales) jurisdiction. The contracts of insurance were entered into in Australia. A purported contract not to sue was entered into in New South Wales and would be determined by the law of that State, and the witnesses to it resided there or

numbers of domestic business, employees, and consumers have looked to foreign markets, investors and products for economic prosperity as well as economic competition.  
17 (Unreported, Supreme Court of New South Wales, 15 August 1995 (anti-suit injunction) and 20 February 1996 (stay of local proceedings)).  
18 It should be noted that, although both Rolfe J and Brennan CJ accepted that there was a contract not to sue, the High Court majority did not, so that this important issue was not a factor in their resolution of the issue.
elsewhere in Australia. Much of the alleged tortious conduct took place in New South Wales and would be determined by the law of that State. Much of the evidence otherwise was available in Australia.

One's first reaction on reading this impressive list is to ask, 'Weren't they right?' The impression that the commonsense approach was ignored grows upon a first reading of the High Court majority judgment, which appears to overlook all of these connecting factors and find in favour of New Jersey 'simply' because the giant mining company, CSR, was first in the field and because they pleaded a US statutory remedy not available in Australia. At first reading it does not seem reasonable that these apparently simple factors should have been decisive.

First impressions are not always the best, however, and it is always advisable, when in doubt about the sensibility of judicial reasoning, to look again. In his speech to the House of Lords in *MacShannon v Rockware Glass*, Lord Salmon said that,

> The common law of England almost invariably marches in step with commonsense. If one examines the authorities and, at first sight, comes to the conclusion that they lead to a result which is contrary to commonsense, it is advisable to re-examine them; for this will usually show that one's first impression was wrong.

At first reading, the decision of the majority in *Cigna* might appear to be contrary to commonsense, the majority having seemingly ignored the list of factors which make Brennan CJ's decision seem, *prima facie*, to be so rationally correct. But one would hope that what Lord Salmon said about the common law of England is equally true of the common law of Australia, and that it, also, almost invariably marches in step with commonsense. This dissertation will set out to reject any thought, therefore, that the High Court majority decision is contrary to commonsense, and that the anti-suit injunction granted by Rolfe J, and upheld by Brennan CJ, should also have been upheld by the majority. It will be argued that in fact this initial reaction is wrong and that the majority did fashion the only correct outcome, consistent with principles of judicial comity and commonsense. It will be argued that the test developed by the High Court majority is a significant contribution to the developing jurisprudence in a complex area of private international law. It accords recognition to the reality that an

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20 Ibid 817.
anti-suit injunction should only be granted in those very rare instances where the interests of justice demands it.

In this dissertation I will undertake a critical discussion and analysis of the High Court’s decision in Cigna, and the issues raised by it, with a view to describing the parameters which now guide Australian courts in determining whether or not to grant an anti-suit injunction.

In this present chapter I will trace the origins and development of the anti-suit injunction. In doing consideration will be given to the influence of principles of judicial comity on the exercise of the discretion to grant such an injunction, and because the history of anti-suit injunctions is intertwined with the jurisdiction to stay local proceedings, I will devote chapter two to that issue, its history and comparative development, primarily in England and the United States.

In chapter three I will continue the analysis and discussion of the jurisdiction to stay local proceedings, focusing on the development of the Australian approach to that issue, which has followed a different path from that of English courts.

In chapter four I proceed to an in-depth consideration of the employment of anti-suit injunctions, as reflected in recent and current jurisprudence, commencing with a discussion of the two different approaches adopted by various Circuits of the United States Court of Appeals. In the following chapter I fully review the approach of English and Australian courts to the matter. And in the penultimate chapter I review the use of the anti-suit injunction in aid of the enforcement of contractual rights, concluding that what appears prima facie to be a comparatively straightforward exercise of the equitable jurisdiction to halt proceedings before a foreign court is, in cases where there was either an agreement to arbitrate or an exclusive jurisdiction clause, in reality, rather more complex.

In the concluding chapter I will discuss possible means to curb the use of anti-suit injunctions, including the proposed international convention, adverted to above, which, it is contended, is the best solution to this vexed issue and which, it is hoped, will remove the uncertainty that has plagued the law in this area, despite, some would say
because of the development of ‘proper approaches’ by the major common law courts in recent years.

1.2 Origins and development

An injunction may be defined as ‘[a] judicial process operating in personam, and requiring [the] person to whom it is directed to do or refrain from doing a particular thing.’ And by the High Court of Australia in the following terms:

The phrase ‘anti-suit injunction’ is now in common use and, at least in some instances, resembles an injunction granted to protect the legal or equitable rights of the plaintiff or a common injunction to protect the processes of the Chancery Court against interference by the processes of other courts. However, it should be borne in mind that the term ‘injunction’ in the parlance of equity has no fixed definition and that it is legal usage which decides which court orders are to be identified as injunctions.

Anti-suit injunctions have been called 'the most practically important class of injunctions'. This because a court issuing an anti-suit injunction effectively renders it impossible for the other court to hear the dispute and make any decision for itself whether to assert its jurisdiction. This, as I shall discuss, is the core of the problem. A device by which one court tells the court of another country to desist (and regardless of the in personam basis of the jurisdiction, this is what really happens), is a device the use of which ought to be severely restricted for what should be obvious reasons: that interference by the courts of one country in the processes of those of another is not a desirable thing.

The anti-suit injunction is a device of ancient and long-established origin, with some of its early ancestors traceable to Ancient Rome. There is also a marked similarity to several of the writs granted by early English monarchs. The anti-suit injunction, as we now know it, is an equitable instrument (although it may be employed in the exercise of either the equitable or inherent jurisdictions, as shall be discussed) and its

24 D.Raack, above n21, 540-50 (detailing the varieties of Roman ‘interdicts’).
25 Ibid. (detailing the early English writs).
modern origins lie with the jurisdiction of the Court of Chancery. Those origins are uncertain, but its principles were well established by the sixteenth century, by which time the Court of Chancery was certainly empowered to prevent persons from proceeding before the courts of law if in doing so they were in breach of its maxims about trust and fraud. These anti-suit injunctions (then called common injunctions) were the techniques by which equity asserted itself over common law. They were granted when, according to the rules of equity, it was ‘unconscionable’ for a party to rely on his common law rights. Lord Diplock’s description of unconscionable conduct in British Airways Board v Laker Airways Ltd (‘Laker’), for instance, is based on the principles on which the Court of Chancery would have granted common law injunctions. His examples included estoppel in pais, promissory estoppel, election, waiver, standing by, laches and blowing hot and cold. Injunctions were issued to prevent persons, for reasons personal to themselves, from proceeding with inequitable conduct.

The equitable rationale notwithstanding, and for reasons which have not altered to this day, judges of the English courts of law took offence at what they nevertheless perceived to be unwarranted interference with their jurisdiction. The best known instance of this is the cause celebre battle between Chief Justice Coke and Lord Chancellor Ellesmere. Ellesmere was a staunch upholder of the absolutist monarch, James I, who believed in the divine right of kings and specifically that the king was above the law. Coke was just as strong an upholder of the common law and the view that it was independent of and above the king. The King commanded that Chancery be available to provide equity to his subjects where they were denied relief by the rigor and extremity of the law. Coke took the offensive (no small act of defiance in those times when many who opposed the Monarch forfeited their lives for less reason) and declared that any calling into question of the judgments of the King’s courts was an

26 F.W. Maitland, Equity, a course of lectures (revised edition, 1936) 8-9; D. Raack, above n 21, 555-558.
27 Ibid.
28 [1985] 1 AC 58.
29 Ibid 81.
30 See H. Hallam, Constitutional History of England (1827) vol 1, 372 et seq; ‘Arguments proving from antiquity the dignity, power, and jurisdiction of the Court of Chancery: The Jurisdiction of the Court of Chancery Vindicated’ (Annexure to the Earl of Oxford’s Case in Chancery (1616) 1 Ch Rep 1).
offence contrary to the Statutes of Praemunire, which provided that a judgment in a
court of law shall not be impeached or attacked, but shall be kept in peace unless
overturned by attaint or error. The dispute was resolved by the intervention of the
King, who was looking for a pretext to assert his authority over the common law courts
(and particularly Chief Justice Coke), in favour of the Court of Chancery. Its
equitable jurisdiction was confirmed as the result of a commission led by Sir Francis
Bacon (then Attorney-General). Despite scholarly argument to the contrary,
Holdsworth stated that James' decision was 'so absolutely right', because it kept intact
a system of equity that greatly benefited litigants.

The Court of Chancery, during and before this time, had not been unconcerned about
the role its injunctions played in interfering with the common law courts, and a series
of curbs had been placed on the use of the injunction, starting with reforms undertaken
during the Chancellorship of Sir Thomas More. Successive Chancellors added to the
requirements necessary for the issuance of an injunction. By the time of the American
Revolution, and the opportunity that arose for the new United States of America to
write its laws anew, the injunction was regarded with great disfavour. It is hardly
surprising therefore that one of the first federal statutes passed by the young country
was one to restrict the use of anti-suit injunctions by the federal courts in domestic
matters.

32 D.Raack, above n 21, 582.
33 27 Edw 3, ch 1 (1353); 4 Hen 4, ch 23 (1403).
34 D.Raack, above n 21, 560.
35 See, e.g., C.Bowen, The lion and the throne; the life and times of Sir Edward Coke, 1957;
J.Pomeroy, A treatise on equity jurisprudence (3rd ed., 1905) s 1360, 699-700. (Noting the 'long
and severe opposition from the common law judges' to the idea that Chancery's equitable
rulings could defeat a recovery at law.).
37 Ibid.
38 D.Raack, above n 21, 586.
Harvard Law Review 49, 96-100 (describing the heated debate in the US Congress over the
Federal Judiciary Act of 1789 and the proposal that suits in equity would not be sustained when
a remedy could be had by law).
40 Act of March 2, 1793 ch 22 ss, 1 stat 334, 334-5 (1793) (Stating that 'no writ of injunction
[shall] be granted to stay proceedings in any court of a state.').
English courts have exercised the equitable jurisdiction to restrain a party from proceeding in a foreign court since the early nineteenth century, and indeed before.41 The real growth of the jurisdiction, however, came with nineteenth century cases that were primarily concerned with restraint of proceedings before the courts of Ireland (eg. Lord Portarlington v Soulby),42 Scotland (eg. Kennedy v Earl of Cassilis)43 or those of the colonies (eg. Beckford v Kemble).44 In 1821, Leach V.-C., in Bushby v Munday, Cloves and Cracroft,45 stated the rule as follows:

Where parties Defendants are resident in England, and brought by subpoena here, this Court has full authority to act upon them personally with respect to the subject of this suit, as the ends of justice require; and with that view, to order them to take, or to omit to take, any steps and proceedings in any other Court of Justice, whether in this country, or in a foreign country.

This principle was affirmed in 1834:

In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstances of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; - if, for instance, as in Penn v Lord Baltimore (1750) 1 Ves. Sen. 444, it can decree the performance of an agreement touching the boundary of a province in North America; ... in precisely the like manner it can restrain the party being within the limits of its jurisdiction from ... the instituting or prosecution of an action in a foreign court.46

In both passages the Court emphasised that, for an injunction to be granted, the party to be restrained must be within its jurisdiction. The basis for injunctions sought in the Chancery jurisdiction to restrain proceedings outside the forum was to establish whether the plaintiff had an equity sufficient to attract the jurisdiction of the court, which could then legitimately interfere with the legal rights of the defendant to continue the action before the other court (whether domestic, that of a colony or that of a foreign jurisdiction). The modern jurisdiction, as Gummow J said in National Mutual Holdings v Sentry Corporation,47 "operates upon legal entitlement and to prevent

42 (1834) 3 My & K 104; 40 ER 40.
43 (1818) 2 Swans 313; 36 ER 635.
44 (1822) 1 Sim & St 7; 57 ER 3.
45 (1821) 5 Madd 297, 307.
46 Lord Portarlington v Soulby (1834) 3 My & K 104, 108.
unconscientious assertion or exercise of that entitlement.\textsuperscript{48} The jurisdiction, he said, 'illustrates ... the force of the precept that equity acts \textit{in personam}.\textsuperscript{49}

Although Chief Justice Coke's battle with Lord Chancellor Ellesmere took place nearly four hundred years ago, litigation \textit{about} litigation is a relatively recent phenomenon. A review of the various editions of the leading text on conflict of laws, \textit{Dicey's Conflict of Laws} (now \textit{Dicey & Morris on the Conflict of Laws}), reinforces this view. From half of one page (and only a 'note' at that) in the first edition of 1896, on the jurisdiction to stay for \textit{lis alibi pendens}, commenting on the decision in \textit{McHenry v Lewis},\textsuperscript{50} the relevant text had only grown to nine pages by the ninth edition of 1973. It is not until the tenth edition of 1980 that we find a substantive chapter devoted to 'Jurisdiction to stay actions -- \textit{forum non conveniens, lis alibi pendens} and foreign jurisdiction clauses.' The phenomenon is largely one of the latter part of the 20\textsuperscript{th} century, caused by the massive growth and increased complexity of global commerce (and now global electronic commerce), and the need to maintain corporate advantage in a shrinking world. As developments like the East Asian economic 'meltdown' prove, it is a world in which international trade and economics makes a mockery of national boundaries and government policies.

'\textit{Forum shopping}', the phrase which has come to describe the search by a party for the forum which has the best chance of victory at the best price, is a natural result of these developments, the stay order and anti-suit injunction a corollary, at least in common law jurisdictions. A useful definition of forum shopping is that supplied by Sir Michael Kerr, in \textit{First National Bank of Boston v Union Bank of Switzerland}.\textsuperscript{51} He said:

\begin{quote}
The expression 'forum shopping' is commonly used to describe the institution of proceedings whereby plaintiffs seek to compel defendants to litigate issues in one jurisdiction when there are already or about to be litigated in another jurisdiction which is suitable for their resolution. It also frequently involves an attempt to persuade the Courts of one country to arrogate to themselves a jurisdiction which belongs more properly to the Courts of another country; so that the grant of the plaintiff's application in one jurisdiction may involve a breach of comity towards the courts of another country.
\end{quote}

\textsuperscript{48} Ibid.
\textsuperscript{49} Ibid.
\textsuperscript{50} (1882) 22 ChD 397, (CA).
\textsuperscript{51} [1990] 1 Lloyds Rep 72 (CA).
And as Collins notes, ‘the enormous cost of litigation has made trials of disputes often prohibitively expensive. Pre-emptive remedies frequently have a decisive effect on the outcome of litigation.’\textsuperscript{52} Lord Simon of Glaisdale has pointed out that,

Forum shopping is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdiction, he will naturally choose the one in which he thinks his case can be most favourably presented; this should be a matter neither for surprise nor for indignation.\textsuperscript{53}

It is submitted that Lord Simon was ahead of his time in expressing these positive (or at least not negative) sentiments with respect to forum shopping, over one quarter of a century ago because forum shopping is a vexed topic, and one which has stirred much judicial and academic debate. The High Court of Australia recently overturned earlier decisions and took a stand against it, at least in domestic matters. In \textit{Pfeiffer Pty Ltd v Rogerson},\textsuperscript{54} the Court unanimously held that, in future the \textit{lex loci delicti} would be applied in all intra-Australian matters.

On one side of the forum shopping debate are those, like the late Professor Juenger,\textsuperscript{55} who argue that plaintiffs will naturally make a ‘judicious choice’ among existing fora; that sometimes this presents the only option to avoid ‘substandard’ law and procedure in the \textit{loci delicti} and that defendants have, in any case, remedies for inappropriate choice of forum by the plaintiff, in the form of the \textit{forum non conveniens} doctrine and the anti-suit injunction.

These arguments are criticised by others such as Professor Opeskin,\textsuperscript{56} who condemns forum shopping for undermining the allocation of jurisdiction between states and being productive of disharmony. He also refutes the ability of defendants to counter plaintiff’s choice of law by relying on \textit{forum non conveniens} or anti-suit injunctions, holding that, under Australian law at least, the plaintiff is in the more favourable position. The ability to ‘forum-shop’ in a small federal entity like Australia with its wide uniformity of laws, however, is one thing – and it can quite clearly be seen that

\textsuperscript{53} \textit{The Atlantic Star} [1974] AC 436, 471.
\textsuperscript{54} (2000) 172 ALR 625.
the recent decision in *Pfeiffer* is a desirable development in retarding it. It is a very different thing, however, to talk of applying the same principles to the international scene; to foreign jurisdictions. As the High Court confined their decision in *Pfeiffer* to intra-Australian disputes this matter is as yet unresolved in Australia.\(^{57}\) The matter is well put in the McLachlan Report,

> The truth is that all systems of civil jurisdiction afford the parties a wide degree of choice as to where to sue in cross-border cases of any complexity. In so doing, the rules reflect the simple reality that the fact patterns presented in transnational cases typically connect the case to more than one country. Those who search for the goal of the one right forum for every case are likely to find their grail elusive.\(^{58}\)

\[^{57}\text{Although it may be: when the High Court delivers judgment in }R\text{egie National Des Usines Renault S}\text{A and Renault Automobiles S}\text{A v Zhang (Special Leave Granted, 15 December 2000).}\]

\[^{58}\text{McLachlan Report: above n7, para 6.}\]

\[^{59}\text{[1987] 1 AC 871.}\]

The 1987 decision of the Judicial Committee of the Privy Council in *Aerospatiale*\(^{59}\) is a useful starting point for an Australian analysis of this topic, in particular because of the review of earlier authorities undertaken by Lord Goff of Chieveley.

The case concerned the crash of a helicopter in Brunei Darussalem. The helicopter was manufactured by a French company, SNIA. It was owned by an English company and operated by a Malaysian company. One of those killed in the crash was a very wealthy businessman, resident in Brunei. The deceased's widow and the administrators of his estate brought proceedings in Brunei against the Malaysian company and SNIA; in France against SNIA; and in Texas against, inter alia, SNIA and its associated companies. The Texas Court had jurisdiction over SNIA because the corporation conducted business there. Very plainly, however, proceedings were instituted in Texas because of the perceived advantages provided by that forum, which included the availability of contingency fees and the award of punitive damages. The principles of *forum non conveniens* were said not to be observed in Texas, although this was not in fact the case. (The situation with respect to *forum non conveniens* in Texas was a complex one. It will be discussed later in chapter five of this dissertation.) SNIA sought an injunction to halt the Texas proceedings.
In a review of the earlier authorities pertinent to the issue, Lord Goff of Chieveley stated that four basic principles had emerged, with respect to exercise of the discretion to grant an anti-suit injunction. He said that these were ‘beyond dispute’:

First the jurisdiction is to be exercised when the ‘ends of justice require it’.

Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.

Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy.

Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.

Lord Goff stated that these principles are uncontroversial,

[B]ut it has to be recognised that it does not provide very much guidance to judges at first instance who have to decide whether or not to exercise the jurisdiction in any particular case.

The decided cases, stretching back over a hundred years and more provide however a useful source of experience from which guidance may be drawn. They show, moreover, judges seeking to apply fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories.

In his speech in Aerospatiale, Lord Goff of Chieveley identified two categories of case from the earlier authorities, noting at the same time that those authorities had never asserted that the jurisdiction should be confined to these two categories. His Lordship identified one category as being the grant of an injunction to protect the jurisdiction of the English court (the inherent jurisdiction) — which Lord Goff himself had thought might generally underlie the jurisdiction to grant anti-suit injunctions, in his earlier judgment in South Carolina Insurance Co v Assurantie Maatschappij ‘De Zeven Provincien’ N.V. Less than a year later, however, in Aerospatiale, ‘their lordships [were] persuaded that this is too narrow a view’.

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60 Ibid 892 (references omitted).
61 Ibid.
62 Ibid.
64 [1987] 1 AC 871, 893.
The other category is that where the plaintiff has commenced proceedings against the defendant in respect of the same subject matter in both the local and a foreign forum, ‘and the defendant has asked the English court to compel the plaintiff to elect in which country he shall alone proceed.’ The foreign proceedings would be restrained, according to authority, if they were regarded as vexatious or oppressive. In *Airbus Industrie G.I.E. v Patel* (*Airbus*), Lord Goff said that, ‘an injunction may be granted to restrain the pursuit of proceedings overseas which is unconscionable. The focus is, therefore, on the character of the defendant’s conduct, as befits an equitable remedy such as an injunction.’

The Privy Council, in *Aerospatiale*, considered the grant of an anti-suit injunction on the second basis. *Aerospatiale* was an ‘alternative forum’ case, in which the choice lay between the competing claims of Texas and Brunei, in contrast to a ‘single forum case’ like *British Airways Board v Laker Airways Ltd* (to be discussed), where the English Court is asked to grant an anti-suit injunction to restrain a party from proceeding in a foreign court which alone has jurisdiction over the relevant dispute. From the cases to be discussed in the course of this dissertation it will be clear that courts will be more reluctant to interfere in single forum cases.

Little attention was paid in either of these cases, to a further important category of case, concerned with the enforcement of contractual rights, except in passing, in *Airbus*. Lord Goff noted that, in attempting to formulate the principle in *Airbus*, he did ‘not concern myself with those cases in which the choice of forum has been, directly or indirectly, the subject of a contract between the parties. Such cases do not fall to be considered in the present case.’ It is this category though which has been established as that providing possibly the best rationale for continuing to allow the use of anti-suit injunctions, although, as shall be discussed in chapter six, that rationale is questionable in all but the very clearest cases.

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65 Ibid.
In *Airbus*, the House of Lords revisited the decisions on anti-suit injunctions and approved the reasoning in *Aerospatiale*. Lord Goff of Chieveley, who also delivered the principal speech in *Airbus*, said that:

This jurisdiction has a long history, finding its origin in the grant of common injunctions by the English Court of Chancery to restrain the pursuit of proceedings in the English courts of common law, thereby establishing the superiority of equity over common law. In the course of the 19th century we can see the remedy of injunction being employed to restrain the pursuit of proceedings in other jurisdictions within the United Kingdom, and even in other jurisdictions overseas.

Given the endorsed authority of the decision of the Judicial Committee of the Privy Council in *Aerospatiale*, that of the House of Lords in *Airbus*, and the ‘useful source of experience from which guidance may be drawn’, which the earlier cases were said to represent, it is appropriate to employ the four principles identified by Lord Goff to categorise these earlier decisions and review them here, as an aide to understanding the historical basis for the jurisdiction, before returning to a discussion of the principles formulated in *Aerospatiale* itself, in chapter five.

**a) The jurisdiction is to be exercised as ‘the ends of justice’ require it.**

This broad phrase, or something akin to it, clearly open to subjective interpretation, has been used often since first employed by Sir John Leach V.-C. in *Bushby v Munday*, as the rationale for the grant of an anti-suit injunction in that instance. That early case concerned one Bushby, a Scot, who gave a bond to Munday to secure a gambling debt. Munday assigned the bond to Cloves who proceeded against Bushby in Scotland, but Bushby sought an injunction in England (where such a covenant would be invalid) to stay proceedings, and to have the bond set aside. The English Court granted the injunction on the grounds that the validity of the bond was governed by English law and it could best be tried there. English courts were the best judges of English law. Scottish judges would have to take English law in evidence as a matter of fact. The Supreme Court of Canada described this attitude as ‘parochial’.

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69 Ibid 133.  
70 *Aerospatiale* [1987] 1 AC 871, 892.  
71 (1821) 5 Madd 297.  
72 *Amchem* [1993] 1 SCR 897, 912.
The 'ends of justice' rationale was next employed in *Carron Iron Co v Maclaren*. The Carron Iron Company was incorporated and carried on business in Scotland. One Stainton, a large shareholder in the company, also acted as its agent for the sale of goods in England, where he resided. When Stainton died the executors of his will took out probate in England. An administration suit was instituted in the Court of Chancery, and an order for a general account of the debts and assets made. Subsequent to that order, the company started proceedings in Scotland against the executors for a large sum of money alleged to be due as a debt by Stainton to the company. The executors sought an injunction in England to restrain the continuation of the Scottish proceedings. The House of Lords dissolved the injunction granted by the lower court, in default of appearance, Lord St.Leonards in vigorous dissent (but only on the issue of residence in the jurisdiction).

The Lord Chancellor, Lord Cranworth, said that an injunction will be 'employed whenever the circumstances of the case make such an interposition necessary or expedient', 'on principles of convenience, to prevent litigation, which it has considered to be either unnecessary, and therefore vexatious, or else ill-adapted to secure complete justice.' With a nod of approval to *Bushby v Munday*, he referred to the power of the Court of Chancery to restrain foreign actions which appeared 'ill calculated to answer the ends of justice.' He went on,

> But even when there is no question as to the foreign litigation being or not being necessary, or being or not being likely to be so effectual as litigation in this country, still if a person within the jurisdiction of the Court of Chancery is instituting proceedings in a foreign court, the instituting of which is contrary to equity and good conscience, the Court will, on a bill filed here, restrain the prosecution of such foreign suit, just as if it had been a suit in this country.

And further,

> The result of the authorities is, that if the circumstances are such as would make it the duty of the Court to restrain a party from instituting proceedings in this country, they will also warrant it in restraining proceedings in the foreign court. But though they will justify such a course, yet they will not, as I apprehend, make it the duty of

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73 [1855] 5 HLC 416.
74 The Carron Iron Company was a famous one at that time, responsible for advances in British armaments. These included the Carronade, the famous 'Smasher' which gave an important advantage to the Royal Navy.
75 [1855] 5 HLC 416, 436.
76 Ibid 437.
77 Ibid.
the Court to so act, if from any cause it appears likely to be more conclusive to substantial justice that the foreign proceedings should be left to take their course.\(^{78}\)

Lord St.Leonards said likewise, arguing that the court has power to act as the ends of justice require, and with that view to order parties to take or omit to take any steps and proceedings in any other court of justice, either in an English court or a foreign court. Lord St.Leonards also referred to Bushby v Munday, stating that the Court had ‘decided upon the jurisdiction, according to the merits of the case.’\(^{79}\) Lord Brougham agreed with the Lord Chancellor, and also approved Bushby v Munday, a case which, he stated, ‘goes to the very verge of the law on this point.’\(^{80}\)

Here we find the Court fleshing out the vague ‘ends of justice’ rationale. An injunction may be granted, ‘when the foreign litigation is unnecessary and therefore vexatious’, or ‘ill-adapted to serve complete justice’, or ‘ill calculated to answer the ends of justice’. Added to the admonition that the foreign proceedings would be left to take their course if ‘it appears likely to be more conclusive to substantial justice’, this approach gives the English court a very great deal of latitude and flexibility in the exercise of its discretion to grant an injunction. What it comes down to is that an injunction may be granted in any case where it seemed that the foreign proceedings might not be completely conclusive or when the English Court could conclude that it might be the more appropriate forum.

It is interesting to note that, although we are here concerned with a discussion of the development of the approach to anti-suit injunctions, the halting of proceedings before foreign courts, that the reasoning in Carron Iron, based on what the Court saw, presumably, as a flexible approach to the ‘ends of justice’ was over a hundred years in advance of the final acceptance by English courts of the Scottish formulation of forum non conveniens in stay of local jurisdictions matters, which was arguably the path, with these early decisions, that the English courts had started down. This possibility

\(^{78}\) Ibid 439.

\(^{79}\) Ibid 452. At the end of his speech Lord St.Leonards said that, ‘Of course my opinion will go for nothing.’ But his dissent from the majority was as to the issue of company domicile within the jurisdiction, not as to the jurisdiction of the court to grant an injunction once that jurisdiction was established. Lord Brougham generously observed that, ‘As to what my noble and learned Friend has said about his opinion going for nothing I must observe that it only goes for nothing as regards the decision, but that otherwise the opinion of my noble and learned Friend, especially backed as it is by his very able arguments, must go for a very great deal.’
was accepted, in 1974, by Lord Kilbrandon in his speech to the House of Lords in The Atlantic Star,\(^1\) when he said, 'the law could have developed in either of two ways; the line of approach of the majority, let alone the dissenting speech of Lord St. Leonards, in Carron Iron Co v Maclaren, might have influenced English law in the direction in which Scots law was moving. The late 19th century cases influenced the law in another direction.'\(^2\) That other direction will be discussed fully, in chapter two.

As Lord Goff of Chieveley noted in Aerospatiale,\(^3\) the 'fundamental principle' was restated by, inter alia, Lord Scarman in Castanho v Brown & Root (U.K.) Ltd,\(^4\) and by Lord Diplock in Laker.\(^5\) And by himself (as Robert Goff LJ) in Bank of Tokyo v Karoon,\(^6\) ‘...the jurisdiction is very wide, being available for exercise whenever justice demands the grant of an injunction.'\(^7\) Very wide indeed. Open-ended in fact. The discretion was intended to be fundamentally a flexible one; to be adapted to the circumstances of a case, and not capable of fixed definition. The cases are replete with reference to the flexible nature of the jurisdiction, to be used when circumstances required it. Despite the breadth of language employed, which granted courts apparently unlimited and unfettered jurisdiction, considerations of comity (discussed below) have always, or at least since the latter part of the 19th century, restrained courts in the actual exercise of the discretion to very rare cases. As in Cigna, to which we shall return, it is contended that that is as it should be. The employment of the anti-suit injunction, if it is to be used at all, must be severely limited.

b) In personam – the order is directed not against the foreign court but against the parties

The in personam nature of the jurisdiction can be traced back to comments in the mid-17th century, at the time of the Restoration, in the case of Love v Baker. Roll and

\(^{80}\) Ibid 446.
\(^{82}\) Ibid 476.
\(^{83}\) [1987] 1 AC 871, 892.
\(^{85}\) [1985] AC 58, 81.
\(^{86}\) [1987] 1 AC 45, 59.
\(^{87}\) See also McHenry v Lewis 22 ChD 397, 408 per Bowen LJ; cf. Ewing v Orr-Ewing (1885) 10 AC 453, and Logan v Bank of Scotland (No.2) (1906) 1 KB 141 at 149-151.
Clutterbuck. Plaintiffs in England sought an injunction to restrain the defendants from proceeding against them in Leghorn, where they had arrested the plaintiff's goods. The Court was of the opinion that an injunction ought not to be permitted against a foreign jurisdiction, 'nor out of the King's Dominions'. However, 'all the Bar was of another Opinion [because] the Injunction was not to the Court, but to the Party.' It is interesting, if futile, to ponder that, if the Court had ignored this Opinion, the anti-suit injunction, issued to halt foreign proceedings, might have been no more than a historical footnote.

The matter was definitely settled by the time, however, less than one hundred and fifty years later, that Sir John Leach V.-C. was able to say, in Bushby v Munday, that:

If a defendant who is ordered by this Court to discontinue a proceeding that he has commenced against the plaintiff, in some other Court of Justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceeding, this Court does not pretend to any interference with the other court; it acts upon the defendant by punishment for his contempt or his disobedience to the order of the court;

And in Carron Iron, Lord Cranworth L.C. said, as to the jurisdiction of English and Scottish courts, 'The Court acts in personam, and will not suffer anyone within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction.' As Lord Goff said in Aerospatiale, the cases are full of statements to this effect, so much so that they have become something of a ritual mantra. See, e.g. Lord Portarlington v Soulby; In re the North Carolina Estate Co Ltd; Lett v Lett; In re Connolly Brothers Ltd.

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88 [1665] 1 Chan Cas 67. Also reported as Lowe v Baker, Roll and Clutterbocke [1665] 2 Freeman 125. See also Lord Portarlington v Soulby (1834) 3 My & K 104; Cranstown v Johnston (1796) 3 Ves 70, 182; Beauchamp v Huntley (1822) Jac 546, 22 RR 143; Kennedy v Castliss (1819) 2 Swans 313; Bunbury v Bunbury (1839) 1 B 318; Breadalbane v The Marquis of Chandos (1837) 2 My & C 711, 732; Venning v Lloyd (1859) 1 De G.F. & J 193; Ex p Tait (1872) LR 13 Eq 311; Armstrong v Armstrong (1892) P 98.

89 Now Livorno, Tuscany (at the time of the case a major neutral port).

90 [1665] 1 Chan Cas 67.

91 Ibid.

92 (1821) 5 Madd, 297, 307.

93 [1855] 5 HLC 416.


95 [1871] 1 AC 871.

96 (1834) 3 My & K 104.

97 (1889) 5 TLR 328 per Chitty J.

98 [1906] 1 IR 816, 635 per Sir Samuel Walker C, and 629 per Porter MR.

99 [1911] 1 Ch 732, 745 per Cozens-Hardy MR; 746 per Fletcher Moulton LJ.
In *Ellerman Lines Ltd v Read*,¹⁰⁰ the principle was extended to include cases where a foreign court had in fact given judgment, to restrain a person who had obtained it by fraud from enforcing it. Scrutton LJ said:

I cannot conceive that if an English Court finds a British subject taking proceedings in breach of his contract in a foreign Court, supporting those proceedings, and obtaining a judgment, by fraudulent lies, it is powerless to interfere to restrain him from seeking to enforce that judgment.¹⁰¹

Atkin LJ agreed, saying that the Court would hold the person 'in conscience bound not to enforce that judgment .... in the interests of justice'.¹⁰²

c) The party must be amenable to the jurisdiction of the court

In *Carron Iron*,¹⁰³ the Court refused an injunction because the majority held that the defendant was not within their jurisdiction, Lord St.Leonards in dissent. Because of this no remedy the Court could offer would be effective. Lord Brougham, however, does not appear to have been so firm in this respect. He said that,

I am of opinion with my learned Friend [that is, the Lord Chancellor], that though it is not denied that the Court of Chancery has power in certain cases to restrain parties within its jurisdiction from proceeding in other countries ... yet that depends on the circumstances of each case. And my opinion is in accordance with that of my noble and learned Friend, that here those circumstances do not arise which call for or justify that interposition.¹⁰⁴

Over one hundred years later, Megaw J argued, in *Royal Exchange Assurance and Others v Compania Naviera Santi, S.A.* (The 'Tropaioforos (No.2)'),¹⁰⁵ that this view, that the situation is confined to the facts of the case, was confirmed by Lord Cranworth himself, in *Maclaren v Stainiton*,¹⁰⁶ a later judgment arising out of the same Carron Iron Company litigation. An injunction to halt the Scots proceedings was again refused. But the Lord Chancellor said, 'I conceive, that it must be a very strong case which would justify this Court in restraining a foreigner domiciled in another country from

¹⁰⁰ (1928) 2 KB 144.
¹⁰¹ Ibid 152-3 per Scrutton LJ.
¹⁰² Ibid 155.
¹⁰³ [1855] 5 HLC 416.
¹⁰⁴ Ibid 445.
¹⁰⁶ (1855) 26 LJ(Ch) 332 (C.A.).
proceeding to obtain payment of debts according to the law of the country in which he
is domiciled..."107 Megaw J, commenting on this statement, said that,

It is thus apparent that Lord Cranworth himself did not regard the proposition which
he had stated in the earlier case as absolute or applicable in all circumstances. The
implication, to my mind, clearly is that Lord Cranworth did not regard the question
as one in which the Court was in all circumstances without jurisdiction to grant an
injunction in relation to proceedings in a foreign country, merely by reason of the
fact that a person whom it was sought to enjoin was resident outside this country.108

A further important point, adverted to by Megaw J in the *Tropaioforos (No.2)*, is that,
at the time of the decision in *Carron Iron*, English courts had no rule of procedure
allowing for service out of the jurisdiction, something which was made available
subsequently and now exists as Rules of the Supreme Court, Order 11, rule 1.

They may not physically be within the geographical jurisdiction of the Court, but
they are within the jurisdiction in the sense of being, under our rules of procedure,
subject to, or amenable to, that jurisdiction. Where, therefore, leave is properly
given to serve notice of a writ out of the jurisdiction under Order 11, rule 1(e)
because the action is brought to recover damages or other relief for or in respect of
a contract which, as here, was made within the jurisdiction and is to be governed by
English law, the defendant, though not physically present in England, is made
subject to the jurisdiction of the Court. It is no longer right to say, as it may have
been right to say at the time of [*Carron Iron*] that the person against whom the
injunction is sought is not within the Court’s jurisdiction.109

Lord St.Leonards disagreed as to the facts of the matter in *Carron Iron*, holding that
the Scottish company was properly within the jurisdiction – because it held property in
England and was represented by an agent.

It is to be noted that the fact that a party is amenable to but not actually present within
the jurisdiction does not render the grant of an injunction useless, a mere *brutum
fulmen*.110 Lord Scarman confirmed this in *Castanho v Brown & Root*,111 when he said
that the answer was succinctly given by the Court of Appeal in *In re Liddell’s*

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107 Ibid 333.
109 Ibid 419.
110 In classical Latin, a thunderbolt, 'which may be extremely effective, but which strikes its
victims at random'. 'That is a phrase which appears not infrequently in the old cases in the
Court of Equity, where it was, I think, intended to convey the meaning of an ineffective or
useless thunderbolt – an injunction which could not be enforced by any sanction of the court.'
The *Tropaioforos (No.2)* [1962] 1 Lloyds Rep 410, 420 per Megaw J.
Settlement Trusts, where Romer LJ observed: ‘It is not the habit of this court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed.’ And Slesser LJ, ‘We are not to assume that the lady will necessarily disobey the court…’

d) The jurisdiction must be exercised with caution

Recognising the very wide terms of the discretion they had devised, English judges quickly incorporated another verse to their judicial ‘mantra’ in anti-suit injunction cases. It is to the effect that the discretion must be exercised with caution, out of respect for judicial comity and because judges know that, when all is said and done, despite the fact that the jurisdiction may be said to act in personam, it really does interfere with the processes of a foreign court. This issue of respect for comity is an important one, although it is one that is not always observed, and arguably one to which mere lip service is paid. It is nonetheless what curbs the use of the anti-suit injunction. The comity of nations is the foundation upon which peace between nations is built. Courts play an important role in that process and cannot ignore comity when it comes to the courts of other nations. They do so at their peril, and every use of an anti-suit injunction threatens that comity.

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112 [1936] Ch 365.
113 Ibid 374.
114 [1936] Ch 365, 373. See also Re International Pulp & Co (1896) 3 ChD 594, at 599 per Jessel MR; Re North Carolina Estate Co (1889) 5 TLR 328 per Chitty J; Re Chapman (1872) LR 15 Eq 77 per Bacon VC; The Tropaioforos (No.2) [1962] 1 Lloyds Rep 410, 420.
The High Court majority in *Cigna* utilised the definition of comity supplied by the United States Supreme Court in *Hilton v Guyot*:\(^{118}\)

'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to its international duty and convenience, and to the rights of its own citizens and of other persons who are under the protection of its laws.

Although the *Cigna* majority said that comity was 'relevantly explained' by the *Hilton v Guyot* formulation, that formulation is more concerned with the rationale for why the courts of one country should apply the law of another. This is a straight derivation from the work of Ulrich Huber (1636-1694) whose writing was a major influence on the development of international law, and who set out basic principles with respect to comity in his *De Conflictu Legum*\(^{119}\) which came to constitute the basis of the English doctrine regarding the conflict of laws.\(^{120}\) For long they were the only guiding principles extant. Huber said:

(1) The laws of each state have authority within its frontiers. They oblige all its subjects there, but not beyond.

(2) A state's subjects must be taken to be all those who are to be found within its frontiers, whether residing there permanently or merely for a time.

(3) Those who govern the state must act with comity, so that the laws of another state which have been applied within its frontiers maintain their force everywhere. So long as no prejudice results to the power or rights of another sovereign or his citizens.

Huber stated the principle upon which his third maxim is founded as follows:

Although the laws of one country can have no direct force in another country, yet nothing could be more inconvenient to the commerce and general intercourse of

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\(^{118}\) 159 US 113 (1894), at 163-4.

\(^{119}\) This forms a chapter of Huber's *Praelectiones Juris Romani et hodierni* (1689). Translations may be found in 18 *British Year Book of International Law* (1937) 49 et seq and in E.G. Lorenzen's *Selected Articles on the Conflict of Laws* (1947) 136 et seq. Dutch jurists were leaders in conflicts jurisprudence because of the federal nature of their State and the necessity to resolve the jurisdictional issues resulting from that.

\(^{120}\) D.Llewellyn Davies, 'The influence of Huber's *De Conflictu Legum* on English private international law' (1937) 18 *British Year Book of International Law*, 49.
nations than that transactions valid by the law of one place should be rendered of no effect elsewhere owing to a difference in the law.\textsuperscript{121}

Although the Hilton v Guyot text undoubtedly has achieved primacy as the definition of the term, being cited by the Supreme Court of Canada,\textsuperscript{122} the High Court of Australia,\textsuperscript{123} by the US Supreme Court\textsuperscript{124} and the US Court of Appeals\textsuperscript{125} and by English\textsuperscript{126} and other Commonwealth and Irish courts,\textsuperscript{127} it has been criticised as vague and leading to inappropriate employment of the term comity in decisions.\textsuperscript{128} Reduced to its essentials, adoption of the principles of comity by courts in their approach to anti-suit injunctions is a justification after the fact rather than a basis for reasoning. The employment of comity by the Cigna majority is really a justification or rationale for the rule that courts should be reluctant to interfere with each other’s processes through the employment of anti-suit injunctions, and the need to exercise caution in doing so, rather than a rule itself.

It should be borne in mind that comity has no definitive quality, no certain criteria. The Cigna majority implied that in not issuing an anti-suit injunction to halt the action pending in New Jersey they were complying with comity. And so they were, however they had already decided that it was inappropriate in that case to issue an injunction on grounds that will be discussed later in this dissertation. Brennan CJ, in his dissenting judgment did not find that comity required him to refrain from granting an injunction, nor did Rolfe J, at first instance. Other recent judgments, which will be cited in this dissertation, will show that, where courts and judges rationalise in favour of granting an anti-suit injunction, ‘comity’ is no barrier. The decision of the English Commercial Court in Akai v PIC,\textsuperscript{129} for instance, where Thomas J granted an injunction that had the effect of overriding Australian legislation and public policy, holding, in the course of his judgment, that comity did not require him to do otherwise. And the decision of the

\textsuperscript{121} Ibid 59.
\textsuperscript{122} Amchem [1993] 1 SCR 897, 913-4.
\textsuperscript{123} Cigna (1997) 189 CLR 345, 395-6.
\textsuperscript{125} Laker Airways Ltd v Sabena, Belgian World Airlines 731 F2d 909, 931 (1984) (D.C. Cir)
\textsuperscript{126} Barclays Bank plc v Homan and others [1993] BCLC 680 (C.A.).
\textsuperscript{127} See, e.g., Kutchera v Buckingham International Holdings Ltd [1988] IR 66 (Supreme Court of Ireland); Fournier v The Ship “Margaret Z” [1997] 1 NZLR 629 (High Court of New Zealand).
\textsuperscript{129} [1999] 1 Lloyds Rep 90.
English Court of Appeal, in *The Angelic Grace*,¹³⁰ where that Court went so far as to say that, when it came to holding parties to their bargain (to arbitrate in the forum in that case), that comity was of little importance.

Comity is important, however its importance should not be rated too highly. Judges are aware of it and take care to justify their reasoning in terms of it, whenever contemplating the grant of an anti-suit injunction, but, in the end, it is arguable that it is a principle that has little more than totemic status. The anti-suit injunction is either granted with the explanation that comity has been considered and not found to be relevant, or it is not, and comity is thereby observed. A more useful definition of comity than that in *Hilton v Guyot*, with this in mind, is that supplied by a later US Supreme Court, in *Societe Nationale Industrielle Aerospatiale v US District Court*,¹³¹ ‘...the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.’

It is contended that the definition should in fact be put no higher than this, ‘the spirit of cooperation’. The degree or level of that spirit may change from judge to judge and jurisdiction to jurisdiction.

### 1.3 Summation

The anti-suit injunction is, as has been said, a creature of common law countries. It has developed as a response to what the local or home court considers to be unnecessarily wide, or just plain wrong, exercise of jurisdiction by the foreign court. It is curbed, if it is curbed at all, only by the recognition that, whatever the rationale, it does, in fact interfere with the processes of foreign courts and most courts and judges are naturally reluctant to take such a step. Reference to comity is not an effective curb on the use of anti-suit injunctions, however, and a wholly ineffective substitute for an international convention that would determine and specify the terms on which jurisdiction is to be retained or declined.

As discussed above, three categories have been identified for the grant of an anti-suit injunction. They will be considered in more detail in the following chapters as they have been developed in England and Australia, and also with reference to Canada. And a chapter will be devoted to the current split in approaches adopted by different Circuits of the US Court of Appeals. It is first necessary to turn, however, to a consideration of the development by courts of the discretion to stay their own proceedings, without a discussion and explanation of which it is not possible to understand the approach taken to anti-suit injunctions.

Attention will first be paid to English courts which, for over one hundred years, based the exercise of that discretion entirely on the need to show abuse of the court's process through vexatious or oppressive conduct on the part of the plaintiff in bringing the proceedings and thereby rarely found in favour of a stay because of the difficulty involved in proving such conduct. Realisation slowly dawned on English Courts, however, that, with respect to stay of local proceedings this was a chauvinistic attitude increasingly out of step with reality. That realisation led to a change of approach by English Courts and adoption of the Scottish doctrine of forum non conveniens. Indeed it was thought, for a time, that this approach might also be applied to anti-suit injunctions. However, after a brief hiatus, the English courts realised that in fact their former approach, requiring proof of vexation or oppression on the part of the plaintiff in bringing the proceedings remained the best way to deal with the question of staying foreign suits, precisely because of the reasoning which had led them to abandon it with respect to staying the local jurisdiction - and because it made doing so much more difficult. Australian Courts have adopted a different approach to stay of matters in the local forum (although not that different in the outcome in most cases), but have arguably applied the same approach with respect to anti-suit injunctions.

As discussed, this dissertation will explore those developments and conclude with a discussion of approaches currently being developed under the auspices of the Hague Conference on Private International Law which, it is contended, offers the best means of resolving a problem that cannot be left to the vagaries of a concept such as comity and the potential chauvinism of individual judges, courts and fora.
Chapter 2.

The discretion to stay: from abuse of process to *forum non conveniens*

In all cases in which the doctrine of *forum non conveniens* comes into play it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.¹

2.1 Introduction

This chapter will principally discuss the shifts in approach that have been undertaken in respect of the discretion to stay matters in the local jurisdiction where service has also been served within the jurisdiction. It is important for an understanding of the nature of the anti-suit injunction, its history and development to consider the development of principles on the ‘other side of the coin’, for, at times, these principles have been considered to be the same, or at least to have a similar basis.

The principal focus will be on the evolution of jurisprudence in England, based on the inherent jurisdiction of the court to stay matters if satisfied that there was an abuse of its process, to one which called for a choice to be made on the basis of specified factors and considerations – the *forum non conveniens* doctrine. Consideration will also be given to developments in this regard in the United States of America. Developments in Australia will be considered in depth in the succeeding chapter.

It should be pointed out that, in respect of r.atters where the leave of the court was sought to serve process on a defendant not present within the jurisdiction, English courts have, for many years, referred to principles of *forum non conveniens* as a consideration, pursuant to RSC Order 11, rule 1, the convenience of the forum being referred to as early as 1925 in *Rosler v Hilbery*.² Since the House of Lords’ decision in *Spiliada*,³ in England, *forum conveniens* principles have been applied to both stay and service *ex juris* cases, as will be discussed later.

This was not the case in Australia, where judges, outside of Victoria, did not apply *forum non conveniens* principles to service out of the jurisdiction. Since the decision of

¹ *Gulf Oil Corp v Gilbert* 330 US 501, 506-7 (1947).
² [1925] Ch 250, 259 per Pollock MR.
³ [1987] 1 AC 460.
the High Court in *Voth*, however, the same principles of ‘clearly inappropriate forum’ (discussed in chapter three) apply in both cases – the onus of proof varying with the type of case, i.e., the defendant being required to show that Australia is a clearly inappropriate forum in stay cases and the plaintiff being required to show that it is not in service *ex juris* cases.

### 2.2 Abuse of Process

In the latter part of the nineteenth century, with respect to cases of service within the jurisdiction and the discretion to stay proceedings in it, English Courts acted when it was appropriate to prevent any obstruction or interference with the administration of justice, basing such action on their *inherent jurisdiction* to control their own proceedings and process. The inherent jurisdiction of the Court has existed from the earliest times. It is defined by Jacob, as,

> The reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

And that,

> The essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.

Also from the earliest times the court has relied on the inherent jurisdiction to stay proceedings which were frivolous or vexatious and which were an abuse of its

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6 Ibid 27. And see per Lord Morris in *Connelly v D.P.P.* [1964] AC at 1301: ‘There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress abuses of its process and to defeat any attempted thwarting of its process.’
process. The practice, as Jacob notes, was given a new lease of life subsequent to the Judicature Acts of 1873-75. In *Castro v Murray* and in *Dawkins v Prince Edward of Saxe Weimar*, the power of the court to terminate proceedings under its inherent jurisdiction for abuse of process was confirmed. As Jacob says, ‘it became a fruitful basis for invoking this power’. In 1883 a new rule was introduced which further empowered courts to stay or dismiss an action or to strike out a defence which was shown by the pleadings to be frivolous or vexation. In 1962 the new Rules of the Supreme Court were introduced and included provision to empower the court to strike out any pleading or indorsement of a writ, ‘on the ground that it is otherwise an abuse of the process of the court.’

As to what ‘abuse of process of the Court’ means, the *Supreme Court Practice* states:

> This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material.

And as Jacob says,

> Unless the court had power to intervene summarily to prevent the abuse of legal machinery, the nature and function of the court would be transformed from a court dispensing justice into an instrument of injustice. It follows that where an abuse of process has taken place, the intervention of the court by stay or even dismissal of proceedings may often be required by the very essence of justice to be done, and so to prevent parties being harassed and put to expense by frivolous, vexatious or groundless litigation.

The decision which is generally accepted as having done much to shape the approach of courts to stay of matters in the local jurisdiction on this basis, i.e., that of the inherent jurisdiction to stay abuse of process, is that of the English Court of Appeal in

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7 Tidd’s Practice (1807), 465 *et seq.*
8 (1875) LR 10 Ex 213.
9 [1876] 1 QBD 499.
10 Jacob, above n5, 40.
11 R.S.C. 1883, Ord. 25, r.4.
12 R.S.C. 1965, Ord. 18, r.19(1)(d) (currently in force).
13 The Supreme Court Practice (1997) 18/19/15.
14 Jacob, above n5, 41.
McHenry v Lewis. In that case the Court refused to stay proceedings in England brought after the plaintiff had already commenced action arising from the same facts in California concerning an alleged breach of fiduciary duty in a company reorganisation. The Court of Appeal held that it was not vexatious per se to pursue different remedies in different jurisdictions:

[We] know that in foreign countries various laws apply as regards remedies, of a totally distinct character from the laws regulating the remedies in this country, so that it is by no means to be assumed in the absence of evidence that the mere fact of suing in a foreign country as well as in this country is vexatious. It seems to me that you must make out a special case... However the Court found that they did have power to do so, basing their reasoning on 'the general jurisdiction of the Court to prevent a Defendant being improperly vexed by legal procedure'. Lord Justice Bowen said that, 'The general principle [is] that the Court can and will interfere whenever there is vexation or oppression to prevent the administration of justice being perverted for an unjust end.' His Lordship went on to hold that, although bringing of proceedings in England in two separate courts was prima facie vexatious, that if proceedings were instituted in an English and a foreign court, it was not prima facie vexatious. 'The man who says it must prove clearly to the Court that it is and that the person suing him in a court with ample jurisdiction would have in every respect the same chance in a foreign court which he has here, and equal facility to enforce the remedy.' He stated that the Court would interfere to prevent the administration of justice being perverted for an unjust end, when the proceedings were an abuse of the court’s process, because they would be 'vexatious' or 'oppressive' to the defendant should they be allowed to proceed. He emphasised the need for 'special circumstances' to be brought to the court’s attention before a matter would be stayed. His reasoning in that respect is therefore in line with that in Bushby v Munday and Carron Iron and would have seemed a natural progression from the 'ends of justice' formulation.

15 (1882) ChD 397.
16 Ibid 401 per Jessel MR.
17 Ibid 399 per Jessel MR.
18 Ibid 400.
19 Ibid.
20 Ibid 408.
21 Ibid 409.
Lord Justice Bowen’s judgment in *McHenry v Lewis* is a short one, as are those of his brother judges. It is apparent that none of the Court regarded the circumstances of the case as appropriate for a fuller exposition of the relevant principles. Had they foreseen the next century they might have thought again. The concluding paragraph of Bowen LJ’s judgment is perhaps more indicative of his thinking than the extract cited above, and which has been so much relied upon. Bowen LJ said that the Court of Chancery has power to stay actions before it; ‘that this Court could do it if necessary for the purposes of justice, but some *special circumstances* ought surely to be brought to the attention of the Court beyond the mere fact that an action is pending between the parties on the same subject matter in America’. To like effect was Cotton LJ’s concurring judgment. He said that it would be unwise to lay down any strict definition of what was vexatious or oppressive conduct on the part of a plaintiff attempting to litigate in the most advantageous forum for his cause (forum shopping in other words). He said that the general principle is that the Court can and will interfere whenever there is vexation or oppression to prevent the administration of justice being perverted for an unjust end, depending on the circumstances of the case.

The reasoning of the English Court of Appeal in *McHenry v Lewis* was arguably a natural evolution from that in *Bushby v Munday* and *Carron Iron*, however the shift to a basis in the inherent jurisdiction removed any possibility that the path suggested in *Carron Iron* by both the majority and Lord St.Leonards, might have been pursued and that the ‘Scottish doctrine’ might have been adopted a century earlier. The seemingly straightforward judgments have been the cause of much judicial trouble and confusion, resulting, in at least some, possibly many, instances in refusal to stay local proceedings in cases where a stay arguably ought to have been granted in favour of proceedings in a foreign jurisdiction. The words ‘vexation’ and ‘oppression’ are the cause of this mischief because, as the cases show, they came to carry such negative connotations that, for all practical purposes, it was extremely difficult to show that any proceedings, regularly brought, were vexatious or oppressive. This was especially so because of the long-held principle that a party who has regularly invoked the jurisdiction of a

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22 (1883) 22 ChD 397, 409 [emphasis added].
23 Ibid 408.
competent court has a *prima facie* right to insist upon its exercise and to have his claim heard and determined.\(^4\)

Bowen LJ emphasised that the key terms 'vexation' and 'oppression' are not to be restricted by definition.

I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the court can and will interfere whenever there is vexation or oppression to prevent the administration of justice being perverted to an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case.\(^5\)

Judicial recital of Bowen LJ’s statement about not restricting the terms by definition became a mantra, but its terms had to be interpreted in some fashion and therein lay the problem. Lord Wilberforce, attempting to turn the clock back and achieve acceptance of a more flexible approach, pointed out, in his speech to the House of Lords in *The Atlantic Star*,\(^6\) that all the judgments in *McHenry v Lewis* emphasised that there is power to stay an English action, if there is concurrent litigation abroad, but that jurisdiction is to be exercised cautiously and special circumstances must exist. Lord Wilberforce said that,

> It is obvious that this important case depends on a principle quite distinct from *forum non conveniens*: it recognises an exceptional power capable of being described by reference to 'vexation' and 'oppression' but shows that these words are to be widely interpreted in relation to the circumstances and in the light of the fact that the court’s discretion is general.\(^7\)

Lord Wilberforce said that each member of the Court of Appeal in *McHenry v Lewis*, 'is found using the word 'vexatious', but as a word of illustration rather than limitation: for the widest range of considerations is taken into account and carefully weighed.'\(^8\) As noted above, this very emphasis on the need not to define the terms, however, meant (or at least so the cases show) that it became very difficult, if not impossible, ever to satisfy a court that it was *in fact* vexatious or oppressive of a

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\(^4\) See e.g., *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 241 per Deane J.

\(^5\) (1883) 22 ChD 397, 407-8.


\(^7\) Ibid.

\(^8\) Ibid.
plaintiff to bring an action, either within the jurisdiction, in which a stay was being sought, or, importantly, out of it, where an anti-suit injunction was sought. The words did of course carry connotations that have changed with time and circumstance. Lord Diplock defined the problem, when he said in *MacShannon v Rockware Glass*, that:

Both in ordinary parlance and as terms of art in relation to the procedure of the courts these terms connote an element of moral blameworthiness – a desire on the plaintiff’s part to harass the defendant by putting him to unnecessary trouble or expense, rather than to improve the plaintiff’s own prospects of success or enhance what he stands to gain from litigation. As pointed out by Lord Morris of Borth-y-Gest [in *The Atlantic Star*], this was the meaning which had been uniformly attributed to the words ‘oppression’ and ‘vexation’ by judges in all cases subsequent to *St.Pierre* in which Scott LJ’s statement of the law had been applied.

To like effect are the words of Lord Brandon of Oakbrook in *The Abidin Daver*:

The application of these principles operated in practice in such a way as to make it extremely difficult for a defendant to obtain a stay of an action brought in the High Court in England, otherwise than where the bringing of it was of itself an abuse of the process of the court. The reason for this was that it was extremely difficult for a defendant to satisfy the court that the continuance of the action would work an injustice to him because it would be oppressive or vexatious to him in the opprobrious sense which these epithets were generally regarded as having in the context in which they were used.

The problem is readily apparent from a reading of the cases. They are replete with examples of what does not constitute vexation or oppression, but very little of what actually does. Lord Goff of Chieveley, in his speech in *Aerospatiale*, referred to two examples of vexatious proceedings provided by Jessel MR in *Peruvian Guano Co v Bockwoldt* (who was nevertheless careful to state that there are many possible grounds, but without naming them). Of the two he instanced, one he referred to as ‘pure’ vexation, which is apparently found when the proceedings are so utterly absurd that they cannot possibly succeed – which may have been brought purely to annoy. Another type of vexation occurs when the plaintiff, not intending to harass or annoy the defendant, but thinking he could get some fanciful advantage, sues him in two courts within the same jurisdiction at the same time. The Master of the Rolls added that, although similar considerations would apply when a case is brought in two different jurisdictions, it is not vexatious simply to bring the two proceedings. And

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30 Ibid 810.
mere inconvenience of location has also been held not to be vexatious: *Fletcher v Rodgers;*\(^{34}\) *Hyman v Helm.*\(^{35}\)

The words frivolous, vexatious and oppressive, are often used in conjunction and interchangeably with 'abuse of process of the court'. Jacob cites a number of examples of such proceedings, including the decisions in *Castro v Murray\(^{36}\)* and *Dawkins v Prince Edward of Saxe Weimar,\(^{37}\)* referred to above, and suggests that they will fall within one or more of the following categories of proceedings:

(a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
(b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
(c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;
(d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.\(^{38}\)

One of the few examples of a case in which vexation was found is *The Christianborg.*\(^{39}\) The case concerned a collision on the high seas between a German ship and the Christianborg, a Danish vessel. The German ship was lost. Action was brought in the Dutch Admiralty Court and the Christianborg was arrested and then released on 'bail' – guarantees by the vessel's owners of payment in the event that judgment went against them in the Dutch Court. The Christianborg was then arrested again when it visited an English port. Sir James Hannen P held that it was *prima facie* oppressive to bring the second English action. He was upheld by the Court of Appeal. Baggally and Fry LJ held that the arrest of the ship in England was against good faith. Lord Esher MR strongly dissented, however, showing that even in this seemingly clear cut case it was possible for there to be no agreement over whether to stay proceedings in the local jurisdiction.

\(^{33}\)(1883) 23 ChD 225, 230.
\(^{34}\)(1878) 27 WR 97.
\(^{35}\)(1993) 24 ChD 531, 537.
\(^{36}\)(1875) 10 Ex 213.
\(^{37}\)(1886) 11 P 59.
\(^{38}\) I.Jacob, above n5, 43.
\(^{39}\)[1885] 10 PD 141.
Other cases where vexation was found include *Egbert v Short* and *In re Norton’s Settlement*. Both cases involved parties normally resident in India with one of them being fleetingly present in England suing the other in that jurisdiction. Such action was regarded as harassment, although this was not the case in the later, very similar case of *Baroda v Wildenstein*, discussed below.

In *Peruvian Guano Co v Bockwoldt*, decided in the same year as *McHenry v Lewis*, the Court of Appeal adopted the same reasoning with respect to vexation and oppression. There is similar emphasis placed in the later case on not depriving the plaintiff of a ‘substantial advantage’ in the guise of ‘additional remedies beyond those obtainable in England’. *McHenry v Lewis* was followed in *Hyman v Helm* and in *Cohen v Rothfield*. Both cases emphasised the point that where there was any possibility of an alternative remedy in the foreign court, then it was not *prima facie* vexatious for the same plaintiff to commence two actions relating to the same subject-matter, one in England and one abroad. ‘The applicant must prove a substantial case of vexation resulting from the identity of proceedings, remedies, and benefits, or from the existence of some motive other than a bona fide desire to determine disputes’. This even applied to parts of the British Empire that applied different procedure with possibly different remedies – ‘South Africa, where the Dutch procedure prevails, in Mauritius or Quebec, where French procedure exists, in Malta with its peculiar law, or in Scotland with its Roman procedure.’ As Nygh notes, ‘In the past courts have been astute to discover a legitimate juridical advantage for the Plaintiff. Where the defendant in the forum is the plaintiff abroad, the mere tactical advantage of having the carriage of the action would be sufficient to prevent a stay of the action.’ He adds that there is only one reported Australian case where a stay was granted in such a situation.
A typical illustration of a case reflecting the principles established by the course of judicial decisions in England in the late nineteenth century (acknowledged as such by the High Court of Australia in *Voth v Manildra Flour Mills Proprietary Ltd*50) is *Logan v Bank of Scotland (No.2).*51 It is convenient to include the following extract from the headnote here:

The Court will stay an action, brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression, to which he would not be subjected if an action were brought, in another and accessible court, where the cause of action arose.

The President, who delivered the judgment of the court, said that, ‘the Court will interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice.’52 *Logan*, as elaborated by Warrington J in *Egbert v Short*,53 was followed by the High Court of Australia in *Maritime Insurance Co Ltd v Geelong Harbor Trust Commissioners*.54 That case represented virtually the last word on the matter as far as Australian courts were concerned until almost eighty years later in *Oceanic Sun Line Special Shipping Co Inc v Fay* (*'Oceanic Sun'*)55 (with the exception of the ACT Supreme Court decision of Gibbs J (as he then was) in *Cope Allman (Australia) Ltd v Celermajer*,56 which simply followed it, and a ‘different understanding’ in Victoria where Hudson J, in *Lewis Construction Co P/L v Tichauer S.A.*57 applied the more appropriate forum test in a case of service out of the jurisdiction).

The principle, as outlined in *Logan* and other cases, was considered and approved by the English Court of Appeal in *St.Pierre v South American Stores (Gath & Chaves) Ltd*58 (*'St.Pierre'*), where Scott LJ propounded what was to be the governing statement in England for the next forty years, and Australia for somewhat longer, with respect to

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50 (1990) 171 CLR 538, 553.
51 [1906] 1 KB 141.
52 Ibid 149.
53 [1902] 2 Ch 205, 213.
54 (1908) 6 CLR 194. *Maritime Insurance* was not cited until *Oceanic Sun*, eighty years later. It may have been a 'longstanding authority' but it is tempting to speculate that that was not because of the masterly reasoning contained therein, but rather that it was simply forgotten.
56 (1968) 11 FLR 488.
58 (1936) 1 KB 382.
the inherent jurisdiction of the court to stay matters based on service within the jurisdiction:

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 Court 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.59

His propositions were said to be consistent with and supported by, the decisions in McHenry v Lewis,60 Peruvian Guano Co v Bockwoldt,61 Hyman v Helm,62 Thornton v Thornton63 and Logan v Bank of Scotland.64 The first limb of this test virtually required the defendant to show that the action had not been brought bona fide, but merely to harass him.65 The second limb was an equally difficult obstacle, since English judges regarded the advantages of English justice as self-evident. The point of the approach formulated in these decisions is that the court was not to weigh up mere expense or the inconvenience of litigating in one jurisdiction or the other but to assess the consequences in terms of the process of the court and its inherent ability to correct injustice. But the putative defendant was hamstrung by the need to prove vexation or oppression, with the added burden of presumption in favour of the plaintiff. In proceedings regularly bought that was a nearly impossible test to satisfy.

The principles were restated in many cases, it being held that, in order to show vexation or oppression, something extra, a special case, would have to be shown. But the cases show again and again the difficulty of satisfying the test; of establishing vexation or oppression. In order to be deemed ‘vexatious’ or ‘oppressive’, the action had to involve something very much out of the ordinary. The difficulty, and sometimes absurdity of this situation was, ultimately, recognised and addressed, with respect to

59 Ibid 398.
60 (1882) 22 ChD 397.
61 (1883) 23 ChD 225.
62 (1883) 24 ChD 531.
63 (1886) 11 PD 176.
64 [1906] 1 KB 141.
65 Egbert v Short [1902] 2 Ch 205, 213.
stay of local proceedings. For a time, as shall be discussed, it was thought that the same principles would apply to anti-suit injunctions. But, as also shall be discussed, it was recognised that because of the importance of comity and the need to exercise great caution with respect to interference in the processes of foreign courts, that the very difficult to prove standard required by vexation and oppression was something that called for retention in that respect, precisely because it was so difficult to prove.

2.3 The Scottish doctrine

Scots courts did not follow the English path except with respect to stay of foreign proceedings where they had all along recognised the need for ‘something extra’ in interfering, or being seen to interfere at any rate, in the processes of a foreign court. In respect of applications to stay proceedings in the local forum, parties pleaded forum non competens, later changed to forum non conveniens, in the sense ‘that it is not expedient for the due administration of justice that the case should be disposed of in this Court’. In 1845, ten years before Carron Iron, Scots courts recognised that the matter was to be decided ‘on the merits’, and the Court referred to the English words ‘inconvenient forum’. The Latin phrase forum non conveniens, means, however, an ‘inappropriate forum’ rather than an ‘inconvenient forum’. Anton, the leading Scots conflicts writer, explains that, ‘a defendant who takes the plea of forum non conveniens invites a court, whose jurisdiction is admitted, to decline to exercise that jurisdiction because the just determination of the dispute requires that the action should be tried elsewhere’. He adds that the plea was a necessary antidote to the Scottish doctrine of arrestment ad fundandum jurisdictioen, whereby jurisdiction over an absent

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66 Young v Barclay (1846) 8 Dunlop 774.
67 See e.g., Clements v Macaulay (1866) 4 MacPherson 583, 587 and Lord Dead in Longworth v Hope (1865) 2 M. 1049, 1058, ‘Although questions like the present are ranged in our books under the head of “forum competens” or “forum non competens”, the plea is really not that the one forum is incompetent, but that the other forum ought to be preferred. Where there are two competent forums, the question is, do the ends of justice require that an action brought in the one should be sitted in order that proceedings may be taken or go in the other?’
68 M Morine v Cowie (1845) 7 Dunlop 270.
70 As explained by Lord Goff in Spiliada [1987] 1 AC 460, 474 and Deane J in Oceanic Sun (1988) 165 CLR 197, 249.
defendant may be based on the seizure of that person's movable property in the hands of a third person present in Scotland.\textsuperscript{72}

Despite the breadth of the language employed by the Scots courts, like that employed in the early English cases, it is apparent from a review of the decided cases that the discretion to stay was in fact employed very narrowly. Take the famous case of \textit{Clements v Macaulay},\textsuperscript{73} for instance. It involved a blockade runner during the US Civil War that had attempted to transport munitions from the West Indies to the rebel Confederate States. The Court of Session refused to stay proceedings on a contract made between parties from Texas and Louisiana. Lord Justice-Clerk Inglis stated that:

> It must never be forgotten that in cases in which jurisdiction is competently founded, a Court has no discretion whether it shall exercise jurisdiction or not, but is bound to award the justice which a suitor comes to ask, Judex tenetur impertiri judicium suum, and the plea must not be stretched so as to interfere with this general principle of jurisprudence.\textsuperscript{74}

In \textit{Sim v Robinow},\textsuperscript{75} a stay was again refused by the Court of Session in a matter that concerned a joint mining venture in South Africa between South Africans. It was the case in which Lord Kinnear made his 'classic statement' to the effect 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.'\textsuperscript{76} This reasoning was approved by the House of Lords which also upheld the first decision of the Court of Session to grant a stay of a contract action on the basis of \textit{forum non conveniens}, in \textit{Société du Gaz de Paris v Aventures Français}.\textsuperscript{77} The Sheriff Court of Dumbarton was held to be an inappropriate forum in a case which concerned a charterparty between French companies for the carriage of coal from England. Lord Chancellor Cave said in his speech that,

> I have no doubt that what was indicated was that, if in any case it appeared to the Court, after giving consideration to the interests of both parties and to the requirements of justice, that the case could not be suitably tried in the Court in which it was initiated, and full justice could not be done there to the parties, but could be done in another Court, then the former Court might give effect to the plea

\textsuperscript{72} Ibid.
\textsuperscript{73} (1866) 4 MacPherson 583.
\textsuperscript{74} Ibid 593.
\textsuperscript{75} (1892) 19 R 665.
\textsuperscript{76} Ibid 668.
\textsuperscript{77} (1925) SC (HL) 13.
by declining jurisdiction and permitting the issues to be fought out in the more appropriate Court.\textsuperscript{78}

He went on to say that, ‘From the beginning to the end of the case there [was] not a breath of Scottish atmosphere’.\textsuperscript{79} Also in that case, Lord Shaw of Dunfermline referred to the judgment of Lord Justice-Clerk Inglis in \textit{Clements v Macaulay},\textsuperscript{80} where he had said, ‘The contention involved in such a plea is rather that for the interests of all the parties, and for the ends of justice, the case may more suitably be tried elsewhere’.

That, said Lord Shaw, ‘is the foundation of the whole doctrine’.\textsuperscript{81} Lord Sumner added his own simple and authoritative definition; that, ‘the object, under the words ‘\textit{forum non conveniens}’ is to find that \textit{forum} which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that \textit{forum} is more likely to secure those ends.’\textsuperscript{82} It is contended that a stay would have not have been granted following the English abuse of process approach to stay of local jurisdiction because the bringing of the Scottish action was not, \textit{prima facie}, vexatious or oppressive.

Scots courts have not always taken a uniform approach to the meaning of \textit{forum non conveniens}. Paul Beaumont notes that some courts took a very restricted view under which they would only stop proceedings if there would be an ‘unfair disadvantage’ or a ‘real unfairness’ to the defendant by trial of the action within the jurisdiction.\textsuperscript{83} And an even narrower view had it that the plea would only be satisfied when it was in the ‘interests of all the parties’, that the case should be tried in a forum other than Scotland. As Beaumont points out, ‘Given that the pursuer has chosen to litigate in Scotland, this is never likely to be the case and such an approach effectively gives the court no discretion to decline to exercise jurisdiction.’\textsuperscript{84}

\textsuperscript{78} Ibid 17.
\textsuperscript{79} Ibid.
\textsuperscript{80} (1866) 4 MacPherson 583, 592.
\textsuperscript{81} (1925) SC (HL) 13, 19.
\textsuperscript{82} Ibid 22.
Other Scottish courts took a broader view and supported exercise of the discretion by finding in favour of 'the best and most suitable forum for trying the case' and, in line with early English authority, advocated an 'ends of justice' or 'appropriateness' test. Beaumont quotes Lord President McNeil who said that the plea applies in 'cases in which the Court may consider it more proper for the ends of justice that the parties should seek their remedy in another forum.' The doctrine of forum non conveniens is undoubtedly the Scots legal system's most successful export, having now been adopted, at least in some form, by most common law jurisdictions.

2.4 Transition to forum non conveniens

a) The Atlantic Star

The demise of the abuse of process approach commenced with the decision of the House of Lords in The Atlantic Star, with respect to stay of local jurisdiction at any rate. It was this case which also saw the commencement of the ascendancy of the doctrine of forum non conveniens.

The case was a straightforward one on the facts and it was obvious, to the majority at least, that the case which had started in Belgium, should be continued there, and only there. The later action which had been brought in England should be stayed. Reliance on grounds of vexation and oppression, however, would not guarantee such an outcome for the plaintiff because it was quite an acceptable course for the defendant to litigate in England. He had regularly invoked the jurisdiction of the English Admiralty Court, 'One of the most famous and historic courts in the world', and there was nothing wrong in him doing so simply because there would be a greater likelihood of a verdict in his favour. There was certainly nothing inherently vexatious or oppressive in this. However no similar case, whereby a stay had been granted could be found. Indeed a list of cases to the contrary was adduced which, although they recognised the existence of a discretion to stay, did not have that result. According to Lord

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84 Ibid.
85 Longworth v Hope (1865) 3 M. 1049, 1053.
87 Ibid 471, per Lord Simon of Glaisdale.
Wilberforce, somewhat understating the case, ‘they do vouch the proposition that a very clear case is needed to justify a stay, where a plaintiff is (properly as to jurisdiction) suing here and that the mere fact that there are proceedings abroad is not enough.’ As noted above, the problem lay in the words and the meaning which had become attached to them. Lord Kilbrandon said that,

‘Oppressive’ is an adjective which ought to be, and today normally is, confined to deliberate acts of moral, though not necessarily legal, delinquency, such as an unfair abuse of power by the stronger party in order that a weaker party may be put in difficulties in obtaining his just rights. ‘Vexatious’ today has overtones of irresponsible pursuit of litigation by someone who either knows he has no proper cause of action, or is mentally incapable of forming a rational opinion on that topic. Either of these attitudes may amount to an abuse of the process of the court, but in my opinion a defendant moving for a stay cannot be compelled to bring the plaintiff’s conduct within the scope of one of these grave allegations.

From words that ought not be restricted by definition, they had become ‘grave allegations’. The decisions of the 1880s subsequent to the passing of the Judicature Acts, and those of the next ninety years were analysed in some detail in four of the speeches in *The Atlantic Star*. The cumulative effect of those decisions was summarised to scathing effect by Lord Reid.

They support the general proposition that a foreign plaintiff, who can establish jurisdiction against a foreign defendant by any method recognised by English law, is entitled to pursue his action in the English courts if he genuinely thinks that that will be to his advantage and is not acting merely vexatiously. Neither the parties nor the subject matter of the action need have any connection with England. There may be proceedings on the same subject matter in a foreign court. It may be a far more appropriate forum. The defendant may have to suffer great expense and inconvenience in coming here. In the end the decisions of the English and foreign courts may conflict. But nevertheless the plaintiff has a right to obtain the decision of an English court. He must not act vexatiously or oppressively or in abuse of the process of the English court, but these terms have been narrowly construed.

The majority rejected the views of Lord Denning in the Court of Appeal, who reflected the view long held by English courts, that it was most unlikely that any foreign court would provide better justice than an English one.


A then recent decision of the Court of Appeal which had pushed the matter to the limit, or more likely beyond it, and which the Atlantic Star majority would have had very much in mind, also involved a judgment of Lord Denning. The case was *HRH Maharanee Seethadevi Gaekwar of Baroda v Wildenstein* (*Baroda v Wildenstein*). It concerned a dispute about the authenticity of a painting bought in Paris by an Indian Princess, resident there, from a Parisian art dealer. The Princess sued the art dealer in England, taking advantage of his temporary presence in the jurisdiction (to attend the races at Ascot) to do so. Bridge J found that the proceeding was oppressive and stayed the action but the Court of Appeal unanimously allowed the appeal, holding that it was not vexatious or oppressive:

[U]nless the plaintiff knows full well that she has no cause of action: she did no wrong in taking out a High Court writ in the first place (foreigner though she is) and serving it here at the first available opportunity upon the defendant (foreigner though he also is). Both in taking it out and serving it (albeit when the defendant was only fleetingly on British soil) she was doing no more than our law permits, even though it may have ruined his day at the races. Some might regard her action as bad form; none can legitimately condemn it as an abuse of process.93

In the Atlantic Star Lord Reid said, ‘There was a time when it could reasonably be said that our system of administration of justice, though elaborate and expensive, was superior to that in most other countries. But today we must, I think, admit that as a general rule there is no injustice in telling a plaintiff that he should go back to his own courts.’94 The Atlantic Star majority stated that it was time to alter the existing state of affairs and commenced the first step towards a major change in the common law in England. They based their reasoning on the need to bring the common law into line with the policy of Parliament and the movement of public opinion, and to render it less reminiscent of ‘the good old days, the passing of which many may regret, when the inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races’.95 Or, as Lord Diplock said in referring to that speech, in *The Abidin Daver*, ‘as Kipling more forthrightly phrased it, “lesser breeds without the law”’.96

93 Ibid 295 per Edmund-Davies LJ.
95 Ibid 453G per Lord Reid.
In order to advance this cause – and arrive at what he obviously considered the appropriate conclusion in that context, Lord Wilberforce said, in the *Atlantic Star*, that vexation and oppression should in future be interpreted ‘more liberally’. ‘There is a danger’, he said, ‘as with all clear propositions, of this receiving quasi-statutory force, and of the key words ‘oppression’ and ‘vexation’ being too rigidly construed and applied. I do not think that these are technical words: they can only be understood against an evolutionary background’.97 His Lordship did not say how, but the clear indication that comes through in his speech is that where reliance on those terms and their accepted meaning could not produce the ‘right’ outcome in a given case – because it is not possible to satisfy the court that the proceedings are vexatious and oppressive within their accepted meaning – then the court must look further and undertake a *balancing approach*, to find the most appropriate forum. His Lordship said,

In considering whether a stay should be granted the court must take into account (i) any advantage to the plaintiff; (ii) and disadvantage to the defendant: this is the critical equation, and in some cases it will be a difficult one to establish. Generally this is done by an instinctive process .... But there are some elements which it is possible to disengage and make explicit. In the first place, I do not think it would be right to say that *any* advantage to the plaintiff is sufficient to prevent a defendant from obtaining a stay. The cases say that the advantage must not be ‘fanciful’ – that a ‘substantial advantage’ is enough. .... A*dvantage to a plaintiff is not in itself decisive for the suit may well have been brought here because our courts give higher damages under broader heads: so if a stay is to be granted it must be because the court can additionally consider the nature of the case, and the disadvantage to the defendant. A bona fide advantage to a plaintiff is a solid weight in the scale, often a decisive weight, but not always so.

Then the disadvantage to the defendant: to be taken into account at all this must be serious, more than the mere disadvantage of multiple suits; to prevail against the plaintiff’s advantage, still more substantial – how much more depending upon how great the latter may be. ... I think too that there must be a relative element in assessing both advantage and disadvantage – relative to the individual circumstances of the plaintiff and defendant.98

With this statement, although not recognised openly by the House, their Lordships (or at least the majority) did in fact abandon the search for vexation and oppression, recognising that the accepted usage of the epithets had rendered it virtually impossible to grant a stay. Continuing to call proceedings which had been stayed as a result of undertaking the new balancing process ‘vexatious’ or ‘oppressive’ was henceforth

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simply to apply outdated labels to what had really become a search for the most appropriate forum. And continuing to apply these labels would be to risk a continuation of the difficulties associated with their use.

The Atlantic Star minority rejected this approach, seeing no reason to turn away from the almost century old line of authorities which the majority were happy to discard. Lord Morris of Borth-Y-Gest reviewed those authorities and held, unsurprisingly, that the proceedings as brought in England could not, on the basis of them, be regarded as vexatious or oppressive, ‘They were not instituted in order to harass the defendants. There was no bad faith. There was no improper motive.’ Lord Simon of Glaisdale thought likewise, although he went somewhat further back for his foundation, perhaps slightly tongue in cheek, when he said,

It may, indeed, be merely a particular application of the promise made at Runnymede that ‘to no one will We deny justice’ (It would be an inadequate performance of such a promise to say, ‘You can (to our way of thinking) get perfectly satisfactory justice elsewhere’). He concluded trenchantly,

If, as I believe, English law does not know the doctrine of forum conveniens, but rather allows any plaintiff bona fide seeking relief to have unrestricted access to the seat of judgment, it would, in my respectful submission, be wrong to hinder such access by marginal alteration of the criteria hitherto prevailing. That would be to admit by the back door a rule that your Lordships consider cannot be welcomed at the front.

The House of Lords was specifically invited, in The Atlantic Star, to discard Scott LJ’s St.Pierre formulation as an authoritative exposition of the principles on which a stay of proceedings ought to be granted in English law, and to substitute for it the Scottish doctrine of forum non conveniens. The House unanimously rejected this proposition. Despite this stated rejection and the reasoning of the majority by which they strove to adhere to the earlier decision in McHenry v Lewis and St.Pierre, the decision constituted a major step along the road towards final acceptance of the doctrine of forum non conveniens. After a further show of reluctance on the part of the House of Lords, that conclusion would finally be accepted fourteen years later.

99 Ibid 459.
100 Ibid 471.
101 Ibid 473.
b) MacShannon v Rockware Glass

The next step in the transition to *forum non conveniens* came with the House of Lords decision in *MacShannon v Rockware Glass*. That case concerned industrial accidents to Scots workmen, in Scotland. Their English-based, union-appointed solicitors sued in England.

In the 're-examination' of vexation and oppression by the House of Lords majority in *The Atlantic Star*, it had been given a more 'liberal' interpretation. Lord Diplock, in his speech in *MacShannon*, said that the result of this re-examination was, 'put bluntly', to give the terms 'some strained and morally neutral meaning'. He said, 'To continue to use these words to express the principle to be applied in determining whether an action brought in England should be stayed can, in my view, lead only to confusion.'

In 'explaining' the reasoning of the House of Lords in *The Atlantic Star*, Lord Diplock, in his speech in *MacShannon*, said that the second part of Scott LJ's *St.Pierre* statement could be restated thus:

(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 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 to him if he invokes the jurisdiction of the English court.

His Lordship then observed that, "If the distinction between this restatement of the English law and the Scottish doctrine of *forum non conveniens* might on examination prove to be a fine one, I cannot think that it is any the worse for that." Significantly, reference to vexation and oppression was omitted from the 'restatement', as was any reference to burden of proof. Lord Diplock then considered the relative advantages to the plaintiff in suing in England, and the disadvantages to suing in Scotland and concluded, on the facts of the case, that Scotland was the natural forum where justice could be done at much less cost and inconvenience; that the plaintiffs would not be

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103 Ibid.
104 Ibid 811.
105 Ibid.
106 Ibid 812.
107 Ibid.
deprived of any legitimate advantages, and that therefore the action in England should be stayed.

Lord Salman held that stay orders could not be confined to situations of vexation and oppression (ie. where the plaintiff had behaved in such a manner), and held that it was impossible to interpret these words ‘liberally’ without destroying their true meaning. He said that the real test of whether to stay or not ‘depends upon what the court in its discretion considers justice demands.’

He would have approved Scott LJ’s St.Pierre formulation minus the nine words: ‘because it would be oppressive or vexatious to him’. Lord Russell of Killowen alluded to the ‘dilution’ of oppression and vexation in *The Atlantic Star* and, referring to the other speeches in *MacShannon*, detected ‘a further liberal use of the water jug.’

The adoption of the ‘balancing’ approach in *The Atlantic Star*, and the ‘restatement’ of Scott LJ’s St.Pierre principles to something more akin to that of the doctrine of *forum non conveniens*, in *MacShannon*, led to a result in those cases that could not have been achieved through adherence to the old formulation of vexation and oppression – as witness the speeches and conclusions of the minority in *The Atlantic Star*. As Lord Diplock observed in *MacShannon*,

[S]o long as it was necessary to show ‘oppressive’ or ‘vexatious’ conduct by the plaintiff in the ordinary meaning of those words, the test remained subjective; an unsubstantiated but bona fide belief by the plaintiff or his legal advisers in an advantage to be obtained by him suing in the English courts might be sufficient answer to the defendant’s application for a stay. Since the *Atlantic Star* this is so no longer.

c) *The Abidin Daver*

The *Abidin Daver* was a Turkish ship which collided with a Cuban vessel, the *Las Mercedes*, in the Bosphorus, an international waterway, off the Turkish port of Buyukdere. The *Las Mercedes* was arrested in Turkish waters and proceedings

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108 Ibid 819.
109 Ibid.
110 Ibid 823.
111 Ibid 812.
commenced in a Turkish court. Subsequently, the Cuban ship-owners commenced proceedings in England.

Referring to *The Atlantic Star* as a landmark case which had effected an essential change in the law, reinforced by the decision of the House of Lords in *MacShannon*, Lord Diplock finally hauled down the flag and said, in his speech to the House of Lords, 'that judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge fully is, in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of *forum non conveniens*.\(^\text{113}\) He went on to say:

Where a suit about a particular matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it.\(^\text{114}\)

Lord Diplock referred to the possibility of the courts of the two jurisdictions reaching conflicting decisions. 'Comity' he said, 'demands that such a situation should not be permitted to occur as between courts of two civilised and friendly states. It is a recipe for confusion and injustice.'\(^\text{115}\)

d) *Spiliada Maritime Corporation v Cansulex*\(^\text{116}\)

A Liberian-owned ship, the *Spiliada*, was chartered to carry bulk sulphur from Vancouver, Canada to India. The shipowners alleged that major corrosion damage to the vessel was caused by the loading of wet sulphur. They sought leave exparte to serve proceedings on the shippers in Canada, on the ground that it was an action to

\(^{113}\) Ibid 411.
\(^{114}\) Ibid 411-412.
\(^{115}\) Ibid 412.
\(^{116}\) [1987] AC 460.
recover damages for breach of a contract governed by English law. The shippers argued that it was not a proper case for service out of the jurisdiction.

The House of Lords upheld the decision of Staughton J, at first instance, who had decided the matter in accordance with the doctrine of *forum non conveniens* and identified England as the forum in which the case could be most suitably tried for the interests of all parties and for the ends of justice. The Judge had identified the correct test and considered the relevant factors, including the advantages of efficiency, expedition and economy in bringing the action in England. A major factor was that similar litigation was taking place in England involving another vessel, the *Cambridgeshire*. Vast amounts of evidence had been assembled for that case, with no less than fifteen counsel engaged. Cansulex were the defendants in both actions and although the shipowners were different they were represented by the same solicitors and counsel. The Judge decided in favour of England because of the ready availability of witnesses, evidence and a desire to avoid multiplicity of proceedings.

Lord Goff of Chieveley delivered the principal speech which finally discarded the ‘half way’ principles which had been evolved in *The Atlantic Star* and ‘explained’ in *MacShannon*. He commenced by noting that, since the decision in *The Abidin Daver*, English courts had exercised the discretion to stay proceedings on *forum non conveniens* grounds. In this respect he also adopted the ‘classic statement’ of Lord Kinnear in *Sim v Robinow*, extracted above. Lord Goff emphasised that the doctrine of *forum non conveniens* is to be interpreted as a search for the more appropriate forum, not the more convenient. According to his Lordship, the law in this respect can be summarised as follows:

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, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.\(^\text{118}\)

And further, that,

The burden is on the defendant not just to show that England is not the natural or appropriate forum but that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is

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\(^{117}\) (1892) 19 R 665, 668.

\(^{118}\) [1987] AC 460, 476.
paid to the fact that jurisdiction has been founded in England as of right ...; and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions.\textsuperscript{119}

Lord Goff gave a six point summary of the way in the discretion to stay might be exercised in support of a plea of \textit{forum non conveniens}:\textsuperscript{120}

\textit{i)} A stay of proceedings will only be granted 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.

\textit{ii)} In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. However, once the defendant has made a \textit{prima facie} case that another forum is more appropriate the burden shifts to the plaintiff to show that justice requires the case to be tried in England.

\textit{iii)} If jurisdiction is founded as of right in England, rather than leave to serve the defendant out of the jurisdiction being required, then the defendant has to show that there is another forum which is clearly or distinctly more appropriate than the English forum.

\textit{iv)} In determining the appropriateness of a forum the court will determine how real and substantial is its connection with the dispute. In doing so it will consider a number of connecting factors including the convenience of witnesses, the law governing the issue, and the places where the parties reside or carry on business.

\textit{v)} If there is no clearly more appropriate forum then no stay will be granted.

\textit{vi)} If, however, the court decides that there is a \textit{prima facie} more appropriate forum it will grant a stay unless the plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.

His Lordship identified the fundamental question as being whether there exists another forum, which is clearly more appropriate, thus separating the considerations of ‘appropriateness’ from ‘justice’. Judges must henceforth first decide whether another court is more appropriate before any exceptional considerations of justice nevertheless require them to hear the case in England.\textsuperscript{121} In determining the first stage of this formulation the court will look first to see what ‘connecting factors’ there are which point in the direction of another forum as the natural forum: those which, as Lord

\textsuperscript{119} Ibid 477.
\textsuperscript{120} Ibid 476-478.
\textsuperscript{121} P.Beaumont above n 83, 3.
Diplock described in *MacShannon*, indicate that justice can be done in the other forum at 'substantially less inconvenience or expense.'

In *Spiliada* Lord Goff adopted the expression of Lord Keith of Kinkel in *The Abidin Daver*, who referred to the 'natural forum' as being 'that with which the action had the most real and substantial connection.' "So it is", said Lord Goff, 'for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction, and the places where the parties respectively reside or carry on business.'

In relation to the second 'justice' stage, Lord Goff said,

> If... the court concludes that there is some other available forum which prima facie is clearly more appropriate... it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the *Abidin Daver* [1984] AC 398, 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff.

Lord Goff said that the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, 'the fact that English law is the putative proper law of the contract may be of very great importance ...; or it may be of little importance as seen in the context of the whole case.' In relation to the question of 'legitimate personal or juridical advantage', Lord Goff said that the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive. He said that the fact that damages in England are awarded on higher scales, that there is a more complete procedure of discovery, a more generous limitation period, and that interest can be awarded when it cannot be in other forums, are not good reasons to

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123 Ibid 812.
126 Ibid 478.
127 Ibid.
128 Ibid 491.
retain jurisdiction and repel a plea of forum non conveniens relying on the 'justice' exception.\textsuperscript{129} 'The key', he said, 'to the solution of this problem lies in ... the underlying fundamental principle'.\textsuperscript{130} His Lordship said that the advantages referred to should not deter grant of a stay simply because the plaintiff would be deprived of such an advantage, 'provided the court is satisfied that substantial justice will be done in the appropriate forum'.\textsuperscript{131} He instanced the Trendtex case,\textsuperscript{132} where the House of Lords granted a stay in favour of Switzerland as the more appropriate forum, depriving the plaintiffs of more extensive English discovery procedures.

As to just what factors \textit{will} be taken into account, following \textit{Spiliada}, in deciding on the relative appropriateness of the competing fora, Lord Templeman observed, in \textit{Spiliada}, that, 'The factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion. The authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case.'\textsuperscript{133} That said, it is now useful to consider some factors that \textit{have} been identified and how persuasive, or otherwise, they are. Paul Beaumont, in his Note on \textit{forum non conveniens} in the United Kingdom, on behalf of the delegation from that country to the Special Commission of the Permanent Bureau of the Conference on Private International Law,\textsuperscript{134} reviewed case law and academic commentary and summarised his findings as follows:

1 -- The applicable law is a relevant factor whenever it has been agreed by the Parties or would be the same in the alternative forum. It is a significant factor in favour of the forum which is applying its own law when the issues of law are important to determining the outcome of the case and are complex and disputable.

2 -- The fact that litigation is pending in another forum is a significant factor if the proceedings there have reached a stage which has had some impact upon the dispute between the parties.

3 -- The convenience of witnesses is a relevant factor unless the dispute is primarily one of law and there is little scope for oral evidence but it is rarely a significant factor unless the dispute is primarily factual rather than legal or a considerable amount of evidence is to be given in a foreign language.

\textsuperscript{129} Ibid 482-3; P.Beaumont above n 83, 3.
\textsuperscript{130} [1987] 1 AC 460, 482.
\textsuperscript{131} Ibid.
\textsuperscript{132} Trendtex Trading Corporation v Credit Suisse [1982] AC 697.
\textsuperscript{133} [1987] 1 AC 460,465.
\textsuperscript{134} P. Beaumont, above n83.
4 -- The convenience of the parties is a relevant factor in making it difficult for a defendant to object to being sued in his own forum (the place where he is habitually resident or domiciled) or for a plaintiff to object to the alternative forum when that is his own forum. This factor has echoes of the interpretation of the Brussels Convention which gives a strict construction to the special jurisdictions in favour of the general jurisdiction of the defendant's domicile in Article 2.

5 -- The geographical place with which the dispute is closely connected, e.g. the place of performance of the contractual obligation in question, is a relevant factor.

6 -- If a negative declaration is being sought in one forum and a positive remedy in another forum then this is currently a factor in favour of the latter forum. However, it is arguable that this should be a neutral factor in determining the appropriate forum.

7 -- If third parties or other defendants can be joined to the action in one forum but not in the alternative forum then this is a significant factor in favour of the former.

8 -- If related litigation has already taken place in one forum and not in the alternative forum and this has enabled the lawyers in the former forum to acquire expertise of relevance to the present litigation then this is a relevant factor in favour of the former forum.

9 -- A forum will be reluctant to decline to exercise jurisdiction if it would require the alternative forum to rule on questions of public policy of the former forum which are central to a resolution of the litigation.

10 -- Differences between one forum and the alternative forum in terms of costs, damages and delays are of little or no relevance to determining appropriateness but in an extreme case can be relevant to the "justice" exception.

11 -- If the defendant is unable to state an arguable defence on the merits in the forum or in the alternative forum then this is a significant factor in favour of the former forum in order to avoid wasting time.135

The possibility of a forum selected by a plaintiff being seriously inconvenient to the defendant was much more relevant formerly however than is the case today. As David Robertson has stated, (referring to the US Supreme Court's decision in Gilbert), in 1947, '[w]e had no commercial jet travel, no personal or office computers, no photocopy technology, no fax machines ... It is hard to grasp how much technology has changed our lives since then.'136 He goes on to say that,

With the advent of technology, the purpose served by the doctrine of forum non conveniens appears to have changed. It no longer appears to be restricted to those instance where the plaintiff's forum choice was so egregiously inappropriate as to appear motivated by a desire to vex and harass the defendant.137

135 Ibid 'Concluding Remarks'.
137 Ibid.
It is Beaumont's point ten that has assumed new significance, however, in the light of two recent decisions of the House of Lords which have had the effect of giving much greater emphasis to the 'justice exception'. In first *Connelly v R.T.Z. Corporation PLC*\(^{138}\) and then *Lubbe v Cape P.L.C.*,\(^{139}\) the House of Lords found that, despite clear findings in favour of Namibia and South Africa being the more appropriate jurisdictions for the trial of the respective actions, justice required that, nevertheless, stays not be granted in the English action. In each case this was because the trial of the actions would be extremely expensive and require costly expert scientific and legal participation and that neither legal aid nor contingency fees would be available in the foreign jurisdictions.

In both cases it was stated that it is not necessarily enough to show that legal aid is available in England but not in the more appropriate forum, but that, because there would be no possibility at all of the cases proceeding otherwise, then they were exceptional cases calling for a refusal to grant a stay.

In the earlier case, *Connelly*, Lord Hoffmann was a lone dissenter, arguing that the result of the decision would be that, '..the action of a rich plaintiff will be stayed while the action of a poor plaintiff in respect of precisely the same transaction will not. It means that the more speculative and difficult the action, the more likely it is to be allowed to proceed in this country with the support of public funds.'\(^{140}\) This criticism was addressed in *Lubbe* by Lord Hope of Craighead,\(^{141}\) under the heading of "public interest", with whose speeches Lord Hoffman agreed. Lord Hope said that,

> In my opinion the principles on which the doctrine of forum non conveniens rest leave no room for considerations of public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice in the case which is before the court.\(^{142}\)

And,

> However tempting it may be to give effect to concerns about the expense and inconvenience to the administration of justice of litigating actions such as these in

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\(^{139}\) [2000] 1 WLR 1545.

\(^{140}\) [1998] AC 855, 876.

\(^{141}\) Ibid 1566-7.

\(^{142}\) Ibid 1566.
this country on the one hand or South Africa on the other, the argument must be resolved upon an examination of their effect upon the interests of the parties who are before the court and securing the ends of justice in their case. I would hold that considerations of policy which cannot be dealt with in this way should be left out of account in the application to the case of the Spiliada principles.\textsuperscript{143}

Lord Hope specifically declined to follow the approach of American courts in this respect (of which more below) and approved the statement of Deane J in Oceanic Sun Special Shipping Co Inc v Fay,\textsuperscript{144} to the effect that ‘the court is not equipped to conduct the kind of inquiry and assessment of the international as well as the domestic implications that would be needed if it were to follow that approach.’

\textsuperscript{143} Ibid 1567.

\textsuperscript{144} (1988) 165 CLR 197, 255.

\textsuperscript{145} This dissertation does not consider the controversial question of whether the plea of forum non conveniens is competent when a court in the United Kingdom has jurisdiction under Article 2 of the Brussels or Lugano Conventions. The English Court of Appeal considers that forum non conveniens is a competent plea in these circumstances provided the parties are not connected with another Contracting State and the alternative forum is a non-Contracting State. See Re Harrods (Buenos Aires) Ltd [1992] Ch 72 and The Po [1991] 2 Lloyds Rep 206. The former case was referred to the European Court of Justice by the House of Lords, see Case C-314/92 Ladenimer SA v Interconfinanz, but settled before a ruling could be given. See, e.g., A.Briggs, ‘Forum non conveniens and the Brussels Convention again’ (1991) 107 Law Quarterly Review 180; and W.Kennett, ‘Forum non conveniens in Europe’ (1995) 54 Cambridge Law Journal 552.

\textsuperscript{146} (1978) 141 CLR 88.
turning to consideration of the ‘flip side’ – anti-suit injunctions – it is appropriate to pause and pay some regard to developments in this area in the other major common law jurisdictions.

2.5 United States of America

The doctrine of *forum non conveniens* permits a United States court to decline to exercise its judicial jurisdiction if the court would be a seriously inconvenient forum and if an adequate alternative forum exists.\(^{147}\)

The United States appeared to have adopted the ‘Scottish doctrine’ by the time, in 1932, that the Supreme Court said, in *Canada Malting Co. Ltd v Paterson Steamships Ltd*,\(^ {148}\) that, ‘[T]he court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.’ However, the position was still uncertain until two cases were decided by the Supreme Court in 1947: *Gulf Oil Corp v Gilbert* ('*Gilbert*')\(^ {149}\) and *Koster v Lumbermens Mut Cas Co* ('*Koster*').\(^ {150}\) In those decisions, the Supreme Court stated that a plaintiff’s choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would, ‘establish .... Oppressiveness and vexation to a defendant ... out of all proportion to the plaintiff’s convenience’, or when the ‘chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems,’ the court may, in the exercise of its sound discretion, dismiss the case.\(^ {151}\)

*Gilbert* was the first case where the Supreme Court had to squarely confront the issue. The plaintiff, a resident of Virginia, brought proceedings in the Southern District of New York against the defendant, a Pennsylvania corporation qualified to do business in both Virginia and New York. The action was to recover damages for the destruction of the plaintiff’s warehouse and its contents by fire resulting from the defendant’s negligence. The defendant relied on *forum non conveniens* and claimed that Virginia was the more appropriate forum for the action because it was the place where the plaintiff lived, where the defendant did business, where all events concerned in the


\(^{148}\) 285 US 413 (1932).


\(^{150}\) 330 US 518 (1947).
litigation took place, where most of the witnesses resided, and where both the state and federal courts were available to the plaintiff and were able to obtain judgment over the defendant.

The Supreme Court stated that, '[t]he principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorised by the letter of a general venue statute.'\textsuperscript{152} However, the Court recognised that a plaintiff might select a forum not simply to seek justice but 'perhaps seeking justice blended with some harassment'.\textsuperscript{153} They acknowledged that a plaintiff may be tempted to adopt a 'strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.'\textsuperscript{154}

The Gilbert Court provided a list of 'private interest factors' affecting the convenience of the litigants and a list of 'public interest factors' affecting the convenience of the forum.\textsuperscript{155} These were to be weighed in deciding whether to dismiss on forum non conveniens grounds. The factors pertaining to the private interests of the litigants included the 'relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.'\textsuperscript{156} Additional considerations would be the enforceability of a judgment if one were obtained and the advantages and obstacles to a fair trial.\textsuperscript{157}

According to the reasoning of the Court, the purpose behind consideration of the private interest factors was to prevent a plaintiff, by choosing an inconvenient forum, from vexing, harassing, or oppressing, 'the defendant by inflicting on him unnecessary expense or trouble unrelated to the plaintiff's own right to pursue his remedy.'\textsuperscript{158} The Court concluded that, 'unless the balance is strongly in favor of the defendant, the

\textsuperscript{151} Ibid 524.
\textsuperscript{152} 330 US 501, 507 (1947).
\textsuperscript{153} Ibid.
\textsuperscript{154} Ibid.
\textsuperscript{155} Ibid 508-9.
\textsuperscript{156} Ibid 508.
\textsuperscript{157} Ibid.
\textsuperscript{158} Ibid.
plaintiff’s choice of forum should rarely be disturbed.\textsuperscript{159} If the private interest factors in a given case were equivalent, not obviously favouring one party or the other, the Court would look further to public interest factors.

The public interest factors identified by the Court included the administrative difficulties flowing from court congestion; the ‘local interest in having localized controversies decided at home’; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.\textsuperscript{160}

In \textit{Koster}, the Supreme Court also applied the \textit{forum non conveniens} test to dismiss the case. The plaintiff, a New York resident, brought a derivative action against an insurance company based in Illinois. The complaint was dismissed on \textit{forum non conveniens} grounds because all the evidence and witnesses were located in Illinois and the plaintiff could show no convenience or other reasons for bringing the action in New York. The Court emphasised that there is normally a presumption in favour of a plaintiff’s choice of forum, which will outweigh any inconvenience for a defendant,\textsuperscript{161} but that a clear showing that oppressiveness and vexation to a defendant is out of proportion to the plaintiff’s convenience, or that the chosen forum burdens the court, will weaken the presumption and allow dismissal based on \textit{forum non conveniens}.\textsuperscript{162}

Paterson has called the version of \textit{forum non conveniens} adopted by the Supreme Court vague, describing the foregoing litany of factors as leaving too much to the discretion of the trial judge.\textsuperscript{163} The decisions in \textit{Gilbert} and \textit{Koster} confirmed, however, that the starting point for an analysis of \textit{forum non conveniens} is that there will usually be a strong presumption in favour of the plaintiff’s choice of forum that should ‘rarely be disturbed’,\textsuperscript{164} and that a two step approach will be applied to considering a motion to dismiss on \textit{forum non conveniens} grounds, viz: that the court should examine:

\textsuperscript{159} Ibid 507.
\textsuperscript{160} Ibid 509.
\textsuperscript{161} 330 US 518, 524 (1947).
\textsuperscript{162} Ibid.
\textsuperscript{164} \textit{Gilbert} 320 US 501, 508 (1947).
i. The availability of an alternative forum to adjudicate the dispute.
ii. If an adequate alternative forum exists, the court will then balance the public and private interests to determine whether the convenience of the parties and the ends of justice would best be served by dismissing the action in favour of the alternative forum.¹⁶⁵

In *Piper Aircraft Company v Reyno*¹⁶⁶ (‘*Piper*’), the Supreme Court confirmed that its decision in *Gilbert* held, ‘that the central focus of the *forum non conveniens* inquiry is convenience’,¹⁶⁷ and applied it to the international context. They said that, ‘Under *Gilbert*, dismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice’.¹⁶⁸ *Piper* concerned the crash, in 1976, of a small commercial aircraft in the Scottish Highlands, killing the pilot and all five passengers, all Scots subjects and residents. The administratrix of the passengers’ estates filed suit in the US against the US manufacturers of the aircraft and the propeller. Admittedly this was because of the American strict liability laws, capacity to sue and likelihood of higher damages in that jurisdiction.

Relying on the private/public interest factor balancing tests set down in *Gilbert*, the US District Court granted the motion to dismiss on *forum non conveniens* grounds. The District Court held that the less favourable law in Scotland was not a matter deserving of any weight – it was a ‘matter to be dealt with in the foreign forum.’¹⁶⁹ The US Court of Appeals for the Third Circuit reversed on appeal, holding, inter alia, that ‘dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff.’¹⁷⁰

¹⁶⁷ Ibid 249.
¹⁶⁸ Ibid.
¹⁶⁹ Ibid 244, quoting *Reyno v Piper Aircraft Co* 479 F Supp 727, 758 (MD PA 1979).
¹⁷⁰ Ibid.
The Supreme Court, however, upheld the decision of the District Court, and affirmed the dismissal. Pre-empting Lord Goff's formulation of principles in Spiliada by several years, they held:

"Plaintiffs may not defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favourable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens enquiry."

The Court was plainly concerned that, because of the attractions of the US jurisdiction to foreign plaintiffs, if the possibility of the lesser adequacy of the substantive law and remedies provided by the foreign forum becoming a substantive factor would render the forum non conveniens principle virtually useless, and open the floodgates to foreigners in US courts. They did note that, 'if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavourable change in law may be given substantial weight...'

In Piper, although Scots law did not provide for strict liability and the Scots courts would award lower damages, the survivors of those killed in the plane crash would not be deprived of remedies nor treated unfairly.

It must be emphasised that the Supreme Court was concerned to highlight the distinction to be accorded to foreigners seeking to litigate in the United States from a resident or citizen plaintiff, which they justified as follows:

"[A] plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that the choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference."

This distinction is not maintained, however, when a US corporation which has engaged in activities overseas takes action at home based on some event occurring in the foreign forum. As Fellas points out, this distinction is based on the underlying

171 Ibid 247.
172 Ibid 250, 252.
173 Ibid 254.
174 Ibid 255.
175 Ibid 255-56 (citations omitted).
176 J.Fellas, above n 165, 142.
rationale of *forum non conveniens* – that the trial is convenient.\(^\text{177}\) He cites the decision of the Court of Appeals for the Eighth Circuit in *Reid-Walen v Hansen*.\(^\text{178}\) 'A corporate plaintiff's citizenship or residence may not correlate with its real convenience because of the nature of the corporate entity, while an individual’s residence more often will correlate with his or her convenience.' And, 'Judicial concern for allowing citizens of the United States access to American courts has been tempered by the expansion and realities of international commerce.'\(^\text{179}\) The *Reid-Walen* Court quoted from a then recent decision of the Ninth Circuit:

In an area of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.\(^\text{180}\)

Fellas contrasts the standard for US corporations with that for individuals injured overseas bringing a tort action in the US, (as in the *Reid-Walen* action which concerned a couple injured while on holiday in Jamaica), where the attitude of the US court is very firmly aligned in favour of support for litigation in the home jurisdiction.\(^\text{181}\) US courts have also held that, while residence is not a decisive factor in consideration of denial of an action on *forum non conveniens* grounds, that the burden on the defendant becomes much heavier when the plaintiff resides in his chosen forum.\(^\text{182}\)

American courts have emphasised that, because the issue of *forum non conveniens* is so fact dependent, that it can only be determined on a case by case basis and that therefore the issue is very largely left to the discretion of the district court and that the scope of review of that decision will be greatly prescribed.\(^\text{183}\) 'The decision lies wholly within the broad discretion of the district court and should be reversed only if that discretion has been clearly abused.'\(^\text{184}\) Fellas states that, if a district court has

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\(^{178}\) 933 F2d 1390, 1395 n8 (8th Cir, 1991).

\(^{179}\) *Ibid* 1395.

\(^{180}\) *Ibid*, quoting *Contact Lumber Co. v P.T. Moges Shipping Co., Ltd.*, 918 F2d 1446, 1450 (9th Cir, 1990).

\(^{181}\) J. Fellas, *above* n 165, 142.


\(^{184}\) *Peregrine Myanmar Ltd v Segal* 89 F3d 41, 46 (2nd Cir, 1996) cited in Fellas, *above* n 165, 141.
focussed on all of the factors outlined in _Gilbert_ before dismissing a case on _forum non conveniens_ grounds, its decision is accorded 'substantial deference'. And he observes that, while dismissal on _forum non conveniens_ grounds should be more the exception than the rule, 'the current trend in the reported cases appears to indicate a growing willingness to grant these motions.'

_Gilbert_ and _Piper_ were followed in the Bhopal Gas Plant disaster litigation. This well known litigation involved an accident at the Indian plant operated by Union Carbide India Limited, which killed over 2000 people and injured over 200,000. The Indian Government, representing the victims, brought a class action in New York against the parent company of the Indian plant but the case was dismissed on _forum non conveniens_ grounds. The US District Court and the Court of Appeals for the Second Circuit both found that the private and the public interest factors favoured India; that there would be appropriate remedies in India and that the Indian courts were well able to deal with the cases. Other factors included that all the witnesses were Indian, as were all the factory workers; that the plant had been assembled in India, by Indians and monitored by Indian inspectors pursuant to Indian regulations.

The Court of Appeals found that India had a greater interest in the outcome of the suit than the United States. They agree with the reasoning of Judge Keenan of the District Court who had stated, 'The Indian Government, which regulated the Bhopal facility, has an extensive and deep interest in ensuring that its standards are complied with,' and that, '[i]t would be sadly paternalistic, if not misguided, of this Court to evaluate the regulations and standards imposed in a foreign court.' The Supreme Court denied leave to appeal.

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186 Ibid 141. Cf. _Reid-Walen v Hansen_, cited above. In that case the Court of Appeals overturned the District Court's _forum non conveniens_ dismissal. Circuit Judge Timber, in a strongly worded dissent, accused the majority of failing to accord deference to the District Court and of substituting its own analysis of the private and public interest factors for those of the lower court.
188 809 F2d 195, 197 (2nd Cir. 1987).
190 Ibid.
The American approach to *forum non conveniens* has been criticised as discriminating against foreign plaintiffs such as the Bhopal victims, who are unable to take advantage of the higher damages and other advantages of litigating in the US.\(^{191}\) Such criticism can, however, be of the emotive kind; knee-jerk responses that tend to focus on the wrong committed and the connection with the United States and the attractiveness of litigating there versus the comparative ‘unfairness’ of litigating in the home jurisdiction; responses driven by an understandable desire to see the victims of wrong receive maximum compensation. Typically in the Bhopal case, the argument concentrates on the US parent company but fails to acknowledge the complete local (i.e., Indian) responsibility for the management and maintenance of the plant and its operations. The question is asked, why, in a case where all of the responsibility, all of the victims, all of the witnesses, and the bulk of the documentation lies in India, a constitutional democracy with a competent judiciary and legal system, should the case be tried in an American court?

The response to that would most generally rest with a number of eminently practical considerations. These include the availability, in the US at least, of vastly higher damages, including punitive damages; less congested court dockets and the availability of contingency fees, which make it a much more attractive proposition both to undertake litigation in the first place, and with respect to the outcome, in the event of victory. US courts have held, however, that these considerations are not relevant when weighing up the private and public interest factors. It all comes back to the *Piper* formulation, based on the rationale of keeping the floodgates closed to foreign litigation. The ‘lesser adequacy’ of the foreign laws and remedies is not to be considered a substantive factor; or rather only if the foreign remedy is no remedy at all.

The case of *Polanco v H.B.Fuller Company*,\(^{192}\) provides a good example of what will not be taken into account when a US court considers the adequacy of the foreign forum. The case, heard by the District Court of Minnesota, was a wrongful death action brought by Ruth Polanco, a Guatemalan national, alleging that her brother died after sniffing glue manufactured by the American Fuller Company’s Guatemalan subsidiary.

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\(^{191}\) See, e.g., P.Prince, ‘Bhopal, Bouganville and Ok Tedi: Why Australia’s *forum non conveniens* approach is better’ (1998) 47 *International and Comparative Law Quarterly* 573, 587.

The Court noted that the non-availability of contingency fees in Guatemala and also the fact that Guatemalan law might require the plaintiff to pay legal fees to the defendant in the event that she lost the case, further diminished the likelihood that she could proceed with the action in Guatemala. 'This is true', the Court said, 'of many countries, and the Court is reluctant to find that a country which observes the same practice in this regard as Great Britain, from which our own legal traditions descended, does not comport with fundamental fairness.'

The Court noted that, 'several federal courts have cautioned against the seductions of equating traditions with which American jurists are familiar with “fundamental fairness”', and quoted a District Court in another Guatemalan case, Bolanos v Gulf Oil Corp.:194

We want to be careful not to let our justifiable pride in the English common law system .. obscure the fact that much of Western Europe and other South American countries besides Guatemala are firmly grounded in the Civil Law tradition [which relies on written submissions of evidence, restricts cross-examination, and does not provide a jury trial].195

The Polanco Court said that,

The above cases do not authorize an “anything goes” standard of adequacy. Rather, they reflect the respect which this Court owes to sovereign nations which as such are endowed, as surely as this Nation is, with the right to determine the standards of compensatory justice which comport with their particular economic and social requirements.196

District Judge Davis concluded his analysis of the issue of adequacy with the following words:

Plaintiff recites a litany of undesirable features of the Guatemalan legal system: the civil law tradition does not rely on reported cases as precedent; product liability under the negligence statute does not have a well-developed jurisprudence; Guatemalan courts are clogged with cases because they are inefficient and corrupt. The Court declines plaintiff's invitation to categorically denigrate legal systems which do not rely on written precedents as American courts do. Moreover, even in America, theories of "strict" products liability have only reached maturity in the past thirty to forty years; Guatemala's relative infancy in this regard does not make it an inadequate forum. Further, plaintiff estimates that the case will take years for

193 Ibid 1527.
195 Ibid 693.
196 941 F.Supp 1512, 1527.
Guatemalan courts to resolve yet court congestion is a fact of life even in this country. Finally, there is no evidence that Fuller-US or its subsidiary would use their considerable resources in an attempt to "buy" the Guatemalan courts.

This Court entertains no illusions that justice in Guatemala is the same as justice in America, but it recognizes that "sometimes different laws are neither better or worse in an objective way, just different." Jepson v. General Casualty Co. of Wisconsin, 513 N.W.2d 467, 473 (Minn.1994) (describing choice of law analysis). The Court concludes that Guatemala provides an adequate remedy for plaintiff's claims.

It cannot be said, however, that, despite the development of principles by the Supreme court in Gilbert and Piper, and the trend towards 'substantial deference' to district court findings, that US Courts are entirely consistent in their application of standards when it comes to considering forum non conveniens dismissal in cases which involve their own nationals. In Reid-Walen v Hansen, referred to above, the Eighth Circuit majority considered the ability of the American plaintiffs to litigate the matter in Jamaica – the place where the wrong complained of took place. They said that, 'Courts must be sensitive to the practical problems likely to be encountered by plaintiffs in litigating their claims, especially when the alternative forum is in a foreign country.'

The majority noted the likely unavailability of a jury trial in Jamaica and said further that,

The absence of a contingent fee system for attorneys in Jamaica also should be taken into account when considering the practical problems for the plaintiff. [199] Reid-Walen contends she would not be able to afford an attorney in Jamaica. Her inability to retain counsel in the alternative forum is an important factor counseling against dismissal. [200] In fact, Reid-Walen's counsel at oral argument stipulated that trying the case in Jamaica was so infeasible, both practically and financially, that Reid-Walen would not pursue the matter if unable to litigate in her chosen forum in the United States. In this case, the "alternative forum" is really not much of a forum at all.

Contrast this passage with the case of the unfortunate Ruth Polanco, whose household, the Court noted, 'includes neither running water nor electricity', and who, 'appears to have few resources with which to litigate the case in Guatemala.' She was nevertheless denied the opportunity to pursue the matter in the US because of the

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197 Ibid.
198 933 F2d 1390 (8th Cir, 1991).
199 Ibid 1398.
200 Ibid 1399. Footnotes omitted.
201 941 F.Supp 1512, 1526.
theoretical availability of a remedy in her own country. Speculation on my part, but it is highly likely that that decision was the end of the matter for Ruth Polanco.

It is, however, unlikely that the sort of reasoning put forward by the majority in Reid-Walen is much more than an aberrant departure from the Gilbert principles. The trend, as Fellas notes, is towards substantial deference to district court rulings. Circuit Judge Timbers pointed out as much in his highly critical dissenting judgment in Reid-Walen. While he agreed with the majority as to the advantages and attractiveness of the US legal system, he said that,

In elevating the advantages of our American system of justice to a Gilbert factor apart from the deference normally accorded plaintiff's choice of forum, the majority in effect is saying that a United States' citizen-plaintiff will rarely, if ever, have to travel abroad to litigate a claim.

And that,

[T]aken to its logical conclusion, the majority's holding renders the doctrine of forum non conveniens a nullity in actions involving American plaintiffs facing the spectre of litigating in a foreign forum. Since the United States judicial system inevitably will be the most attractive forum, dismissal by a district court will seldom be appropriate under the majority's analysis.

Judge Timbers referred to a number of decisions which had held that procedural advantages such as those accorded weight by the majority were held not to be ordinarily conclusive or substantial. He analysed the decisions on which the majority based their reasoning and found them to be of 'dubious origin', 'misplaced' and opined that they had culled their proposition 'from a passing reference' in another case. He concluded,

Piper Aircraft made clear that a forum generally is adequate where the defendant is amenable to process, it permits litigation of the subject matter of the dispute, and there is "no danger that [a plaintiff] will be deprived of any remedy or treated unfairly." 454 US at 254-55 & n. 22, 102 S.Ct. 265 & n. 22. Here, in light of the contingent nature of the dismissal, there is little question that Jamaica is an "adequate" forum under Piper Aircraft.

202 J. Fellas, above n 165, 147.
203 933 F2d 1390, 1408.
204 Ibid 1409.
205 Ibid 1408.
206 Ibid.
207 Ibid.
208 Ibid 1409.
209 Ibid. Peter Prince posits an argument that the Australian approach to forum non conveniens (that of the clearly inappropriate local forum, discussed in the next chapter), is preferable.
In the foregoing review we are now presented with two very different approaches to this vexed public policy question. That recently developed by the House of Lords in the Connelly and Lubbe decisions takes a very clear ‘hands off’ approach to the matter. It is not to be a consideration, no matter the floodgates that may be opened. This is in sharp contradistinction to the attitude of US courts to foreign litigants. It could be argued of course that, if higher damages and contingency fees were readily available in the alternative ‘richer’ jurisdiction, why would a matter be pursued in the poorer local one? And one could argue that there would be no encouragement to reform of local legislation, no development of local legal systems or the judiciary. That these might therefore stagnate. The argument that the English might put is that their courts and legal profession will attract a great deal more foreign business, to their advantage, and that the international prestige of English courts will grow.

An important consideration in all of the foregoing, with respect not just to US courts, but in all jurisdictions which follow forum non conveniens principles, is the necessity for the availability of an alternative forum for the matter to proceed. US courts have stated as much.210, 211 In order to grant a motion to dismiss for forum non conveniens, a court must satisfy itself [among other things] that the litigation may be conducted elsewhere against all defendants.211 An alternative forum is available if all parties are amenable to process and come within the jurisdiction of the forum.212 An alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly.213

regard because it makes it less likely that a case such as the Bhopal litigation would be dismissed on forum non conveniens grounds. This may in fact be so, but his argument relies on the Ok Tedi mining case (Dagi and Others v BHP [1997] 1 VR 428 - mining by BHP in Papua New Guinea, causing environmental damage), that was heard in Australia rather than Papua New Guinea. But that case was argued on the basis of the ‘Mozambique principle’ (British South Africa Co v Companhia de Mozambique [1893] AC 602, 631, per Lord Halsbury), and forum non conveniens grounds were not pursued. Prince's argument is based on the fact that forum non conveniens was not relied on by BHP because they knew that they could not succeed with such an argument although this is highly speculative. See P. Prince, above n 191, 587.

212 In re Air Crash Disaster Near New Orleans, La., 821 F2d 1147, 1165 (5th Cir, 1987) (en banc), partially vacated on other grounds 490 US 1032 (1989).
This issue was considered by the US Court of Appeals for the Second Circuit, in *Jota v Texaco, Inc.* ("Jota"), in a case involving plaintiffs from Ecuador against the giant US oil company, for alleged environmental and other damage in that country. In 1993, a class action lawsuit was filed on behalf of 1,500 Indians and farmers from the Oriente region of the Ecuadorian Amazon Basin in a Texas state court (later removed to the Federal district court). The Plaintiffs’ complaints included: the disposal of waste crude oil in open pits and landfills rather than in re-injection wells; burning crude oil in open pits without temperature or air pollution controls; spreading oil on dirt roads; negligently designing and constructing the Trans-Ecuador pipeline; causing adverse changes to the indigenous population’s way of life, including “their culture, their diet, and other ancient traditions” and employing inadequate technology for rain forest conditions. The plaintiffs filed suit in the US because of the tremendous difficulties in getting their case heard in Ecuador.

Initially resistant to the US action, a new Ecuador Government actually endorsed the US court’s jurisdiction over its citizens claims against Texaco. Holwick points out that the courts of Ecuador would not be able to adjudicate on the issue or enforce a judgment; that currently Ecuador does not recognise class action lawsuits, and its courts have no experience with large scale toxic tort cases; that indeed the only environmental disputes heard to date have been before administrative tribunals, with adverse findings resulting in penalties of only a few thousand dollars. Holwick draws attention to an emerging trend when he says that countries like Ecuador, beholden to transnational corporations (TNCs) for their economic growth and development, “may believe it is easier to allow US courts to penalise a TNC for the benefit of that nation’s citizens than to try to reform its own ineffectual or limited

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216 Ibid.
217 The country is the most volatile in South America and there have been numerous changes of government in the last decade; the most recent one was installed as the result of a coup in January, 2000.
218 S.Holwick, above n 215, 204.
219 Ibid 205.
judiciary or to renege on promises previously made to TNCs. He further suggests that, 'Indeed, some developing nations could possibly ask that TNCs consent to be sued at home for environmental or other damages resulting from their industrial activities ... that would seek to take advantage of the broader equitable powers (and the higher damages awards) available to US courts.' The advantage to TNCs in so doing, he suggests, would be avoidance of local jury trials, and the sort of entanglements that may result from the complex politico-military scenarios in countries like Ecuador.

The *Jota* Court found that dismissal for *forum non conveniens* was not appropriate because the defendant, Texaco, was not subject to suit in Ecuador, nor had it made a commitment to subject itself to the Ecuadoran jurisdiction. The Court contrasted this situation with the Bhopal case, where the Court had conditioned dismissal for *forum non conveniens* upon the defendant’s consent to personal jurisdiction in India: ‘such conditions are not unusual and have been imposed in numerous cases where the foreign court would not provide an adequate alternative in the absence of such a condition.’

The *Jota* Court also held that comity considerations require a court to, ‘consider whether an adequate forum exists in the objecting nation and whether the defendant sought to be sued in the United States forum is subject to or has consented to the assertion of jurisdiction against it in the foreign forum.’

The *Jota* case has opened up fertile ground for debate both in the courts and among academic commentators about the extent to which courts can and should look to the adequacy of proceedings in the foreign forum. Scott Holwick has observed that there are significant parallels with Spain’s attempt to extradite General Pinochet from the United Kingdom for crimes against humanity committed in Chile: ‘the basic issue in both is whether a foreign court can adjudicate torts committed in a second foreign nation when that nation has its own judiciary capable of ruling on the same issue.’

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220 Ibid 207.
221 Ibid.
222 Ibid.
224 Ibid.
225 Ibid 160.
226 S. Holwick, above n 215, 206.
A central issue of course is whether there is a judiciary capable of ruling on the issue. In *Jota*, the matter was remanded by the Court of Appeal to the District Court for the Southern District of New York, where Judge Rakoff filed a Memorandum Order updating his position on jurisdiction and *forum non conveniens* (the Court of Appeals had disagreed with his original stance). The Judge noted that, 'the Court is tentatively of the view that, if Ecuador provides an alternative forum, it is the proper place to try these cases.' However, that, 'Very recent events ... have revived lingering questions about the ability of the Ecuadorian ... courts to dispense independent, impartial justice in these cases.' The Judge was referring to the corruption which has tainted the Ecuadorian judiciary and the possibility 'that the Ecuadoran military, which is directly funded from oil reserves, would harass the plaintiffs if they attempted to bring these suits in Ecuador.'

In making his findings Judge Rakoff drew his information from the US State Department 'Country Report' on Ecuador's human rights practices, noting that, '[a] primary conclusion of that report is that “the most fundamental rights abuse [in Ecuador] stems from shortcomings in [its] politicised, inefficient and corrupt legal and judicial system.” He further noted that the report did not take account of the military coup that took place subsequent to its publication, in January 2000, and that one of the leaders of that coup was in fact a former justice of the Supreme Court of Ecuador. Judge Rakoff reopened the record and invited submissions as to whether the foreign court 'might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed in contemplation of being re-filed in [Ecuador].' In doing this, the Judge noted, 'the caution and deference a United States court must exercise in even approaching the question of the independence and impartiality of a foreign court.' The matter came back to Judge Rakoff in due course. He considered further submissions, and especially the fact that the Oil Company had submitted to the jurisdiction of the Ecuador Courts, and found that there was nothing

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228 Ibid at *1.
229 Ibid.
230 Ibid.
231 Ibid at *2.
232 Ibid at *3.
233 Ibid.
to say that the claims could not be pursued and addressed in those courts. The matter was therefore dismissed on *forum non conveniens* grounds.\(^{234}\)

Judge Rakoff did not have recourse to the US State Department Country Reports without prior endorsement by a higher authority. He was following the precedent set by the Court of Appeals for the Second Circuit in *Bridgeway Corporation v Citibank*.\(^{235}\) That Court was deciding whether to dismiss for *forum non conveniens* in favour of the courts of Liberia. The *Bridgeway* Court noted the observations in successive State Department Country Reports about the corruption and incompetence and even collapse of the Liberian legal and judicial system. They held that the Report constituted, ‘powerful and uncontradicted documentary evidence.’\(^{236}\)

The Second Circuit continued this approach in a subsequent decision, *Guidi v Intercontinental Hotels Corp*,\(^{237}\) in considering whether to dismiss in favour of adjudication in the courts of Egypt. This was a case bought by the widows of two American businessmen who were shot and killed in an Egyptian hotel by Egyptian gunmen, against the American corporate manager of the hotel, for wrongful death. The District Court dismissed on *forum non conveniens* but the Second Circuit reversed. One basis for their findings was the ‘emotional burden’ the plaintiffs would face in travelling to Egypt. The Court noted the possibility of hostile attack on foreigners in Egypt and the concerns the plaintiffs would have for their own safety if required to travel there:

> Plaintiffs have supplied us with ample evidence of terrorist attacks occurring after the events giving rise to their action – including the subsequent killing of nine foreign terrorists by the very man who attacked plaintiffs – which give credence to Plaintiffs' uncertainty as to the safety of American visitors to Egypt insofar as fear of religious extremism is concerned.\(^{238}\)

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\(^{234}\) *Aguinda v Texaco, Inc* 142 F.Supp 2d 534 (2001, S.D.N.Y.)

\(^{235}\) 201 F3d 134 (2d Cir, 2000).

\(^{236}\) Ibid 141-2. Hypothetically speaking, it is unlikely that an Australian court, if it was referred to, and used such materials, would have found any support in the Country Reports for declining to dismiss in favour of the Papua New Guinea Courts. The most serious allegation made in the latest Country Report on that country is to the effect that, ‘At times political interests interfere with due process’. (http://www.siatc.gov/wwww/global/human_rights?1999_hrp_report/papuaneew.html).

\(^{237}\) 203 F3d 180 (2nd Cir, 2000).

\(^{238}\) Ibid 186.
Newman, commenting on these decisions, calls them evidence of a new readiness by courts to 'pass judgment on the adequacy in fact of a foreign court's performance of the judicial function'.\textsuperscript{239} He clearly considers this development to be a healthily sceptical one and says that it is a more realistic one than an approach, 'that makes assumptions as to the sameness of legal systems.'\textsuperscript{240} Newman did point out that the Guidi Court failed to take account of the fact that under the Egyptian legal system, there would have been no jury trial, that the matter would have been largely dealt with by written submissions and that, in all likelihood, there would have been no need for the American plaintiffs to travel to Egypt.\textsuperscript{241}

In the area of establishing whether an alternative forum exists, a further and extremely interesting development has been crafted by some Central and South American countries, in an attempt to support their citizens in bringing suits in US courts. Laws passed by a number of these countries are intended to deny their citizen plaintiffs access to their own courts in an attempt to preclude US courts from dismissing on \textit{forum non conveniens} grounds – because there will be no alternative forum for the trial of the action.\textsuperscript{242}

These laws are called, in most countries that have them, 'Ley de Defensa de los Derechos Procesales de Nacionales y Residentes' (Law in Defence of the Procedural Rights of Nationals and Residents), or some close approximation of this.\textsuperscript{243} These Latin American laws seek to effectively deny recognition to \textit{forum non conveniens} dismissals by foreign courts of lawsuits, brought by their nationals, by terminating subject-matter jurisdiction over the national's claims from the time they are commenced in the foreign country. Or at least by suspending their jurisdiction, as it may be revived if the national voluntarily dismisses the foreign action.\textsuperscript{244}

\textsuperscript{240} Ibid.
\textsuperscript{241} Ibid.
\textsuperscript{242} The Governments and Legislatures of Costa Rica, Ecuador, Guatemala, Honduras and Nicaragua have recently proposed and/or enacted such legislation. L.Newman, 'Latin America and \textit{forum non conveniens} dismissals' 2/4/99 3 \textit{New York Law Journal} (col. 1).
\textsuperscript{243} Ibid.
\textsuperscript{244} Ibid.
Newman also notes that US courts appear, so far not to have accepted that they preclude *forum non conveniens* dismissal. However the few decided cases indicate that this is rather more because of uncertainty as to the full scope and effect of the relevant Latin American statutes, and whether the foreign courts really would not entertain a suit in a case dismissed on *forum non conveniens* grounds by a US court. It seems that a US court might first require proof of this—in the form of *actual* dismissal of a suit by a Latin American country—before entertaining the action again.\(^\text{245}\)

In *Polanco v H.B. Fuller Company*, discussed above, the District Court said that, Plaintiff argues that Guatemalan law forbids disturbing a plaintiff's forum choice. Consequently, Guatemalan courts will not recognize jurisdiction that has been "manipulated" by a *forum non conveniens* transfer. However, a quick and decisive solution to this potential problem was reached in *Delgado v Shell Oil*, 890 F.Supp. 1324, 1375 (S.D.Tex.1995). After finding Guatemala and other fora to be adequate to merit *forum non conveniens* dismissal, the court directed that "in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction" of any plaintiff's case, that plaintiff may return, and the court will resume jurisdiction.\(^\text{247}\)

Newman cites a third, unreported decision of the US District Court for Hawaii, *Patrickson v Dole Food Co.* Affidavits were supplied by the plaintiffs in that case stating that claims relating to alleged pesticide exposure in Costa Rica, Ecuador, Panama and Guatemala, could not be heard in those jurisdictions, and evidence was given of a Costa Rican case in which a Court of that country had refused to take jurisdiction in a similar matter, after a *forum non conveniens* dismissal by a Texas District Court.\(^\text{249}\) The defendants in *Patrickson*, however, provided a rationale for this decision, and the Hawaii District Court 'indeed found that there was sufficient evidence that Costa Rica was an available alternative forum.'\(^\text{250}\) The *Patrickson* Court dismissed on *forum non conveniens* grounds, 'with conditions and a statement that the


\(^{247}\) Ibid 1525.

\(^{248}\) Civil No.97-01516 HG (D.Haw, September 9, 1998).


\(^{250}\) Ibid.
Court would resume jurisdiction should the highest court of any foreign country affirm the dismissal for lack of jurisdiction.\textsuperscript{251}

2.6 Canada

The doctrine of \textit{forum non conveniens} is now well established in Canada, both in the common law provinces and in the civil law province of Quebec.\textsuperscript{252} \textit{Amchem Products Inc v British Columbia (Workers' Compensation Board)}\textsuperscript{253} (\textit{Amchem'}), a decision of the Supreme Court, is the leading Canadian authority on the subject of \textit{forum non conveniens}, as it also is on the subject of anti-suit injunctions. In Quebec, the rule was codified in Article 3135 of the new Civil Code that was promulgated on July 1, 1994. Prior to \textit{Amchem}, the state of Canadian law on the subject was summarised by Hayes as follows:\textsuperscript{254}

The status of the doctrine of \textit{forum non conveniens} in Canada is unclear. In general terms the Canadian courts have looked to English authorities when considering \textit{forum non conveniens} issues. Their specific approach, however, is not consistent. The most recent cases from the Western provinces refer to the current English test, but at the same time resist adopting a comprehensive test or rule which would result in an 'overly legalistic approach'. The Ontario courts, on the other hand, have fallen behind the English courts' development of the doctrine and continue to apply a test which has now been replaced by the House of Lords. There is confusion in many of the cases as to whether the test is different when the defendant is served within the jurisdiction rather than ex juris, where the burden of proof lies and the weight to be given personal or juridical advantages to the plaintiff of proceeding in the home jurisdiction.

In \textit{Amchem}, Sopinka J, who delivered the opinion of the Court, followed \textit{Spiliada}, holding that 'the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff.'\textsuperscript{255} He approved the test stated by Ritchie J in the Federal Court's decision of \textit{Antares Shipping Co v The Ship 'Capricorn}.\textsuperscript{256}

\begin{footnotesize}
\textsuperscript{251} Ibid.
\textsuperscript{253} [1993] 1 SCR 897.
\textsuperscript{255} [1993] 1 SCR 897, 921 [emphasis in original].
\textsuperscript{256} Ibid 919-920.
\end{footnotesize}
In my view the overriding consideration which must guide the Court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.

The *Amchem* test has been codified in Article 11 of the 1994 Uniform Court Jurisdiction and Transfer of Proceedings Act proposed by the Uniform Law Conference of Canada.

### 2.7 New Zealand

There has been little development worthy of note in New Zealand, on the matter of stay cases (and, apparently, none at all with respect to anti-suit injunctions). As Fawcett notes, forum-shopping is no problem in New Zealand, 'because of the geographical isolation of that State and because there are no obvious substantial advantages in suing in New Zealand over any other common law jurisdiction.'

New Zealand still accepts the jurisdiction of the Privy Council so it was inevitable that it should follow *Spiliada*. In the first decision of the Court of Appeal post-*Spiliada*, *Club Mediteranee NZ v Wendell*, the Court had to consider whether to grant a stay in favour of the courts of New Caledonia. A New Zealand resident had booked a holiday at Club Med in New Caledonia, through a New Zealand subsidiary of the French company. He contracted food poisoning whilst on holiday. Hillyer J refused the stay at first instance, but by applying the old abuse of process principles. His decision was upheld by the Court of Appeal, but Cooke P applied the newly decided *Spiliada* test instead, to reach the same conclusion.

As Fawcett notes the *Spiliada* principles have also been followed in Brunei, Hong Kong (prior to 1997), Singapore, and Gibraltar for the same reasons.

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258 (1989) 1 NZLR 216.
259 Above n 258, 12.
262 *Binkarhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776.
2.8 Summation

Before proceeding, in the next chapter, to a review and analysis of the Australian position on stay of matters in the local jurisdiction, it is useful to set out the similarities and differences between the English (and other Commonwealth countries, except for Australia) position on *forum non conveniens*, and that of the United States. Fawcett has laid these out admirably and it is appropriate to reproduce his summary (at least substantially and omitting footnotes) here:

Similarities:

(i) It is an essential requirement for declining jurisdiction on the basis of *forum non conveniens* in Britain ... and the United States that there is an alternative forum abroad.

(ii) The considerations looked at in the United States as private interest factors would also be considered in Britain ... when ascertaining the appropriate forum for trial.

(iii) The treatment of the advantage to the plaintiff in trial in the local forum appears to be the same. In *Piper Aircraft v Reyno* the Supreme Court of the United States held that the fact that Scots law was less favourable to the plaintiff was not a sufficient basis to defeat the dismissal on *forum non conveniens* grounds of an action brought in the United States. In the *Spiliada* case the House of Lords was concerned to reduce the weight that had previously been given to the advantage to the plaintiff of trial in England. Lord Goff held that this factor cannot be decisive and, by way of example, that an English court would not, in ordinary circumstances, hesitate to stay English proceedings merely because the plaintiff would be deprived of a higher award of damages in England. Both England and the United States also have the same attitude towards time-bars in the foreign forum.

(iv) The relationship with bases of jurisdiction is the same in the sense that, when an action is dismissed or stayed, what the court is saying is that,

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263 *Aldington Shipping Ltd v Bradstock Shipping Corp and Marbrnaft GmbH (The Waylink and Brady Maria)* [1988] 1 Lloyds Rep 475 (Gibraltar C.A.).
although it has jurisdiction, it refuses to accept jurisdiction. In the United States this means dismissing a case when what is constitutional is not desirable.

Differences:

(i) The framework within which the *forum non conveniens* considerations are examined in the United States is more flexible than that which operates in England, with its two-stage process and its rules on the burden of proof.

(ii) In the United States the courts expressly consider public interest factors. This does not happen in England, apart from when the applicable law is considered. In so far as public interest considerations operate under the surface in English law they point towards a public interest in allowing trial in England, even where the dispute is essentially foreign. This public interest is founded on the economic benefits of England being a centre for international litigation. This is in direct contrast to the emphasis placed in the United States on the clogging of local courts by foreign litigants.

(iii) Following on from this, a United States court can of its own motion dismiss a case on the basis of *forum non conveniens*, whereas an English court cannot.

(iv) This can affect the weight to be attached in the United States to a forum selection clause which confers jurisdiction on the local court. Normally, this will operate as a strong factor against staying the local proceedings. However, if the court is acting on its own motion this private interest factor, whilst still relevant, is not given as much weight.

(v) A distinction is drawn in the United States between local plaintiffs and foreign plaintiffs. There is a presumption in favour of a local plaintiff's choice of forum, which will normally outweigh any inconvenience to the defendant. There is no such presumption in the case of foreign plaintiffs.
Chapter 3

The Australian approach

3.1 Introduction

English courts have abandoned the traditional test of vexation and oppression, with respect to stay of local proceedings, and adopted the Scottish doctrine of forum non conveniens, as described in the preceding chapters. Australian courts have adopted a different approach. The High Court of Australia decided a 'stay' case soon after Spiliada but chose not to follow the reasoning of the House of Lords, despite the adoption of those principles by the courts of New Zealand and Canada. The time, it should be remembered, was a significant period in Australian law for developments other than consideration of the approach to take to stay of jurisdiction. It was subsequent to the decision of the High Court in Viru v The Queen,1 where the Court held that it was not bound by decisions of the Privy Council, and the passing of the Australia Act 1986 (C'th), which ushered in a new era in the development of Australian law, allowing the High Court to decide cases unconstrained by the need to follow any but its own earlier decisions.

It is interesting to speculate whether this new found freedom had any role to play in the making of judgments which took a different approach to that of their Lordships of England. There has been a general trend against reliance on English law in Australia over the last two to three decades, and indeed an increased questioning of the continued maintenance of the historical ties with England. The recent moves towards the establishment of an Australian Republic, arguably only defeated because of a split in the Republican vote over the method of appointment of a President, is evidence of this. Parkinson, for one, writes that a nationalist consciousness has developed in Australian law in recent years as the apron strings tying Australia to England have loosened.2 And the former Chief Justice of the High Court of Australia, Sir Anthony Mason, has said that judicial nationalism in Australia is flowering.3 Australian law is developing a distinctive approach in a range of areas including property law, tort law,

1 (1978) 141 CLR 88.
contract law, criminal law, trade practices law and securities regulation. Nygh suggests that the reasons for the rejection of Spiliada by the High Court were threefold: 'a desire to adhere to established Australian authority, the view that the plaintiff has a right to select the forum which the court cannot deny, and a general distrust of judicial discretionary power.'

Speculation about the motives of a ‘flowering’ judiciary and Nygh’s threefold reasons aside, the High Court did, in two decisions in 1988 and 1990, specifically decline to follow the approach of the House of Lords in The Atlantic Star-Spiliada line of cases. Instead, Deane J, supported by Gaudron J, in Oceanic Sun Line Special Shipping Company Inc v Fay (‘Oceanic Sun’), in a judgment followed soon after by a High Court majority in Voth v Manildra Flour Mills P/L (‘Voth’), varied the approach of a much earlier High Court, in Maritime Insurance Co Ltd v Geelong Harbor Trust Commissioners. In that early case the Court, not surprisingly, had followed the late 19th century English decisions, to the effect that the power to dismiss or stay proceedings within the jurisdiction on grounds that the case should have been brought in a tribunal of another country, is limited to situations where to permit the proceedings to go forward would be vexatious or oppressive or other abuse of the court’s process.

This chapter will discuss the approach adopted by the High Court of Australia. As indicated at the commencement of this dissertation, it is the decision of the High Court in Cigna that currently represents the last word of that court in respect of both applications to stay matters in the local jurisdiction and anti-suit injunctions. It is therefore appropriate to base this discussion on that decision and its consequences.

3.2 Cigna – the facts

The facts of the Cigna litigation are complex and are set out at length in the majority decision and also in Brennan CJ’s dissenting opinion. Because they are important, both

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7 (1990) 171 CLR 538.
8 (1908) 6 CLR 194.
to the issue of *forum non conveniens* and anti-suit injunctions in Australian law (the latter issue is discussed in chapter five), they are summarised here:

Cigna Ltd, the lead insurer of mining giant CSR Ltd, had for many years provided general insurance coverage to the giant mining company and its US subsidiary - CSR Inc. Cigna Ltd's parent was Cigna Inc, a US corporation, and neither carried on business in the other's territory. CSR Ltd operated a blue asbestos mine at Wittenoom in Western Australia and, in 1991, was subjected to claims from persons, both in the United States and Australia, who claimed to have suffered illness and injury as a result of that mining activity and its associated processes. Both CSR Ltd and Cigna Ltd were incorporated in Australia. In 1992 CSR Ltd sought admissions from Cigna Ltd that its insurance policies indemnified CSR Ltd against the asbestos claims.

Cigna Ltd vehemently denied that this was the case and claimed that, in fact, asbestos-related matters had always been specifically excluded from their coverage of CSR Ltd. Cigna Ltd stated that it would not continue to provide general insurance cover (which was then due for renewal) to CSR Ltd unless and until the matter was satisfactorily resolved. In March 1992, CSR Ltd wrote what has been called the 'Coerced Withdrawal Letter' to Cigna Ltd. The letter appeared to drop all claims to indemnification for asbestos-related claims - although this has been hotly contested in the litigation. Cigna Ltd apparently thought (or so they claimed) that the letter did have that effect, and responded by renewing their general insurance coverage of CSR Ltd. CSR Ltd later claimed that it was forced to write the letter, for reasons including alleged misrepresentation by Cigna Ltd of the terms of its insurance policies and because CSR Ltd could not be left without insurance cover, which it had tried and failed to find elsewhere. Allegations were made that Cigna had colluded with other insurance companies to deny CSR coverage.

CSR Ltd and CSR Inc filed a complaint in the United States District Court for the District of New Jersey. They sought declarations that they were entitled to indemnity with respect to the American asbestos claims from the insurers but not in respect of the Australian claims. In addition CSR Ltd, but not CSR Inc, pleaded that if the 1992 letter operated, to any extent, to bar CSR Ltd's claim for indemnity, Cigna Ltd was liable in damages for tortious interference with CSR's contractual relations, for tortious
interference with its prospective economic advantage and for misrepresentation. Significantly, as Brennan CJ pointed out, CSR, despite its pleading of duress and coercion underlying the writing of the March 1992 letter, did not seek to avoid the release of the right to indemnity with respect to the Australian claims.\(^9\)

Cigna Ltd and Cigna Inc and other associated insurance companies responded, within a month, by commencing proceedings in the Supreme Court of New South Wales. They sought a permanent anti-suit injunction to halt the New Jersey proceedings. They also sought a negative declaration to the effect that they were not liable to indemnify CSR Ltd or CSR Inc in respect of the asbestos claims and a declaration that they were not involved in any conspiracy or unlawful conduct to force CSR Ltd to withdraw its claims. Rolfe J granted an interlocutory anti-suit injunction on 15 August 1995, and subsequently dismissed applications by CSR for orders permanently staying the New South Wales proceedings on \textit{forum non conveniens} grounds, on 20 February 1996. CSR appealed to the New South Wales Court of Appeal, which refused leave to appeal, but without providing detailed reasons. The High Court therefore focused on the reasons for decision of Rolfe J. In a 6-1 judgment they reversed his decision and that of the Court of Appeal, granting the stay of the New South Wales proceedings and ordering that the application for the anti-suit injunction be dismissed.

There were two differences between the American and Australian proceedings. The first difference is that the American proceedings were solely concerned with the American asbestos claims - of which there had been a greater number but involving lesser sums than those from Australia. The New South Wales proceedings related to the Australian as well as the American claims. The second difference is that CSR also sought damages in the New Jersey proceedings - in respect of the ‘Coerced Withdrawal Letter’ of 1992 – alleging that Cigna was liable for tortious interference with its prospective economic advantage and for misrepresentation. And further, that Cigna was liable for statutory damages for violation of the Sherman Act\(^10\) and its State


\(^10\) 15 USC s1-7. Section 1 provides: ‘Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not
counterpart.\textsuperscript{11} CSR could not pursue its claim for damages under the Sherman Act in New South Wales because action for damages under that Act would fail the first limb of the rule in \textit{Phillips v Eyre}.\textsuperscript{12} The majority and Brennan CJ reached opposite conclusions, with respect to this matter of the Sherman Act claims, as to the reasons for their inclusion in the pleadings, and to its ultimate effect on the decision to grant an anti-suit injunction and the appropriate forum for determination of the matters.

It should be noted that, according to Brennan CJ, the relief available from the New South Wales Court, a declaration of the right to enforce or avoid an Australian contract made under Australian law and between Australian parties, and relief for any commercial anti-competitive conduct under the Trade Practices Act 1974 (C'th), was relief that was only available from the New South Wales Court. According to the majority,

\begin{quote}
[T]here is nothing to suggest that the relief which the respondents seek in the NSW proceedings, including a declaration that Cigna Australia and its company-insurers are not liable to indemnify CSR in respect of the Australian asbestos claims, is not available to them by way of a cross-claim in the US proceedings.\textsuperscript{13}
\end{quote}

The \textit{Cigna} majority followed the test for determining whether to exercise the discretion to stay proceedings in a local court, developed by Deane J in \textit{Oceanic Sun},\textsuperscript{14} and approved in \textit{Voth}. A stay is only to be granted if the Australian court is a ‘clearly inappropriate’ forum. In doing so they noted that in \textit{Voth} it was held to be common ground in \textit{Oceanic Sun} that, 

\begin{quote}
The traditional power to stay proceedings ... on \textit{forum non conveniens} grounds, is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process exceeding three years, or both said punishments, in the discretion of the court.’ By s15 of 15 USC (s4 of the Clayton Act), it is provided that, ‘any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws [which includes the Sherman Act by virtue of s12 of 15 USC (s1 of the Clayton Act)] may sue therefor ... without respect to the amount in controversy, and shall recover threefold the damages by him sustained.’
\end{quote}

\begin{itemize}
\item \textsuperscript{11} NJ STAT ANN 56-9-3.
\item \textsuperscript{12} (1870) LR 6 QB 1, 28-29. For a wrong committed to be actionable in this country, two conditions must be fulfilled. First, ‘the wrong must be of such a character that it would have been actionable if committed here; secondly ‘the act’ must not have been justifiable by the law of the place where it was committed. The test has been altered in the case of acts done within Australia: \textit{John Pfeiffer Pty Ltd v Rogerson} (2000) 172 ALR 625.
\item \textsuperscript{13} \textit{Cigna} (1997) 189 CLR 345, 402.
\item \textsuperscript{14} (1988) 165 CLR 197 at 242, 248, 251-55.
\end{itemize}
and the rationale for the exercise of the power to stay is the avoidance of injustice ... in the particular case.\textsuperscript{15}

To understand this it is necessary to backtrack a little and review the development of the Australian approach as explained in \textit{Cigna}.

3.3 Background

\textit{Oceanic Sun} was the first occasion post-\textit{Spiliada} on which the High Court had to decide whether to maintain the traditional approach or to follow the House of Lords and adopt the doctrine of \textit{forum non conveniens}. It chose neither, or rather different members of the bench opted for both of these approaches, but the majority chose a 'third way'.

The case concerned an Australian who undertook a cruise on a Greek ship in Greek waters, where he was injured in a trap-shooting accident. His cruise ticket was purchased in Australia. In a joint judgment, Wilson and Toohey JJ applied the 'natural' or 'more appropriate' forum approach adopted by the House of Lords in \textit{Spiliada}. In doing so, they found that Greece was the most natural and appropriate forum because it had the most real and substantial connection with the action. They would have granted a stay of the Australian proceedings on this basis despite the fact that the plaintiff, by the terms of the agreement likely to be applied in Greece, was limited to a recovery of SUS5000. In their judgment they noted the world-wide developments which had led to the changes in English law:

In our view the evolution of English law since the \textit{Atlantic Star} cannot be ascribed to local considerations such as the incorporation of the United Kingdom into the European Economic Community. Rather, this century has witnessed such a transformation in communications and travel, coupled with a greater importance attaching to considerations of international comity as the nations of the world become more closely related to each other as to render the \textit{St.Pierre} principle, fashioned as it was in the nineteenth century, inappropriate to modern conditions ... The \textit{St.Pierre} principle placed such a tight rein on the discretion of a court as to render it unable to deal justly with the problem of 'forum shopping'.\textsuperscript{16}

Brennan J (as he then was), saw no reason to depart from the traditional, pre-\textit{Atlantic Star} view of vexation and oppression, consistent with the principles enunciated by

\textsuperscript{15} (1997) 189 CLR 345, 391.
Scott LJ in *St. Pierre v South American Stores (Gath & Chaves) Ltd* ("St Pierre").17 Maintaining that line, like the minority in the House of Lord’s decision in *The Atlantic Star*, he had no alternative but to refuse a stay because the plaintiff had regularly invoked the jurisdiction of the court, and of course the conduct of the defendant could not be characterised as vexatious or oppressive in the traditionally understood sense of those terms. Brennan J relied on an extract from the judgment of Gibbs J (as he then was) in *Cope Allman (Australia) Ltd v Celermaier*,18 as being indicative of the Australian law prior to the *Atlantic Star* line of cases.19

However, the question that I am bound to pose to myself is not simply, 'Which is the more convenient forum?' The principles to be applied in such a case as this were laid down by the High Court in *Maritime Insurance Co Ltd v Geelong Harbor Trust Commissioners* (1908) 6 CLR 194. At 198 Sir Samuel Griffith, whose judgment was concurred in by the other members of the court, said: 'I will read one or two passages from the judgment of the President, Sir Gorell Barnes, in which the other members of the Court of Appeal concurred, in *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141 at 150. He said: "The court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice" (I interpolate there the words supplied by Warrington J in *Egbert v Short* (1907) 2 Ch 205 at 213 "in defending the action that he ought not to be sued in the court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent court").

Gibbs J went on to say,20

Before I may decline to exercise jurisdiction and deny to the plaintiff its prima facie right to proceed in this Court I must be satisfied that there would be something amounting to vexation, oppression or injustice to the defendants. I am not so satisfied.

In his judgment in *Oceanic Sun* Brennan J restated the *St. Pierre* principles, emphasising the long held principle that the policy of the law is to allow 'any plaintiff bona fide seeking relief to have unrestricted access to the seat of judgement',21 and, 'that is a policy which prevails unless oppression, vexation or other abuse of process is shown.'22 In what amounts to quite an impassioned argument, stretching over three

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16 (1988) 165 CLR 197, 212.
17 (1936) 1 KB 382 (CA).
22 Ibid.
pages in the Commonwealth Law Reports, his Honour condemned the change in approach of the English Courts, observing that that approach had not been free from criticism, and saying that, 'In retrospect, the English law can be seen to have moved from a discretion confined by a tolerably precise principle 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”'. Brennan J said that this approach offered little guidance to judges and he was strongly critical of the discretion which it conferred on the judiciary. He agreed with the dissenting speech of Lord Simon of Glaisdale in The Atlantic Star and argued strongly that the St.Pierre formulation of Scott LJ should remain the law of Australia. Brennan J ended,

If this view be thought chauvinistic, it may be remembered that the law applied in many other countries preserves local jurisdiction even more jealously. Moreover, the established rule does not call for an assessment by the courts of this country of the quality of justice administered elsewhere: an assessment which would be often of dubious validity, if not a source of grave embarrassment. If we be confident of the quality of justice administered in Australian courts, there is no reason why we should defer to other fora, who have it within their power to grant or refuse recognition to and enforcement of the judgments of Australian courts according to their municipal laws.\(^{24}\)

It would be easy to dismiss Brennan J's adherence to the traditional doctrine by labelling him as an out-of-touch, chauvinistic judge of the old school, loathe to break from tradition. It should be recalled, however, that it was this same High Court Justice, who, only four years later, was instrumental in overturning two hundred years of Australian legal doctrine based on the idea that the country had been 'terra nullius' at the time of British settlement.\(^{25}\)

Justice Deane developed a new approach, or rather, a new variant on the traditional approach. He 'redefined' vexation and oppression to mean that, in stay cases, the local forum must be 'clearly inappropriate'. 'The clear inappropriateness of the local forum may justify dismissal or a stay. The mere fact that some foreign tribunal would represent a “more appropriate” forum will not.'\(^{26}\) In considering anew the meaning of the terms vexation and oppression, Deane J attempted to apply the reasoning of Lord Wilberforce who, in his speech in The Atlantic Star, had warned against a rigid

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23 Ibid 238.
24 Ibid 240.
construction of the words and urged that they be interpreted ‘more liberally’.\footnote{[1974] AC 436.} We know the effect that had in England. Once the House of Lords departed from adherence to the ‘opprobrious’ definition of the terms – which in reality made it very hard, if ever, to satisfy a court of their existence, and to grant a stay – the dam wall quickly gave way. Their attempts to shore it up were quite artificial and doomed to failure. They were deemed as such in \textit{MacShannon} where it was held that the words had become ‘strained and morally neutral’ and the House of Lords, finding itself on shifting sands, committed itself to the more solid ground of \textit{forum non conveniens}.

Deane J’s reasoning in \textit{Oceanic Sun} was followed by the majority in \textit{Voth} and thus constitutes the approach to be followed by Australian courts although that approach has been modified and may still be evolving, as will be discussed below. The latter case concerned two New South Wales-resident companies suing an American accountant, a resident of Missouri. The accountant had allegedly provided negligent advice regarding liability to United States tax laws to a Missouri-based subsidiary of the Australian parties. They suffered a loss in New South Wales in consequence. The High Court majority in that case found in favour of a stay of the local proceedings.

The principles to be applied in respect of applications for stay of jurisdiction were accepted by the majority in \textit{Voth} to be those stated by Deane J in \textit{Oceanic Sun}.\footnote{(1988) 165 CLR 197, 247-8.} It is appropriate to reproduce them here in full:

\begin{quote}
That power is a discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary and in which both the question of the comparative weight to be given to particular factors in the circumstances of a particular case and the decision whether the power should be exercised are matters for individual judgment and, to a significant extent, matters of impression. The power should only be exercised in a clear case and the onus lies upon the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him. Ordinarily, a defendant will be unable to discharge that onus unless he can identify some appropriate foreign tribunal to whose jurisdiction the defendant is amenable and which would entertain the particular proceedings at the suit of the plaintiff. Otherwise, that onus will ordinarily be discharged by a defendant who applies promptly for a stay or dismissal if he persuades the local court that, having regard to the circumstances of the particular case and the availability of the foreign tribunal, it is a clearly inappropriate forum for the determination of the dispute between the parties. The reason why that is so is that, once it is accepted that the
\end{quote}
adjectives "oppressive" and "vexatious" are not to be narrowly or rigidly construed and are to be applied in relation to the effect of the continuation of the proceedings rather than the conduct of the plaintiff in continuing them, the continuation of proceedings in a tribunal which is a clearly inappropriate forum would, in the absence of exceptional circumstances being established by the plaintiff (cf. *Spiliada Maritime Corp. v. Cansulex Ltd.*), be oppressive or vexatious to such a defendant if there is some available and appropriate tribunal in another country. Admittedly, that approach to the "vexatious" and "oppressive" test is less stringent and less rigid than would have been accepted in the nineteenth century. Under it, the applicable test pursuant to traditional principles can, in the ordinary case, properly be seen as an "inappropriate forum" test. It cannot, however, properly be seen as a "more appropriate forum" test since the mere fact that a tribunal in some other country would be a more appropriate forum for the particular proceedings does not necessarily mean that the local court is a clearly inappropriate one.

The High Court majority in *Voth* adopted Deane J's *Oceanic Sun* approach, in preference to that adopted by the House of Lords in *Spiliada*, in part because it accorded with the long-standing principle that a party who has regularly invoked the jurisdiction of the court has a *prima facie* right to insist upon its exercise. But with his redefinition of vexation and oppression Deane J tried to allow for findings more in accordance with modern expectations. Deane J's test was also attractive because it provided some of the flexibility of the *Spiliada* approach. The *Voth* majority said:

The content of the "clearly inappropriate forum" test is more expansive than the traditional test applied by Brennan J. The former test, unlike the latter, recognizes that in some situations the continuation of an action in the selected forum, though not amounting to vexation or oppression or an abuse of process in the strict sense, will amount to an injustice to the defendant when the bringing of the action in some other available and competent forum will not occasion an injustice to the plaintiff. Thus, in order to obtain a legitimate advantage, the plaintiff may commence an action in the selected forum though the subject-matter of the action and the parties have little connexion with that forum and the defendant may be put to great expense and inconvenience in contesting the action in that forum. On the application of traditional principles, a stay would be refused in such a case, notwithstanding that the selected forum was a clearly inappropriate forum. Since the traditional test is apt to produce such an extreme result, the "clearly inappropriate forum" test is to be preferred to the traditional test. In this respect, it is significant that the traditional test is no longer applied in the United Kingdom, New Zealand, Canada or the United States.  

*a) The objective effect*

The difficulties involved in characterising an action as vexatious or oppressive had

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been the stumbling block in any attempt to persuade a court to stay its own hand in favour of proceedings in another jurisdiction. As noted above, in his judgment in Oceanic Sun Deane J contrived his own new definition of vexation and oppression, which was accepted by the High Court majority in Voth (which included Deane J). His Honour held that ‘oppressive’ in the context of staying an action on forum non conveniens grounds, should be understood as meaning ‘seriously and unfairly burdensome, prejudicial or damaging’ while ‘vexatious’ should be understood as meaning ‘productive of serious and unjustified trouble and harassment.’ As the majority emphasised in Voth,  

His Honour also took the view that the words should be read as describing and characterizing the objective effect, on balance, of a continuation of the proceedings and a particular forum as the venue of proceedings rather than as describing the conduct of the plaintiff in selecting or persisting with that forum. [emphasis added]

This statement sums up the essence of Deane J’s formulation, accepted by the High Court majority in that case, and applied but modified subsequently by the Court in later decisions, as will be discussed below.

The case of Henry v Henry involved matrimonial divorce proceedings begun by the husband and wife (separately) in Monaco when both were domiciled there, and later by the husband in Australia. His Monaco proceedings were struck out but the wife’s continued. The wife applied to have the Australian proceedings stayed on forum non conveniens grounds. The High Court applied the Voth test in deciding that the local court should determine whether the continuation of the proceedings would be vexatious or oppressive in the sense those terms were used by Deane J in Oceanic Sun. They modified that test however, for cases where the identical issues were being raised in the local and foreign fora.

The majority, (Dawson, Gaudron, McHugh and Gummow JJ) confirmed the stated rejection in Voth of the Spiliada application of the principle of forum non conveniens – that a court may stay proceedings pending before it if that court is not the natural forum and there is another available forum which is clearly or distinctly more

33 (1996) 185 CLR 571.
appropriate.\textsuperscript{35} They also utilised Lord Goff's \textit{Spiliada} connecting factors and his discussion of legitimate personal or juridical advantage, noting that these provide 'valuable assistance'.\textsuperscript{36} As noted above, they emphasised that Lord Goff had expressed the view with respect to legitimate personal or juridical advantage that, it is a 'relevant but not decisive consideration', the fundamental question being, 'where the case may be tried “suitably for the interests of all the parties and the ends of justice”'.\textsuperscript{37}

The majority emphasised that,

[T]he substance of the test in \textit{Voth} is simply whether the chosen forum is a clearly inappropriate forum. And ... that is to be determined by considering whether continuation of the proceedings would be 'oppressive' or 'vexatious' in the extended sense in which those words were used by Deane J in \textit{Oceanic Sun}.$^3\text{8}$

The change that was started by English courts in \textit{The Atlantic Star} was due to the difficulty of characterising the actions of the defendant, a \textit{person}, as vexatious or oppressive. As discussed, this had become well nigh impossible. The problem was addressed in England by first modifying and then abandoning the traditional approach in favour of the Scottish doctrine of \textit{forum non conveniens}. Deane J took a different tack and varied the traditional approach by focussing on the objective effect of the litigation. The focus was no longer to be on the actions of an individual but the \textit{impact} of the whole action. Deane J sought in this way to remove the individual opprobrium from the process. He preferred a test where the defendant,\textsuperscript{39}

[W]ould discharge the onus of proof which rested on him if he established that, having regard to the circumstances of the particular case and the availability of the foreign tribunal, the local court is a clearly inappropriate forum for the determination of the dispute. The continuation of the proceedings in that forum would then be oppressive or vexatious.

Deane J's formulation was still based on the traditional approach, however he had re-focussed that approach so that it was directed purely to the \textit{effect} of the litigation in the local forum rather than the actions of an individual in bringing the proceedings. There was, \textit{prima facie} under the \textit{Voth} expression of his test, to be no weighing up or balancing of the merits of the local and foreign fora to decide which was the \textit{more} appropriate. The gravamen of the \textit{Voth} test, as Brennan CJ said later, in \textit{Henry v Henry},

\begin{itemize}
  \item \textsuperscript{35} [1987] AC 460, 478 per Lord Goff of Chieveley.
  \item \textsuperscript{36} (1996) 185 CLR 571, 587.
  \item \textsuperscript{37} Ibid.
  \item \textsuperscript{38} Ibid 588.
\end{itemize}
'is that some reason must be shown, not for preferring one forum or another, but for staying the exercise of the jurisdiction in the selected forum.'

The High Court, however, did acknowledge, in *Voth*,

that the distinction between its test and that in *Spiliada* is small, and is 'likely to yield the same result in the majority of cases'. They went on to say that,

The difference between the two tests will be of critical significance only in those cases -- probably rare -- in which it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly inappropriate one. But the question which the former test presents is slightly different in that it focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on the need to make a comparative judgment between the two forums. That is not to deny that considerations relating to the suitability of the alternative forum are relevant to the examination of the appropriateness or inappropriateness of the selected forum. The important point is that, in those cases in which the ascertainment of the natural forum is a complex and finely balanced question, the court may more readily conclude that it is not a clearly inappropriate forum.

The availability of relief in a foreign forum will always be a relevant factor in deciding whether or not the local forum is a clearly inappropriate one. But such a decision neither turns upon an assessment of the comparative procedural or other claims of the foreign forum nor requires the formation of subjective views about either the merits of that forum's legal system or the standards and impartiality of those who administer it. Indeed, circumstances could well exist in which the local court was a clearly inappropriate one notwithstanding that there was no other tribunal which was competent to entertain the particular proceedings: eg, a claim for damages for injury in a road accident in circumstances where the courts of the only country with which the parties or the accident had any real connexion were denied jurisdiction to entertain any such claim by reason of the express provisions of a general legislative scheme providing for limited benefits and compensation for all road accident victims from public funds.

In contrast, a conclusion that some suggested foreign tribunal is, in the judgment of the local court, the appropriate or more appropriate forum necessarily involves assumptions or findings about the comparative claims of the competing foreign tribunal, including the standards and impartiality of its members.

Garnett, in a recent article, has in fact demonstrated the similarity of approach by an analysis of more than fifty relevant cases decided since *Voth*. In only a very few of

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41 *Voth* (1990) 171 CLR 538, 558.
42 Ibid.
them, where the connection with the foreign jurisdiction was arguably either equal to or greater than that with Australia, but a stay still not granted, was the outcome likely to have been different if the Spiliada principles had been explicitly adopted and followed.\textsuperscript{44} There is, nevertheless, therefore, a distinct presumption in Australia in favour of retaining jurisdiction pursuant to this test, different to the English approach. Although, interestingly, and somewhat ironically, the English position has now shifted more towards that of Australia, since the recent decisions of the House of Lords in Connelly and Lubbe, which have seen the employment of the ‘justice’ exception to the Spiliada formulation in order to find in favour of retaining jurisdiction, despite the foreign fora in each case being clearly more appropriate. This ‘justice’ exception is not of course needed in Australia under the Oceanic Sun/Voth formulation.

\textit{b) Plaintiff’s right to choose}

Because of the primacy accorded to the plaintiff’s \textit{prima facie} right to choose the jurisdiction, affirmed by the High Court in Oceanic Sun, Deane J’s test would still have not been an easy one for a defendant to satisfy, regardless of the change in emphasis of the definitions of vexation and oppression to focus on the effect of the litigation – as witness the outcome in that case, where a stay was not granted.\textsuperscript{45} Recognising this, the High Court has somewhat watered down the significance to be accorded to that right.

In Voth, the majority said that, in the circumstances of that case, little weight was to be accorded to the plaintiff’s \textit{prima facie} right to litigate in his chosen forum. This, as Nygh states, is ‘internally inconsistent’. ‘The majority judgment starts off with the right of the Plaintiff to invoke the jurisdiction of choice but concludes by saying that it has ‘little weight’.'\textsuperscript{46} In considering the respective merits of the Monegasque and Australian jurisdictions in the light of Lord Goff’s remarks in Spiliada, the High Court, in Henry \textit{v} Henry, also declined to give much weight to the ‘prima facie right [of a party who has invoked the jurisdiction] to insist upon its exercise’.\textsuperscript{47} And in Cigna neither the majority, who found in favour of staying the New South Wales

\textsuperscript{44} Ibid 60.
\textsuperscript{45} Oceanic Sun (1988) 165 CLR 197, 241.
\textsuperscript{46} P. Nygh, above n 5 108.
\textsuperscript{47} Henry \textit{v} Henry (1996) 185 CLR 571, 589.
proceedings, nor Brennan CJ who found against, appeared to have even referred to the concept in the course of their findings. The right of the plaintiff to litigate in his chosen forum, despite the status accorded to it as the primary basis for retaining the traditional approach (as modified) rather than moving to forum non conveniens, will likely only receive serious consideration when matters are otherwise evenly balanced.

c) Substantive law of the forum

In *Oceanic Sun*, Deane J stated that, in particular, where any significant connection between the action and the forum exists, such as that the defendant resides there, or the law of the forum applies to the action, then it would be difficult to describe the forum as clearly inappropriate. Gaudron J agreed with this test, saying that, 'the selected forum should not be seen as an inappropriate forum if it is fairly arguable that the substantive law of the forum is applicable in the determination of the rights and liabilities (including the extent of liability) of the parties.' The *Voth* majority (which included Deane and Gaudron JJ), recognising in this a further stumbling block to satisfying Deane J's test, also qualified the significance of this aspect. They agreed that 'the substantive law of the forum is a very significant factor in the exercise of the court's discretion, but the court should not focus upon that factor to the exclusion of all others.'

The significance of the law of the forum was further reduced in *Henry v Henry* where the Court approved the statement in *Voth* that, although the substantive law of the forum is a very significant factor in the court's exercise of its discretion, it is not exclusively so. This trend was also maintained by the High Court majority in *Cigna*. Very little weight was attached to the law of New South Wales as the governing law of any contract between the parties. Garnett points out that, despite this, the cases decided since *Voth* indicate that, in a number of instances, lower courts have misinterpreted *Voth* and greatly overstated the weight to be applied to the law of the forum and denied

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49 Ibid 266.
50 *Voth* (1990) 171 CLR 538, 566.
52 (1997) 189 CLR 345.
stays in cases with only a very slender connection between Australia, the parties and
the action.\textsuperscript{53}

d) Connecting factors

The \emph{Voth} majority held that Deane J’s principles were to be applied with the assistance
of the \emph{Spiliada} ‘connecting factors’ and the discussion of ‘legitimate personal or
juridical advantage’ by Lord Goff.\textsuperscript{54} Those connecting factors were proposed by Lord
Goff in the context of adopting the Scottish doctrine of \emph{forum non conveniens} to
replace the \emph{MacShannon v Rockware Glass}\textsuperscript{55} formulation, of deciding whether justice
can be done in the other forum at ‘substantially less inconvenience or expense’.\textsuperscript{56} The
factors he listed included the availability of witnesses, the places where the respective
parties reside or carry on business and the law governing the relevant transaction.\textsuperscript{57}
Also considered helpful and relevant by the High Court in \emph{Henry v Henry}, was Lord
Goff’s ‘key to the solution of the problem’, which, he said, lies in the underlying
fundamental principle of determining ‘where the case may be tried “suitably for the
interests of all the parties and for the ends of justice”’.\textsuperscript{58} The use of Lord Goff’s
connecting factors to assist in the application of Deane J’s \emph{Oceanic Sun} rendering of
vexation and oppression was specifically approved in \emph{Voth}, despite the majority’s
rejection of the House of Lords’ ‘more appropriate’ or ‘natural’ forum approach to
\emph{forum non conveniens} in favour of their ‘clearly inappropriate forum’ doctrine.\textsuperscript{59}

The \emph{Voth} majority found in favour of a stay of the NSW proceedings in that case for a
number of reasons, including that the action had a substantial connection with the law
of Missouri; the relevant acts and omissions took place predominantly there; the
appellant resided or worked there and the professional standards of accountants in
Missouri would therefore be relevant to his liability, if any. And in large part the
damage which the appellant was alleged to have caused was referable to United States
taxation law. As against that, the advantages to the plaintiffs in bringing the action in

\textsuperscript{53} R. Garnett, above n 43, 38.
\textsuperscript{54} \emph{Voth} (1990) 171 CLR 538, 564-5.
\textsuperscript{55} \[1978\] AC 795.
\textsuperscript{56} Ibid 812.
\textsuperscript{57} \emph{Spiliada} [1987] 1 AC 460, 478.
\textsuperscript{58} (1996) 185 CLR 571, 587.
\textsuperscript{59} (1990) 171 CLR 538, 565.
their home territory of New South Wales, that they suffered the damage there and that the transactions themselves had connections with that State and with Australian revenue laws, were deemed to be 'natural consequences and incidents of residence in a particular jurisdiction and, as such, are merely different aspects of the right of any plaintiff to bring an action in the courts of the jurisdiction wherein he or she resides.'

The *Voth* majority also approved of Lord Templeman's advice, in *Spiliada*, that in considering the connecting factors, the primary judge should 'be allowed to study the evidence and refresh' his or her memory of the relevant law 'in the quiet [of his or her chambers]...; that he or she should not be burdened by unhelpful reference to other decisions or other facts; and 'that submissions will be measured in hours and not days.' To this the *Voth* majority added the gloss that 'counsel should be able to furnish the primary judge with any necessary assistance by a short, written (preferably agreed) summary identification of relevant connecting factors and by oral submissions measured in minutes rather than hours.'

By adopting Lord Goff's connecting factors the High Court was not also adopting the English more appropriate forum approach, but rather utilising them in a consideration of the relative advantages and disadvantages of the local forum, relative to the continuance of the matter elsewhere, to assist in the finding of reasons for staying the exercise of the jurisdiction or not.

e) Availability: an alternative forum

Australian courts have not been as clear as their US counterparts in stating that there must be an alternative forum available for the hearing of a matter before a stay will be considered, although Deane J indicated, in *Voth*, that to obtain a stay a defendant should show that there is a competent alternative forum available to hear the plaintiff's suit. However, his clearly inappropriate forum test focuses only on the suitability of the local forum and therefore, while the availability of an alternative forum and whether it could give the plaintiff adequate relief will be relevant to determining whether the local forum is a clearly inappropriate one, the *Voth* majority

60 *Voth* (1990) 171 CLR 538, 571.
61 Ibid.
held that it was possible that an Australian court might be held to be clearly inappropriate even if no other forum was available to the plaintiff. For example, where there was no connection with Australia but the action was time-barred in the foreign tribunal. In *Henry v Henry*, however, Brennan CJ suggested that such an outcome ‘could be contemplated only in an extreme case’.

The issue may be considered moot, however because Garnett has demonstrated that, in decisions since *Voth*, Australian courts have refused to grant stays in cases where a foreign forum was either unavailable or where there was a failure to identify suitable foreign fora or suitable courts within a foreign forum. In the cases referred to, identification of an alternative forum was considered to be a necessary precondition of a stay being granted.

**f) Personal and juridical advantage**

The Australian plaintiffs in *Voth* possessed two ‘juridical advantages’ when suing in New South Wales: greater recovery of legal costs and the award of interest on damages. In the view of the majority, however, these matters were of ‘diminished importance’, given the very strong connections with Missouri – the alternative forum. In favour of a stay were the considerations addressed under “Connecting factors” above. However,

...the plaintiffs in the action are residents of New South Wales and may therefore reasonably point to the advantages to them in practical terms of bringing an action in the local courts; the transactions concerned have some connexion with New South Wales and with Australian revenue laws; and, to a large extent at least, the damage was suffered in New South Wales. However, these last considerations are natural consequences and incidents of residence in a particular jurisdiction and, as such, are merely different aspects of the right of any plaintiff to bring an action in the courts of the jurisdiction wherein he or she resides. That is a legitimate personal or juridical advantage which is acknowledged by the prima facie right of a plaintiff to insist upon the exercise of a jurisdiction which he or she has regularly invoked, but beyond that it has little weight. More importantly, the plaintiffs in this case point to three further legitimate juridical advantages. First, it is said that an effective limitation bar exists in Missouri, through which the appellant could, if he wished,

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63 Ibid.
64 *Voth* (1990) 171 CLR 538, 558.
66 Ibid.
successfully resist the action. Secondly, there is evidence that, in proceedings of this kind in Missouri, the costs awarded in favour of a successful plaintiff may not include attorneys' fees. Finally, there is evidence that the rules as to the awarding of damages by way of interest are less advantageous to a plaintiff in Missouri than in the Supreme Court of New South Wales.

**Conclusion**

The first of these advantages was the subject of an undertaking by the appellant, both in the Court of Appeal and in this Court, when special leave to appeal was granted. Accordingly, it may be made a condition of any order staying the action. The second and third advantages, while doubtless significant to the respondent plaintiffs, are of diminished importance in the overall task of the court exercising the discretion based upon the competing connexions of the respective forums with the subject-matter of the proceedings. They are not sufficient to resist the conclusion to which the other considerations irresistibly point, that New South Wales is clearly an inappropriate forum in which to permit the action to proceed.67

It may therefore be seen that, although personal and juridical advantage are factors for consideration, like the *prima facie* right of a plaintiff to insist upon the exercise of a jurisdiction which he or she has regularly invoked, they are of little moment if the disadvantages of continuing in the forum are such as to outweigh them – as they did in this instance.

**g) Service ex juris**

The *Voth* majority resolved a further issue in the course of their judgment, adverted to previously in this dissertation. English courts have traditionally distinguished the situation where a defendant has been served within the jurisdiction under the common law rules of service, and where the defendant has been served outside the jurisdiction under applicable statutory provisions. A line of authorities had applied a 'more appropriate forum' test when dealing with questions of service outside the jurisdiction.68

This had not been the case in Australia, where only Victoria had followed the English model, specifically in the case of *Lewis Construction Co Pty Ltd v Tichauer S.A.*69 A Melbourne-based building firm contracted to purchase cranes from a French firm. One

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67 Ibid.
of the cranes collapsed at the Melbourne building site, killing and injuring workmen and causing serious damage. Hudson J found that the Victorian Court had jurisdiction pursuant to O.XI r1 of the Rules of the Supreme Court, although there was an exclusive jurisdiction clause in favour of the French courts and although he found that the governing law of the contract was that of France, Hudson J decided to allow the matter to be heard in Victoria, and to exercise his discretion to allow service out of the jurisdiction because:

...in the circumstances of the present case I think it is far more than a balance of convenience to have the trial in this Court rather than the Commercial Court of Lyon. To compel the plaintiff to resort to the latter tribunal would, I think, be likely to result in injustice, having regard to what would be involved, whereas I think no such result would be likely as against the defendant if it were compelled to contest the case here, even if it meant bringing some of its witnesses to this State...  

In the course of his judgment, Hudson J referred to English Court of Appeal decisions in *The Athenee*  and *The Fehmarn*. In the latter case Lord Denning said he preferred to look to see with what country the dispute was most closely concerned. Hudson J concluded that, 'the questions to be litigated in this action are much more closely concerned with Victoria than with France and that the action is one which properly belongs to the courts of this State.'

*Oceanic Sun* was itself a service *ex juris* case, although the members of the High Court dealt with it as if it was a case of service according to the common law rules. This, as the majority explained in *Voth*, was possibly because the defendant Greek company was said to carry on business through an agent in Australia and therefore *could* have been served in New South Wales. The matter was argued and dealt with on the basis that service outside the jurisdiction was not a significant issue. All parties seem to have accepted that the 'applicable test was that relevant to a case where proceedings had been regularly commenced by service which was no longer challenged.'

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60 Ibid 349.  
71 (1922) 11 Lloyds Rep 6.  
72 [1958] 1 WLR 159.  
73 Ibid 162.  
74 [1966] VR 341, 349.  
75 *Voth* (1990) 171 CLR 538, 562.
The Voth majority held that, despite the earlier authorities to the contrary, ‘applications to set aside service on inappropriate forum grounds, as well as applications for leave to serve process outside the jurisdiction, must be governed by the same principles as apply to applications for a stay on inappropriate forum grounds’. They said that it would not make any sense to apply different principles,

For once a challenge to service is sought on such grounds the issues raised are the same as those raised when a stay is sought on these grounds. Questions of service out of the jurisdiction are subordinate to the ultimate question concerning the appropriateness of the chosen forum and those questions must necessarily be resolved by recourse to the principles governing the latter question.\(^{76}\)

It is the onus of proof which varies according to the situation. ‘In one case, should the court assume jurisdiction? In the other, should the court decline jurisdiction?’ \(^{77}\) ‘The question whether the local court is a clearly inappropriate forum focuses, on both kinds of application, upon the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum. In practice the differing onus should raise no real difficulty.’ \(^{78}\)

3.4 Cigna – analysis

In respect of stay of local proceedings, three situations emerge from the decision of the majority in Cigna and it appears, from that decision and those in Oceanic Sun, Voth and Henry v Henry, that each should be approached differently by Australian courts. The first situation is where the only proceedings pending are those in the forum but it is alleged that they are ‘clearly inappropriate’. This was the situation in Oceanic Sun and Voth. The second situation is where there are identical proceedings pending in both the local and foreign fora – *lis alibi pendens*. The Henry v Henry situation. The third is the situation in Cigna – related proceedings pending in both the local and foreign fora, but where there is not necessarily identical subject matter or parties. Each situation will be discussed in turn.

\(^{76}\) Ibid 564.
\(^{77}\) Ibid 565.
\(^{78}\) Ibid.
a) Local forum cases

As noted this is the type of situation encountered in both Oceanic Sun and Voth. The only proceedings pending in each case were those in New South Wales and it was alleged that they were ‘clearly inappropriate’. In Oceanic Sun they were not held to be so. There was no consideration of the advantages and disadvantages of the forum, but, as indicated, the disadvantage to the plaintiff in the Greek forum was obvious – in that his potential recovery would be severely limited.

In Voth, there was a great deal to be said for not finding New South Wales clearly inappropriate as it offered a number of advantages that Missouri did not. This is unavoidable because the advantages and disadvantages of proceeding in the chosen forum must be considered. It must be noted that, in this process, the Court did not consider certain Missouri advantages, including the availability there of contingency fees. These matters were not important in the context of ‘exercising the discretion based upon the competing connexions of the respective forums with the subject-matter of the proceedings.’

When what is sought is a stay of local proceedings, the court will adhere to the Oceanic Sun/Voth formulation and look for vexation or oppression as redefined by Deane J, and with reference to the Spiliada connecting factors to assist in a determination of the matter. As discussed there will be a presumption in favour of retaining jurisdiction however, and the court is less likely to intervene, as was the case in Voth. This presumption can be displaced where there is clear disadvantage to proceeding in the Australian forum.

b) Lis alibi pendens

In discussing the nature of vexation and oppression, in the strict or traditional sense (i.e., not the Voth sense), the majority in Henry v Henry held that although there are

59 Ibid 571.
cases in which it has been held that it is not *prima facie* vexatious to bring proceedings in different countries,\(^\text{80}\)

[T]he problems which arise if the identical issue or the same controversy is to be litigated in different countries which have jurisdiction with respect to the matter are such, in our view, that, prima facie, the continuation of one of the other should be seen as vexatious or oppressive within the *Voth* sense of those words.\(^\text{81}\)

They went on:

It does not follow that, because one or other of the proceedings is prima facie vexatious or oppressive within the *Voth* sense of those words, the local proceedings should be stayed. However, it does follow that the fact that there are or, even, that there may be simultaneous proceedings in different countries with respect to the same controversy is highly relevant to the question whether the local proceedings are vexatious or oppressive, in the sense of ‘productively of serious and unjustified prejudice or inconvenience.’ And it also follows that courts should strive, to the extent possible, to avoid that situation.\(^\text{82}\)

The majority reviewed the considerations relevant to the different fora and stated that,

‘The list is not exhaustive: Rather, the question whether Australia is a clearly inappropriate forum depends on the general circumstances of the case, taking into account the true nature and full extent of the issues involved.’\(^\text{83}\) They found, in the event, that because proceedings had been under way in Monaco, and had been on foot for some time, the Family Court should have granted a stay of the Australian proceedings. Australia was an inappropriate forum.

The finding of the majority in *Henry v Henry* appears to have been modified somewhat by that of the majority in *Cigna*, at least in situations where the local defendant becomes the plaintiff in foreign proceedings. The majority referred back to the review of nineteenth century cases on vexation and oppression undertaken by the Privy Council in *Aerospatiale*, in particular that of *Peruvian Guano Co v Bockwoldt*,\(^\text{84}\) which, they said, established that ‘“double litigation [which] has no other element of oppression than this, that an action is going on simultaneously abroad, which will give other or additional remedies beyond those attainable in [the domestic forum]’ does not

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\(^{80}\) See, e.g., *McHenry v Lewis* (1882) 22 ChD 397 (CA).

\(^{81}\) (1996) 185 CLR 571, 591.

\(^{82}\) Ibid.

\(^{83}\) Ibid 593.

\(^{84}\) (1883) 23 ChD 225, 234.
amount to vexation or oppression." This may indicate that, instead of finding the local proceedings to be oppressive, the view of Brennan CJ in *Henry v Henry*, that there is nothing *per se* harmful in *lis alibi pendens* situations may gain strength.

c) Related proceedings

According to the *Cigna* majority, the avoidance of injustice is an aspect of the inherent or implied power that every court must have to prevent its own processes being abused and this power is utilised where it would be vexatious or oppressive, or an abuse of process to allow a matter to proceed in an Australian court. How does that translate in practice into a situation where proceedings are brought in this and another country in respect of the same subject matter, by the same parties? Where the subject matter is identical, as it was in *Henry v Henry*, the High Court has said that, *prima facie*, the continuation of one or the other proceeding should be seen as vexatious or oppressive within the *Voth* sense of those words, even though it is not necessarily vexatious or oppressive to bring proceedings in different countries in the strict or traditional sense.

This is because of the 'problems which arise if the identical issue or the same controversy is to be litigated in different countries which have jurisdiction...' (But noting the modification suggested by the majority’s reference to *Peruvian Guano Co v Bockwoldt* in *Cigna*, referred to above).

The ‘*Voth* sense’ of vexation and oppression, as opposed to the ‘strict’ or traditional sense, taken directly from Deane J’s decision in *Oceanic Sun*, means that to be vexatious or oppressive the proceedings must be ‘productive of serious and unjustified trouble and harassment’, or ‘seriously and unfairly burdensome, prejudicial or damaging’. The matter will be resolved by considering whether Australia is an inappropriate forum - with the aid of the ‘valuable assistance’ provided by Lord Goff

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85 *Cigna* (1997) 189 CLR 345, 393.
87 Ibid.
88 (1996) 185 CLR 571.
89 (1996) 185 CLR 571, 591.
90 Ibid.
91 (1988) 165 CLR 197.
92 *Voth* (1990) 171 CLR 536, 555.
of Chieveley in *Spiliada*, with respect to ‘relevant connecting factors’ and ‘a legitimate personal advantage’.93

In *Henry v Henry* the Monegasque proceedings had commenced first, complete relief was available in that forum, the orders of a Monegasque court would be recognised in Australia, and Monaco had been the last domicile of the marriage. These factors determined the outcome in favour of that jurisdiction or rather, determined that Australia was a clearly inappropriate forum. The Court noted that the list of factors is not exhaustive but the decision as to whether Australia is a clearly inappropriate forum is ‘one that depends on the general circumstances of the case, taking into account the true nature and full extent of the issues involved.’94 This reasoning was in accord with Lord Goff’s underlying fundamental principle, of determining ‘where the case may be tried suitably in the interests of all parties and for the ends of justice.’95

If the subject matter in the local and foreign proceedings is not identical, say because one party has pleaded a foreign statutory remedy not available in the local forum (as in *Cigna*), then, according to the *Cigna* majority,

[T]he question is not whether the Australian court is a clearly inappropriate forum for the litigation of the issues involved in the Australian proceedings. Rather, the question must be whether, having regard to the controversy as a whole, the Australian proceedings are vexatious and oppressive in the *Voth* sense of those terms, namely that they are “productive of serious and unjustified trouble and harassment” or “seriously and unfairly burdensome, prejudicial or damaging”.96

Here the High Court developed a further modification to the *Voth* formulation. The *Cigna* majority deemed New South Wales a ‘clearly inappropriate’ forum having regard to ‘the controversy as a whole’, which included the issue of the US statute-based damages and the fact that they could only be pleaded in a US court. In doing this they were not making a search for the more appropriate forum but inevitably had to consider the issues before the foreign court. In this case they found the New South Wales proceedings to be vexatious or oppressive in the *Voth* sense of those terms because the US proceedings involved an issue that could not be litigated in New South

93 Ibid 565.
95 Ibid.
Wales. They held that Rolfe J erred in not considering this, or in giving little weight to it.

It is difficult to see on a straight out consideration of whether New South Wales was a 'clearly inappropriate forum', except as explained above, why the choice of New South Wales should be either 'seriously and unfairly burdensome, prejudicial or damaging' or 'productive of serious and unjustified trouble and harassment'. The majority attached determinative importance, in characterising the New South Wales proceedings as oppressive, to the fact that CSR had pleaded a statutory remedy not available in New South Wales. It is contended that, consistent with the clearly inappropriate forum approach, and adherence to judicial comity, this is the correct approach. New South Wales was the clearly inappropriate forum for the trial of the action because of the unavailability there of the American statutory damages and also because the proceedings had begun in New Jersey. Further justification was unnecessary.

Brennan CJ stated, in his dissenting judgment, that the jurisdiction to grant an anti-suit injunction is exercised where it is 'appropriate to avoid injustice', and, also adhering to the Oceanic Sun/Voth formulation he reproduced in his judgment the summary of factors relevant to the application for a stay of the New South Wales proceedings provided by Rolfe J. Ignoring the US statute-based claim, he found that there were clearly no substantial grounds for holding that New South Wales was a clearly inappropriate forum. To the contrary, Brennan CJ held, that New South Wales 'is clearly the natural forum' to determine the issues. His Honour found that, having surveyed the list of factors connecting New South Wales to the litigation, that it was not a 'clearly inappropriate forum'. And in relation to the Sherman/Clayton Act claims, that because of the way those claims were formulated, described above, that their determination would have to await a decision on the effect of the 'Coerced Witiawal Letter'. As noted above "a majority considered these factors briefly but discounted them in favour of New Jersey because the US statute-based claims could only be litigated in the foreign forum.

97 Ibid 374.
98 Ibid 362.
The *Cigna* majority attached reduced importance to the law of the forum, consistent with the decisions in *Voith* and *Henry v Henry*, and they ignored all of the other factors that connected New South Wales to the action, despite the importance attached to them at first instance by Rolfe J, and by Brennan CJ in his dissenting judgment. It is possible that the majority may have been influenced by the sheer size of the matter. In a major international litigation between multi-national corporations (insurance and mining giants) involving mammoth sums of money, factors such as the location of witnesses, parties and documents are likely to have been regarded as of much less significance than otherwise would have been the case, in a private divorce case such as *Henry v Henry* for example. But the majority did not say so, and it would not have been consistent with their expressed rationale in any case – that in the context of the whole case, the New South Wales proceedings were vexatious or oppressive because matters in issue in the US could not be litigated there. Those other factors were simply not relevant to their approach once this determination had been made. The majority paid no heed to the circumstance, although Brennan CJ did, that Cigna had no warning of the impending litigation and that, even if they did,

...until the insurers were put on notice that CSR ... intended to claim against them there was no real or live issue and for them to have approached a Court for declaratory relief of the type now sought would have led, almost inevitably, to its being rejected on the grounds that it was hypothetical and not responsive to any justiciable issue between the parties. Secondly, the only real relief available to the insurers, once they were aware that CSR ... intended to assert a claim under the policies, is declaratory relief of the type now sought. Thus the available relief had to be responsive to a claim and declaratory in terms.99

Under the reasoning of the majority, such an issue would not be relevant. Proceedings had been instituted by CSR in the United States and quite clearly those proceedings were instituted there in order to take advantage of the treble damages available to a successful litigant under the Sherman and Clayton Acts, damages not available in New South Wales. But this was simply a natural incident of the process of international or transnational litigation. The majority also ignored the factor (regarded with much importance by Brennan CJ), that CSR had not sought to avoid the release of the right to indemnity achieved by their 1992 letter - which would have nullified their claims of Sherman/Clayton Act damages. Rather their claims were based on proving the purported coercion and misrepresentation on the part of Cigna, without which they had
no claim and no treble damages. It is arguable that CSR stood to gain more by making out the coercion/misrepresentation charges than by a finding that, in fact their original claims to indemnification in relation to the asbestos matters by Cigna had been correct. Again this is not relevant to the appropriateness or otherwise of the jurisdiction, and but a natural incident of the litigious process, which is to choose the jurisdiction where one might expect the most favourable outcome, which leads naturally into the next topic for discussion, the motivation of the parties.

d) Dominant purpose

The High Court majority, in *Cigna*, introduced a new element that will henceforth be relevant in related proceedings cases such as *Cigna*, by considering the *dominant purpose* of the insurance companies in bringing the New South Wales action. The majority considered whether the Australian proceedings were, ‘having regard to the controversy as a whole’, vexatious or oppressive in the *Voth* sense of those terms. In considering the controversy as a whole they necessarily, as has been discussed, had to consider the proceedings before the American court, and the fact that the Sherman Act claims were only justiciable there, and that the New South Wales action had been brought to prevent that action from proceeding.

They deemed the New South Wales proceedings to be ‘oppressive’ in the *Voth* sense because they had been brought for the *dominant purpose* of preventing CSR from pursuing remedies available in the courts of the United States and not available in this country.  

The issue was revisited, briefly, by the High Court, a short time after their decision in *Cigna* was handed down. The insurance companies took issue with the description of their ‘dominant purpose’ in bringing the New South Wales proceedings as being simply to defeat those in New Jersey. Cigna lodged a notice of motion to vacate the judgment on the grounds that the ‘dominant purpose’ issue was not adduced in

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100 (1997) 189 CLR 345, 400.
argument. The matter was heard\(^{102}\) before a somewhat differently constituted bench, Justice Michael Kirby having replaced Sir Daryl Dawson, who had retired in the meantime. Counsel for \textit{Cigna} argued that,

When a party commences New South Wales proceedings and contemporaneously seeks an anti-suit injunction one can readily conclude that the party has the purpose of having the proceedings heard in New South Wales. There is nothing illegitimate about the purpose. It is not oppressive or vexatious.\(^{103}\)

And,

When we came to the argument in \textit{Voth} we were entitled to believe that everybody was speaking about the objective test laid down in \textit{Voth} (at 355) and reaffirmed in \textit{Henry v Henry} (at 571). The relevant finding is of a subjective purpose. That is in the teeth of \textit{Voth}.\(^{104}\)

The transcript of argument\(^{105}\) makes it clear that the High Court majority intended, in characterising the dominant purpose of \textit{Cigna} in bringing the New South Wales proceedings as oppressive, that they were characterising the \textit{objective purpose} of those proceedings in line with the reasoning in \textit{Voth}. In this case the proceedings were so deemed because \textit{Cigna}'s objective purpose was to prevent another party from pursuing remedies available in the courts of another country. The words used by the majority in their judgment were not a labelling of the \textit{actions} of \textit{Cigna} as such, but, having regard to the controversy as a whole, they were vexatious and oppressive in the \textit{Voth} sense of those terms, in the outcome of the case, having regard to all the circumstances. Namely, that they were productive of serious and unjustified trouble and harassment or seriously and unfairly burdensome etc because \textit{CSR} would be prevented from pursuing a remedy only available to it in New Jersey.

Compounding the finding of dominant purpose or motivation was the majority's view that \textit{Cigna}'s claim for a negative declaration in the New South Wales proceedings was one which had, 'the appearance of one brought in the hope of concealing that the dominant purpose of the NSW proceedings is to prevent \textit{CSR} from pursuing its claim for statutory damages for breach of the Sherman Act in the US proceedings.'\(^{106}\)

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\(^{102}\) September 30, 1997.

\(^{103}\) \textit{Cigna} (1997) 189 CLR 345, 404.

\(^{104}\) Ibid.


An action for a negative declaration is one for a declaration by the court that the defendant has no valid claim or right against the plaintiff. Kerr LJ, in the *Volvox Hollandia*, described them thus:

...claims for negative declarations are a novel type of pre-emptive forum-shopping with novel implications ... Claims for declarations, and in particular negative declarations, must be viewed with great caution in all situations involving possible conflicts of jurisdictions, since they obviously lend themselves to improper attempts at forum shopping.

The hostility of English judges towards negative declarations was confirmed as long ago as 1915 by Pickford LJ in *Guaranty Trust Co of New York v Hannay & Co*: 'A declaration that a person is not liable in an existing or possible action is one that will hardly ever be made, but that in practically every case the person asking it will be left to set up his defence in the action when it is brought.' English hostility was confirmed in *Sohio Supply Co v Gatoil* and in *FNBB v UBS*, where the Court of Appeal overruled the decision of the court of first instance and granted a stay in favour of proceedings in Switzerland. The Court of Appeal relied on Lord Wilberforce's dictum in *Camilla Cotton Oil v Granadex SA*, to the effect that:

The declaration claimed is of a negative character and as Lord Sterndale himself had said, 'a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made'. He went on, 'Hardly ever' is not the same thing as 'never' but the words warn us that we must apply some careful scrutiny. So I inquire whether to grant such a negative declaration would be useful.

In *Rowland v Gulspac Ltd*, Rix J considered a negative declaration brought in England admittedly as a defensive measure. Although he took a cautious approach to the consideration of the matter, referring to the decisions in, inter alia, *Camilla Cotton* and the *Volvox Hollandia*, he did not dismiss, but stayed the declaratory action, pending decision of the US court as to jurisdiction. As Paul Beaumont notes, this may

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108 [1915] 2 KB 536, 564-6 (CA).
111 [1976] 2 Lloyds Rep 10, 14. The quotation from Lord Sterndale is from a decision when he was still Lord Justice Pickford in *Guaranty Trust* [1915] 2 KB 536, 564-5. The quotations were made by Sir Michael Kerr in *FNBB v UBS* [1990] 1 Lloyds Rep 32, 36-7.
112 (Unreported, Queen's Bench Division, Rix J, 12 May 1997).
be evidence of the development of a less rigid approach that does not simply designate a negative declaration as forum shopping.113

Although the High Court in Cigna found that the negative declaration sought by Cigna was further support for the dominant purpose of their proceedings being to prevent CSR from pursuing claims only available to it in New Jersey, they did not evince hostility per se to such declarations, and, as far as the High Court is concerned, that phrase now has little meaning when applied to the actions of the party first filing where it is apparent that the jurisdiction has been selected on substantive and not spurious grounds. For all the modern commercial realities adverted to elsewhere in this dissertation, and in particular the succinctly expressed rationale from the joint judgment of Toohey and Wilson JJ in Oceanic Sun,114 it is contended that this is the only realistic attitude for a court to adopt. To assume any other attitude is to revert to an insular and chauvinistic stance entirely out of step with these modern realities.

Michael Whincop115 condemns the approach of the High Court as encouraging forum shopping but he misses the point that it was CSR that filed first, in the jurisdiction of their choice to defend their claims and, at least on a reading of the facts it could not be said that they had done so spuriously. Why would they not choose to litigate in their home forum, where they would obviously and admittedly have an advantage, and of course have recourse to the US antitrust legislation with its treble damages? They had no obligation to litigate in Australia, or to let Cigna 'go first'. There is no sinister motivation in this. Litigation is an adversarial process; it should come as no surprise that adversaries do not treat their protagonists with benevolence. At least in a case where there is no blatant forum shopping, simply pleading a statutory claim to attract the jurisdiction of a forum, in which case the remedy lies in proving vexation or oppression (undeniably a difficult task), or pleading forum non conveniens in the

jurisdiction where litigation has been commenced by the plaintiff, then it is submitted that the alternative, granting an anti-suit injunction, is no answer, because it simply substitutes one jurisdiction for another, one court’s perception of ‘justice’ for another.116

‘Dominant purpose’ was revisited by the New South Wales Supreme Court, by Rolfe J, in Conagra v Lief Investments.117 Rolfe J said that, as he understood the decision in Cigna,

[I]t must be shown, as the majority of the High Court was satisfied it was in that case, that there is something more, namely the dominant purpose of depriving a litigant of rights, which it would otherwise have in the courts of another country, but does not have in this court. In this sense, as I understand it, the view was taken that the respondents must be shown not to have been acting bona fide or in pursuit of a legitimate advantage in pursuing the proceedings in New South Wales.118

Rolfe J posed the hypothetical example of the situation in Cigna where the New South Wales proceedings had commenced first, and said,

It seems to me that the principles expounded in [Cigna] by the majority, apply where the dominant purpose is to prevent the pursuit of remedies available in extant proceedings in another country, not in proceedings which may have been brought in another country if the defendant had instituted proceedings in the first instance. This must be subject to the first proceedings having been regularly instituted in good faith in pursuit of a legitimate advantage. I think that the prima facie assumption, in most cases, will be that this has occurred. It is for the defendant to show that this is not so.119

Rolfe J’s ‘explanation’, however, flies in the face of that given by the High Court. His use of such phrases as ‘bona fide’ and ‘good faith’ indicate an understanding of a subjective dominant purpose on the part of the party undertaking the proceedings, rather than the objective effect of those proceedings, which is what the High Court were concerned to characterise. In the end, the finding in Cigna is a straightforward one. The proceedings in NSW were oppressive because they were brought with the dominant purpose of preventing CSR from proceeding in New Jersey where it had

116 In April 2001 the New Jersey Court denied the insurers’ motions for dismissal on forum non conveniens grounds and the case is proceeding with discovery on the merits. [Information supplied by Gita F. Rothschild, Partner, McCarter & English, New Jersey (Counsel for CSR in the New Jersey litigation)].
118 Ibid 160.
119 Ibid.
recourse to US statute-based remedies not available in NSW. To have allowed the NSW proceedings to go forward would have been vexatious.

3.5 Summation

The Voth majority drew a distinction between their ‘clearly inappropriate’ forum test and that of the ‘clearly more appropriate’ forum adopted by the House of Lords in Spiliada, indicating, as noted above, that the difference in approach is small and likely to yield the same result in the majority of cases. They did accept that where it could be said that the foreign tribunal was ‘more appropriate’ but that the local forum was not ‘clearly inappropriate’ a stay would more likely be granted following Spiliada than Voth (although without the benefit of the more recent House of Lords decisions in Connelly and Lubbe).120

To recap, the essential purported difference between the Australian approach, and that of England after Spiliada, is that the Australian approach focuses on the inappropriateness of the local forum. The ‘mere fact that a tribunal in some other country would be a more appropriate forum for the particular proceeding does not necessarily mean that the local court is a clearly inappropriate one’.121 The Spiliada ‘more appropriate forum’ approach clearly articulates the weighing up of the relative advantages of the local and foreign fora. It has been argued that the Spiliada approach is to be preferred as being the more global in attitude and that it is therefore the more suitable for resolving conflict in a modern world where transnational commercial and other relationships are the norm. Garnett has observed that:

...the Voth test may have forced Australian courts into the position of focusing upon the connections between the action and the Australian forum, or on the advantages enjoyed by the plaintiff when suing here, rather than looking at the issue from a truly transnational perspective to comparing the entitlements of both the Australian and foreign forums to try the action. Any test which professes almost to ignore one half of the equation (the foreign forum) in inter-jurisdictional conflicts is unlikely to yield the same results as one which takes into account, on a relatively equal basis, the claims of both jurisdictions.122

And that,123

120 Voth (1990) 171 CLR 538, 558.
121 Oceanic Sun (1988) 165 CLR 197, 248 per Deane J.
122 R. Garnett, above n 43, 36.
123 Ibid, 55.
[It is impossible to determine the advantages and disadvantages of litigating here without undertaking an examination of the comparative merits of suing abroad. Thus, while Brennan CJ was correct in suggesting that the effect of the joint judgment is to move toward a Spiliada-type test, it is suggested that, in any stay application, with or without pending proceedings, some sort of comparative analysis of the claims of the competing jurisdictions is inescapable.

The High Court majority in Voth did acknowledge the attractiveness of the Spiliada approach.124

The complexity of modern transnational transactions and relationships between parties is such as to indicate that in a significant number of cases there is more than one forum with an arguable claim to be the natural forum, that is, the forum with which the action has the most real and substantial connexion.

The Voth majority did recognise the attractiveness of the Spiliada approach, saying,

From an abstract (and international) standpoint there is much to be said for the 'more appropriate forum' test. It is designed to ensure that the cause of the action is litigated in the natural or more appropriate available forum and litigation in that forum will generally reflect the balance of convenience between the parties. The justification for the selected forum declining to exercise its jurisdiction is that it defers to the exercise of jurisdiction by another available and more appropriate forum.125 They forbore to adopt that approach, however, because they felt that it would have led Australian judges to make subjective determinations about the 'appropriateness or comparative appropriateness of a particular foreign tribunal of which he or she is likely to have little knowledge and no experience.'126 And that,

Moreover, there are powerful policy considerations which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case. Those policy considerations are not dissimilar to those which lie behind the principle of 'judicial restraint or abstention', which ordinarily precludes the courts of this country from passing upon 'the provisions for the public order of another State'.127

The majority accorded little force to the argument of the appellant that the Spiliada approach should be followed because 'judicial comity has replaced judicial chauvinism'.128

In deciding whether to grant or refuse a stay, the court does not, indeed cannot, evaluate the justice or relative merits of the substantive laws of the available forums.

124 Voth (1990) 171 CLR 538, 558.
125 Voth (1990) 171 CLR 538, 557.
126 Ibid 559.
127 (1990) 171 CLR 538, 559.
128 Ibid 560.
(including the chosen forum). Consequently, the argument rests on a limited notion
of the interests of justice arising from balance of convenience factors which, though
relevant, have never been regarded as decisive.  

It can be seen from the recent decisions of the House of Lords in Connelly and Lubbe,
referred to in the previous chapter, that the forum non conveniens approach is not
without its problems and it seems likely that the 'justice' exception may be used in
more cases where, despite the alternative forum being clearly more appropriate, the
English court finds that justice will not be served by granting a stay. Under the
Australian approach this 'fix' is not necessary because it already incorporates such a
justice exception, by definition.

The principal example of this remains Oceanic Sun itself, a case involving an accident
in Greek waters, on a Greek ship. Under the Spiliada approach (prior to Connelly and
Lubbe at any rate), that action in New South Wales would likely have been stayed in
favour of the Greek proceedings — as indeed Wilson and Toohey JJ so held.

The following is a summary of the current situation in Australia with respect to stay of
the local jurisdiction on forum non conveniens grounds:

1. In deciding whether to stay proceedings in the local jurisdiction, an Australian court
must first consider whether those Australian proceedings are clearly inappropriate, in
the Voth sense of them being vexatious or oppressive.

2. The 'Voth sense' of these words means that the proceedings are either 'productive of
serious and unjustified trouble and harassment' or 'seriously burdensome, prejudicial
or damaging'. The application of the words is aided by Lord Goff of Chieveley's
Spiliada 'connecting factors'.

3. The plaintiff's right to litigate in his chosen forum and the persuasive value of the
substantive law of the forum are factors in determining whether to grant a stay, but
with reduced significance if other factors indicate disadvantage in continuing in the
forum.

129 Ibid.
4. The availability of an alternative forum is an important condition precedent to the grant of a stay, except in exceptional circumstances.

5. Where the identical matter is pleaded in both the local and foreign fora, \textit{prima facie} one is deemed to be oppressive, in the \textit{Voth} sense, although this does not necessarily mean that a stay of local jurisdiction will be granted. And the judgment of the majority in \textit{Cigna} may indicate an increased level of tolerance to such proceedings in any case.

6. Where there are pending proceedings in both fora, although not identical but arising from the same sub-stratum of fact, the court will consider the litigation as a whole, necessarily having regard to the proceedings in the foreign court. The dominant purpose of the party proceeding in the local forum will be a factor.

Having considered the grounds on which Courts in the major common law jurisdictions will consider a stay of matters proceeding in their own jurisdictions, it is now appropriate to turn to a consideration of the other side of the coin, the grounds on which they will issue anti-suit injunctions.
Chapter 4.

Anti-suit injunction: United States approaches

4.1 Introduction

Although they are considered unfashionable there are many who would agree with the opening words of the late Lord Denning’s judgment in *Smith Kline & French Laboratories Ltd v Bloch*:\(^1\)

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk to having to pay anything to the other side. The lawyers there will conduct the case ‘on spec’ as we say, or on a ‘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. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40% before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.\(^2\)

What the late Lord Denning said in 1983 is just as true today - that most of the proceedings brought to apply for anti-suit injunctions in countries other than the United States involve attempts to halt litigation in that country. There are some very good reasons why this is so. They include:

- the availability of contingency fees (compared with very expensive fees in other countries);
- the availability of jury trials in civil actions (not available in most other countries);
- much higher levels of damages awards, including punitive damages;
- availability of causes of action not available elsewhere.\(^3\)

Whether these reasons are always correct and present, or to an extent apocryphal and the result of misunderstanding and mistake of fact about the complexities of a large and varied legal system, they should be of no concern to the judges of foreign courts, without the necessary means of being fully briefed and informed on the complexities of foreign legal systems, nor the right to make enquiry about the public policies that

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\(^1\) [1983] 2 All ER 72.
\(^2\) Ibid 74.
underlie such practices as contingency fees. Foreign courts are ill-equipped to do so. They have no right to do so. They should not do so.

Chapter one provided an introduction to the anti-suit injunction and the history of its development up to the mid-20th century. Because of the nature of the origins of the anti-suit injunction, identified in that initial chapter as being so much akin to the discretion to stay proceedings in the local jurisdiction, it was necessary first to consider in some depth the history and development of that discretion and its evolution from the ‘chauvinistic’ attitude of the late 19th century English courts, grounded in notions of abuse of the courts’ processes, to a basis of forum non conveniens, more in line with modern international realities and based on the Scottish doctrine of the more appropriate forum in England and the Voth variant of that traditional doctrine in the guise of the ‘clearly inappropriate forum’ in Australia. Or supposed variation. As the previous chapter makes clear the variation is largely a fiction now.

Having identified the basis of the exercise of the discretion to stay matters within the jurisdiction, which is integral to an understanding of the exercise of the discretion to grant an injunction to stay proceedings in a foreign jurisdiction, it is appropriate now to move to a consideration of the way in which that discretion has been exercised, with regard to the major common law jurisdictions. This chapter will deal with the situation in the United States, where two different approaches have been adopted by various Circuits of the Court of Appeals. Chapter five will deal primarily with the development of the law in England and Australia.

The following extracts purport to state the law in the United States with respect to anti-suit injunctions:

On occasion, a court may enjoin a person over whom it has personal jurisdiction from bringing suit in what the court deems to be an inappropriate forum. The factors which determine the award of such relief are the same as those a court considers in deciding whether to dismiss a case on forum non conveniens grounds. Injunctions of this sort are only granted in extreme circumstances.4

A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.5

4 Restatement of the Law 2nd, Conflict of Laws, §84 comment h.
5 Restatement of the Law 3rd, Foreign Relations Law, 421.
An action or proceeding in another state or country generally may be enjoined on the ground that it interferes inequitably with local litigation affecting local citizens or residents, evades the law of the local state, or otherwise requires the interposition of equity to prevent manifest wrong or injustice.6

These statements notwithstanding, there is, as yet, no uniform approach to the grant of anti-suit injunctions in the courts of the United States, although it is well settled that United States courts have the power to issue such an order.7 Although one of the earliest statutes of the United States, the Anti Injunction Act, deals with anti-suit injunctions, it only extends to matters in issue between the courts of the states. While it is considered highly desirable for the courts of one American state not to interfere with a matter proceeding before the court of another state, no legislative regard has been paid to the potentially much more serious interference with proceedings in the courts of a foreign sovereign country. At least one commentator has proposed that the matter be resolved by Congress adopting the standard of the Anti Injunction Act, which adopts as its baseline a prohibition against anti-suit injunctions with a limited number of exceptions, and extending it to anti-suit injunctions to enjoining foreign proceedings.8 There does not appear to have been any interest in such a move, however.

The Supreme Court of the United States has not pronounced on the matter, and this vacuum has been filled by two conflicting approaches developed by Circuits of the Court of Appeals,9 called the ‘lax’ and the ‘strict’ approaches. The lax or liberal approach has been accepted by the Fifth, Seventh and Ninth Circuits (see the cases cited in Kaepa, Inc v Achilles Corp)10 and arguably by the Eighth Circuit as well. Courts which follow this approach will grant anti-suit injunctions in circumstances where the proceedings are duplicative in nature, and they, ‘(1) frustrate a policy of the forum issuing the injunction; (2) [are] vexatious or oppressive; (3) threaten the issuing court’s in rem or quasi in rem jurisdiction; or (4) ... prejudice other equitable

7 Kaepa v Achilles 76 F3d 624, 626 (5th Cir, 1996).
9 The Supreme Court turned down an opportunity to do so when they refused to grant certiorari in Achilles Corp v Kaepa, Inc. 117 S.Ct. 77 (1996).
10 76 F3d 624, 626-627 (5th Cir, 1996).
considerations. Less regard is paid to concerns of comity under this approach for reasons which will be discussed below.

The strict approach is typified by the decision of Judge Wilkey in *Laker Airways v Sabena, Belgian World Airlines ('Laker')*, and has been adopted by the D.C., Second, Third and Sixth Circuits. Judge Wilkey’s opinion has become the benchmark for the courts and scholars that endorse the stricter standard. Anti-suit injunctions are only issued when ‘necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant’s evasion of the important public policies of the forum’. As well the applicant may be required to establish the accepted requirements for issuance of an injunction: likelihood of success on the merits, a risk of irreparable injury, a lack of significant harm to the defendant and a public interest in issuing an injunction: see *Gau Shan Co. Ltd v Bankers Trust Co.*

### 4.2 The ‘Strict’ or ‘Comity’ Approach

The saga of the *Laker* litigation is well known, however a work such as this would be incomplete without a recounting of the facts and circumstances which led to the infamous battle of anti-suit injunctions and which certainly undermined comity, judicial and otherwise, between the United States of America and the United Kingdom. Briefly, in 1977, after many attempts and setbacks, the English entrepreneur, Sir Freddie Laker, obtained permission for his Laker Airways Ltd to operate air services between the United Kingdom and the United States. The service, which offered greatly discounted fares, was known as the Skytrain. The very much cheaper fares offered by Laker led his competitors to introduce lower fare structures themselves. By 1982, however, Laker’s finances had become overstretched and attempts at refinancing had failed. The company ceased trading and went into liquidation.

Laker commenced action in the US District Court for the District of Columbia, late in 1982, alleging that a number of the rival airlines had unlawfully combined and

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11 *Re Unterweser Reederei GmbH* 428 F2d 888, 920 (5th Cir, 1970).
12 731 F2d 909 (DC Cir, 1984).
13 See also *Gau Shan Co v Bankers Trust Co* 956 F2d 1349 (6th Cir, 1992); *China Trade & Development Corporation v MV Choong Yong* 837 F2d 33 (7th Cir, 1997).
conspired to restrain and monopolise trade or commerce, contrary to the American Clayton and Sherman Acts which provided for the award of treble damages. Three months after Laker’s action was filed in the US District Court, a number of the foreign airlines filed suits in the High Court of Justice in England, seeking an anti-suit injunction to prevent Laker from pursuing the US action against them. Parker J in the High Court granted an interim injunction. This was confirmed on appeal by the Court of Appeal which issued a permanent injunction ordering Laker to take action to dismiss its US suit against the airlines which were party to the English action.

While this was going on in England Laker sought injunctive relief of its own, in the US District Court, to prevent the remaining foreign and domestic airline defendants from taking the same steps as the other foreign defendant airlines: an anti-anti-suit injunction as it was called. Judge Harold Green of the District of Columbia District Court granted Laker’s motion for a preliminary injunction. His criticism of the actions of the English courts was trenchant:

The Court exceedingly regrets that it must issue an injunction in this case. However, it is worth emphasizing that this Court had no part in precipitating the current dispute. The lawsuit pending before it was proceeding in its normal course, when the British court, without appropriate regard to principles of comity, proceeded to interfere with that action. At that juncture, this Court’s options were severely limited. It could either issue its own injunction to prevent at least the remaining defendants – those from the United States and some of those from the European continent – from seeking shelter from a United States law in a British court, or it could acquiesce in silence in the effort to have a foreign tribunal decide on this Court’s jurisdiction and to see the plaintiff’s Sherman Act rights dissipated. With regret, the Court has no choice but to follow the former course.15

Judge Green was upheld, on appeal, by the US Court of Appeals for the District of Columbia in March 1984.

The English Court of Appeal had issued a permanent injunction restraining Laker from taking any steps in the US action against the airlines.16 The Court was obviously concerned, however, at the ramifications of its actions and the scathing comments of Judge Green in particular. One commentator has described them as ‘somewhat embarrassed.’17 Sir John Donaldson, M.R. said,

16 [1984] QB 142.
First let it be said, and said loud and clear, that no one has ever suggested that the United States District Court is without jurisdiction to try Laker's complaint against the Appellants both under the Sherman and Clayton Acts and in respect of the commission of an intentional tort. Both Appellants carry on business in the United States of America sufficiently to make them accessible to the jurisdiction of its courts. If any such submission had been made it would have been rejected out of hand.

Second, let it be said at no less volume and with no less clarity that no submission has been made to this Court that the civil procedures of the United States courts and, in particular, the system of pre-trial discovery by the taking of depositions, the administration of interrogatories or the disclosure of documents, the limited circumstances in which a successful defendant could be awarded costs and the conduct of litigation upon the basis of contingency fees are in any way to be criticised. They are different from English civil procedures, but the days are long past when the English courts and judges thought that there was only one way of administering justice and that was the English way. Each nation must decide of itself which way is appropriate to its need and there is nothing strange in two nations which enjoy a common legal heritage and could be described as 'cousins-in-law' rightly deciding that different procedures suited them best.

Third, let it be said no less loudly and clearly that neither the English courts nor the English judges entertain any feelings of hostility towards the American anti-trust laws and would never wish to denigrate that or any other American law. Judicial comity is shorthand for good neighborliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards. In the context of the United Kingdom and the United States, this comes naturally and, so far as we are concerned, effortlessly.\textsuperscript{18}

The subject of international comity was given careful consideration by Judge Wilkey who delivered the opinion of the United States Court of Appeal in \textit{Laker}.\textsuperscript{19} He said that 'comity serves our international system like the mortar which cements together a brick house. No one would willingly permit the mortar to crumble or be chipped away for fear of compromising the entire structure.'\textsuperscript{20} He quoted the definition of comity provided by the Supreme Court in \textit{Hilton v Guyot},\textsuperscript{21} and went further, holding that,

No nation can expect its laws to reach farther than its jurisdiction to prescribe, adjudicate and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations. Thus, comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations.\textsuperscript{22}

\textsuperscript{18} [1984] QB 142, 185-186.
\textsuperscript{19} 731 F2d 909 (DCC, 1984).
\textsuperscript{20} Ibid 937.
\textsuperscript{21} 159 US 113, 163-4 (1895).
\textsuperscript{22} 731 F2d 909, 937 (DCC, 1984).
However, that,

No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognised that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign court.23

And to the outcome:

Opinions vary as to the degree of prejudice to public policy which should be tolerated before comity will not be followed, by any definition the injunction of United Kingdom courts are not entitled to comity. This is because the action before the United Kingdom court is specifically intended to interfere with and terminate Laker’s United States antitrust suit.24

Huber would have approved.

Further trenchant criticism was made of the attitude of the English courts (specifically of course the decision of the Court of Appeal) with respect to their failure to exercise comity. They had the first opportunity to do so by recognising that the matter had been brought in US courts – which alone had jurisdiction. ‘No recognition or acceptance of comity was made in those courts. The appellants’ claims of comity now asserted in US courts come burdened with the failure of the British to recognise comity.’25 The US Court of Appeals at the same time defended the District Court’s employment of an anti-suit injunction, saying:

[The action before the UK courts is specifically intended to interfere with and terminate Laker’s US antitrust suit. The District Court’s anti-suit injunction was purely defensive – it seeks only to preserve the district court’s ability to arrive at a final judgment adjudicating Laker’s claims under US law... In contrast, the English injunction is purely offensive – it is not designed to protect English jurisdiction, or to allow English courts to proceed to a judgment on the defendant’s potential liability under English anticompetitive law free of foreign interference. Rather, the English injunction seeks only to quash the practical power of the US courts to adjudicate claims under US law against defendants admittedly subject to the courts’ adjudicating jurisdiction.26

Judge Wilkey found that:

[There may, and often will be concurrent jurisdiction to prescribe by a local and a foreign court. This does not necessarily entail conflict and the mere existence of

23 Ibid.
24 Ibid 938.
25 Ibid 939.
26 Ibid 938.
concurrent jurisdiction does not oust either one of the forums. Each forum is usually free to proceed to a judgment.\textsuperscript{27}

Injunctions operate on the parties \textit{in personam} but they do \textit{effectively} interfere with and restrict the foreign court’s ability to exercise its jurisdiction. Therefore, according to the strict interpretation, it must be only in the most compelling circumstances that a court can be allowed to issue an anti-suit injunction.\textsuperscript{28}

There are no precise rules governing the appropriateness of antisuit injunctions. The equitable circumstances surrounding each request for an injunction must be carefully exercised to determine whether ... the injunction is required to prevent an irreparable miscarriage of justice. Injunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant’s evasion of the important public policies of the forum.\textsuperscript{29}

Neither multiplicity of proceedings nor the possibility of an ‘embarassing race to judgment or potentially inconsistent adjudications’ justify overriding ‘the respect and deference owed to independent foreign proceedings.’\textsuperscript{30} The ‘logical reciprocal’ to the parallel proceeding rule is that the local court can resist any attempt by a foreign court to interfere with an \textit{in personam} action before the local court.\textsuperscript{31} It must be noted that the sole purpose of the English proceedings in the \textit{Laker} litigation was to terminate the United States proceedings.\textsuperscript{32} They were not parallel proceedings.

Anti-suit injunctions are also justified following the strict approach when necessary to prevent a litigant’s evasion of the forum’s important public policies.\textsuperscript{33} The rules, like

\textsuperscript{27} Ibid 926.
\textsuperscript{28} Ibid 927.
\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid 928-9.
\textsuperscript{31} Ibid 929.
\textsuperscript{32} Ibid 930.
\textsuperscript{33} Fellas provides a good example: \textit{Farrell Lines Incorporated v. Columbus Cello-Polly Co.}, 1998 WL 570494 (S.D.N.Y.). Plaintiff, Farrell Lines, operated a merchant vessel which was involved in an accident while delivering cargo in Norfolk Virginia. As a result of this accident the cargo suffered $800,000 of damage. After an exchange of correspondence concerning insurance settlement, plaintiff Farrell Lines filed suit in the Southern District of New York, the jurisdiction specified in a forum selection clause. The Court issued a declaratory judgment of nonliability in plaintiff's favor. Farrell Lines also sought an antisuit injunction preventing defendants from filing or prosecuting suit related to the damaged cargo in any other forum including Italy where suit was pending.

Following the comity standard for determining antisuit injunctions, the Court observed that an injunction would be granted only if the foreign proceeding presents a threat to the public policy or jurisdiction of the enjoining forum. The Court found that defendants in this case had sued in a foreign forum to evade two important public policies. The Court determined that the defendants had filed suit in Italy to avoid the U.S. policy favoring \textit{c. f.} clement of forum
that with respect to refusing full faith and credit in such circumstances to foreign judgments, were said to be based on recognition that 'a state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests.'\(^{34}\) Such statements owe a clear debt to the early jurists, like Huber. Judge Wilkey stated in *Laker* that, 'deference to the foreign proceedings may be denied because of the litigant's unconscionable evasion of the domestic laws, and not necessarily because of the inherent obnoxiousness of the foreign laws to which the litigant has resorted.'\(^{35}\) The Judge held that the standard is a strict one because preventing involvement in a foreign lawsuit in order to pre-empt a potential judgment is a much greater interference with an independent country's judicial processes. 'It follows that an anti-suit injunction will issue to preclude participation in the litigation only when the strongest equitable factors favor its use.'\(^{36}\)

The Second Circuit followed the stricter approach, in *China Trade & Development Corporation v MV Choong Yong ('China Trade')*,\(^{37}\) but arrived at a different conclusion on the facts, over-turning a District Court finding that had employed the liberal approach, and issued an injunction because the parties and claims were identical. The plaintiff, China Trade, had tried to import soybeans from the US to China, using a ship supplied by the defendant. The ship ran aground, and the soybeans were allegedly contaminated by seawater. The plaintiff filed suit in the US federal court for damages resulting from failure to deliver the soybeans. While discovery proceedings were underway, the defendant filed an action in Korea seeking a negative declaration for their non-liability for the damaged produce. The plaintiff sought an anti-suit injunction to prevent the defendant from pursuing the Korean action.

The Second Circuit held that the most important factors relevant to the decision to grant an anti-suit injunction are, (i) whether the foreign action threatens the jurisdiction selection clauses. In addition the Court found that the defendants sued in Italy to evade the contracted liability limitation provisions. Finally, the Court noted that since it had already granted a declaratory judgment in favor of plaintiff there was less justification for permitting litigation in a foreign court.


\(^{34}\) Ibid 931.

\(^{35}\) Ibid 931, fn71.

\(^{36}\) Ibid 931.
of the enjoining forum, and (ii) whether strong public policies of the enjoining forum are threatened by the foreign action. The Court held that since neither the defendant nor the Korean court had attempted to enjoin the New York proceedings there was no threat to the jurisdiction of the US court.\textsuperscript{38} In considering the second factor – evasion of important public policies – the Court observed that an injunction is not appropriate merely because a party has attempted to seek slight advantages in the procedural or substantive law by litigating in a foreign court. The Court stated that vexatiousness and a race to judgment are \textit{inevitable by-products of parallel proceedings} and in themselves are not sufficient justifications for issuing an anti-suit injunction.\textsuperscript{39} The Circuit Court held that mere duplication of parties and claims was insufficient to warrant enjoining a plaintiff from pursuing foreign proceedings. They deemed adherence to notions of international comity to outweigh the ‘equitable factors’ which swayed the District Court.\textsuperscript{40}

The Sixth Circuit also adopted the \textit{Laker} approach in \textit{Gau Shan Co Ltd v Bankers Trust Company}\textsuperscript{41} (‘\textit{Gau Shan}’), in overruling a District Court decision granting an anti-suit injunction to halt proceedings in Hong Kong. Circuit Judge Ryan delivering the opinion of the Court said, in words reminiscent of the House of Lords majority in \textit{The Atlantic Star},\textsuperscript{42} and also those of Wilson and Toohey JJ in \textit{Oceanic Sun},\textsuperscript{43} that,

\begin{quote}
\textit{... {	extendash} inevitable by-products of parallel proceedings and in themselves are not sufficient justifications for issuing an anti-suit injunction.}
\end{quote}

\textsuperscript{37} 837 F2d 33 (2nd Cir, 1987).
\textsuperscript{38} Fellas provides a further example of an appropriate case for the grant of an injunction in such circumstances: \textit{Mutual Service Casualty Insurance Company v. Frit Industries}, 805 F. Supp. 919 (M.D. Alabama, 1992). \textit{Plaintiff,} Mutual Services was an insurer of Defendant Frit Industries, a corporation conducting business in the British Isles. Plaintiff filed a lawsuit against defendant in federal court seeking a determination of the scope of coverage under the insurance policies. Plaintiff was later named as a defendant in a counter-claim filed by Frit Industries in the British Isles and in a cross-claim filed by two other insurers of Frit Industries in the Cayman Islands.

\textit{Plaintiff sought an antisuit injunction to enjoin the proceedings in the British Isles and the Cayman Islands. The Court found that this was a rare instance where there was a sufficient threat to the court's jurisdiction to justify overriding the principles of international comity, and to grant an antisuit injunction. Significant to the Court's decision was that the defendants in the British Isles had sought an antisuit injunction enjoining Mutual Service from continuing the U.S. action. The Court viewed this as an attempt to carve out exclusive jurisdiction over the action. The Court, emphasizing that an antisuit injunction should be no broader than necessary, enjoined the defendants from seeking to establish the British Isles as the exclusive forum for the claim, either through injunctive or declaratory relief.}

\textit{Fellas, above, n33.}

\textsuperscript{39} Ibid 193.
\textsuperscript{40} 837 F2d 33, 37 (2nd Cir, 1987).
\textsuperscript{41} 956 F2d 1349 (6th Cir, 1992).
\textsuperscript{42} [1974] AC 436, 453, per Lord Reid.
The days of American hegemony over international economic affairs have long since passed. The United States cannot today impose its economic will on the rest of the world and expect meek compliance, if indeed it ever could. The modern era is one of world economic interdependence, and economic interdependence requires cooperation and comity between nations.44

Judge Ryan adverted to the growing internationalization of commerce and the concordant growth in the number of transactions presenting possibilities of concurrent jurisdiction in the courts of the nations involved, noting that,

If both the foreign court and the United States court issue injunctions preventing their respective nationals from prosecuting a suit in the foreign forums, both actions will be paralysed and neither party will be able to obtain relief. The more readily courts resort to this extraordinary device, the more frequently this sort of undesirable stalemate will occur.45

And,
Factors such as “vexatiousness” or “oppressiveness” and a “race to judgment” are “likely to be present whenever parallel actions are proceeding concurrently” (citing China Trade).46 An anti-suit injunction based upon these factors would tend to debilitate the policy that permits parallel actions to continue and that disfavors anti-suit injunctions.

This goes to the core of the case against the employment of anti-suit injunctions in all but the rare circumstances. If all jurisdictions took the lax approach (discussed below) and were readily prepared to grant anti-suit injunctions to halt duplicative proceedings then there would indeed be global stalemate. Judge Ryan said further, in words echoing the 17th century English decision in Hughes v Cornelius,47 that,

The inappropriate use of anti-suit injunctions can have unintended, widespread effects. International commerce depends in no small part on the ability of merchants to predict the likely consequences of their conduct in overseas markets. Predictability depends on an atmosphere of cooperation and reciprocity between nations. The issuance of anti-suit injunctions threatens predictability by making cooperation and reciprocity between courts and different nations less likely.

The Third Circuit has also weighed into the debate on the side of the strict approach. In Republic of the Philippines v Westinghouse Electric Corp,45 the Court overturned an injunction by the District Court which had enjoined the Philippines Government. This injunction did not enjoin a foreign court but the executive, although the Third Circuit

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45 956 F2d 1349, 1354 (2nd Cir, 1987).
46 Ibid 1354-5.
47 837 F2d 33, 36 (2nd Cir, 1987).
48 (1680) 2 Shower 232.
seemed to review the District Court order as if it was the same as one enjoining foreign proceedings. In doing so it followed the stricter approach and deferred to principles of comity. The Circuit equated comity with the ‘golden rule’, and said,

[O]ne could imagine the profound legal .... issues that would arise if the Executive Branch of the United States government were enjoined by a foreign court the way the district court has enjoined the Republic here. Were the shoe on the other foot, we would surely find it intolerable for a court in the Philippines to order the President of the United States to provide immunity for witnesses who had testified in a Philippines proceeding, silence members of Congress who called for an investigation of those witnesses, prevent members of Congress from even speaking in a manner that could be interpreted as harassment of those witnesses, or sue an independent prosecutor who had threatened or instituted proceedings against such witnesses.\[49\]

The Third Circuit had adopted a comity approach in a much earlier decision, *Compagnie Des Bauxites de Guinea v Insurance Co of North America.*\[50\] The case involved a company that mined and sold bauxite in the Republic of Guinea. It sued its excess insurers in the federal court because the insurers improperly refused a claim. The insurers sued, four years later, in England to rescind the insurance contract because the miners allegedly failed to disclose material facts. The District Court enjoined the English action but the Court of Appeals reversed, holding that ‘duplication of issues and the insurer’s delay in filing the London action were the sole bases for the district court’s injunction. ... These factors alone did not justify the breach of comity among the courts of separate sovereignties.’\[51\]

4.3 The Lax Approach

The lax or liberal approach to the issue of anti-suit injunctions is grounded on the premise that parallel proceedings are inherently vexatious and one or the other of them should be enjoined. This approach to anti-suit injunctions is embodied in *Kaepa, Inc v Achilles Corporation,*\[52\] a decision of the Court of Appeals for the Fifth Circuit. The case concerned an anti-suit injunction sought by Kaepa, a US athletic shoe manufacturer, to prevent mirror image litigation being brought in Japan by Achilles, a

\[49\] 43 F3d 65 (3d Cir 1995).
\[50\] Ibid 78.
\[52\] Ibid 887.
Japanese corporation which had agreed to distribute Kaepa's products in Japan subsequent to the commencement of litigation in the US. The contract explicitly provided that Texas law and the English language would govern its interpretation; that it would be enforceable in Texas, and that Achilles consented to the jurisdiction of the Texas courts. The opinion of the majority (Wiener and Benavides, Circuit Judges) was delivered by Judge Wiener.

Judge Wiener noted the difference of opinion among the Circuits as to the proper legal standard to be applied in considering whether to forestall a party subject to the jurisdiction from proceeding in a foreign court. He referred to two earlier decisions of the Fifth Circuit, *Unterweser Reederei GmbH*53 and *Bethell v Peace*.54 as authority for the proposition that a court may grant an anti-suit injunction to halt parallel proceedings that are vexatious or oppressive on the grounds that, 'allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and 'tend to frustrate and delay the speedy and efficient determination of the case.'55 Judge Wiener noted that *Unterweser* was authority for the proposition that anti-suit injunctions would be granted whenever foreign litigation would '(1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) prejudice other equitable considerations'.56

In *Unterweser*, the Fifth Circuit, following the now outdated 'first-filed rule' granted an injunction to halt proceedings in London on the grounds that concurrent suits in distant fora would impede the 'speedy and efficient determination of the issue'.57 The decision in *Bethell v Peace*58 re-emphasised the vexatiousness of parallel proceedings. The Fifth Circuit approach would thus encompass, but go much further than, that of the DC Circuit. Judge Wiener noted that the Seventh and Ninth Circuits have, 'either adopted or “inclined toward” this approach, but other circuits have employed a

52 76 F3d 624 (5th Cir,1996).
53 428 F2d 888 (5th Cir, 1970).
54 441 F2d 495 (5th Cir, 1971).
55 428 F2d 888, 896 (5th Cir, 1970).
56 Ibid 890.
57 Ibid 896.
58 441 F2d 495 (5th Cir, 1971).
standard that elevates principles of international comity to the virtual exclusion of essentially all other considerations. 59

The Achilles Corporation had urged the Fifth Circuit to give more weight to principles of comity and apply the stricter standard. The Court declined, however, ‘to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.’ 60

In the instant case, for example, it simply cannot be said that the grant of an anti-suit injunction actually threatens relations between the United States and Japan. First, no public international issue is implicated by the case: Achilles is a private party. Second, the dispute has been long and firmly ensconced within the confines of the United States judicial system: Achilles consented to jurisdiction in Texas; stipulated that Texas law and the English language would govern any dispute; appeared in an action brought in Texas; engaged in extensive discovery pursuant to the directives of the federal court; and only then, with the federal action moving steadily toward trial, brought identical claims in Japan. Under these circumstances, we cannot conclude that the district court’s grant of an anti-suit injunction in any way trampled on notions of comity. 61

Judge Wiener attacked the dissenting opinion of Circuit Judge Garza, who had made clear his preference for the stricter approach. Judge Wiener stated that, contrary to principles of stare decisis, Judge Garza had ignored the Fifth Circuit’s earlier decisions in Unterweser and Bethell. The majority found that the grant of an anti-suit injunction in no way ‘trampled on notions of comity’; that nothing about the grant would threaten relations between the US and Japan, and that the prosecution of the Japanese action would entail, ‘an absurd duplication of effort and would result in unwarranted inconvenience, expense and vexation. Achilles’ belated ploy of filing as putative plaintiff in Japan the very same claims against Kaepa that Kaepa had filed as plaintiff against Achilles smacks of cynicism, harassment and delay.’ 62

The Fifth Circuit, however, adopted an approach that treats the Japanese courts with disrespect, failing to acknowledge or consider that they might review the same facts and stay their own proceedings in such circumstances; and equally failing to consider

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60 76 F2d 624, 627 (5th Cir, 1996).
61 Ibid.
the possibility of what would happen if the Japanese Court adopted the same attitude and issued its own anti-suit injunction: stalemate.

In a persuasive and forceful dissenting opinion in this 2-1 decision, Chief Judge Emilio Garza supported the stance taken by the Circuits which had adopted the stricter approach, preferring the primacy of comity over convenience:

Unless we proceed in each instance with respect for the independent jurisdiction of a sovereign nation's courts, we risk provoking retaliation in turn with detrimental consequences that may reverberate far beyond the particular dispute and its private litigants. Amicable relations among sovereign nations and their judicial systems depend on our recognition, as federal courts, that we share the international arena with co-equal judicial bodies, and that we therefore act to deprive a foreign court of jurisdiction only in the most extreme circumstances. 63

Chief Judge Garza agreed with the proponents of the stricter approach in holding that the existence of parallel proceedings alone is not sufficient to enjoin proceedings; that they should ordinarily be allowed to proceed simultaneously, "at least until a judgment is reached in one which can be pleaded as res judicata in the other." 64 Chief Judge Garza disputed the finding of the majority that there would be no untoward consequences as the result of the grant of an anti-suit injunction. He held that it was impossible to judge the consequences and that such matters were best left to the Congress. 65

As with most transnational relations, the potential harm to international comity caused by the issuance of a specific anti-suit injunction will be as difficult to predict as it will be to remedy. It is precisely this troubling uncertainty, and the recognition that our courts are ill equipped to weigh these types of international policy considerations, that cautions us to make the respectful deference underlying international comity the rule rather than the exception. 66

Chief Judge Garza criticised the majority for essentially finding that, 'a duplication of the parties and issues, alone, is sufficient to justify a foreign anti-suit injunction.' Under this rule, he said, 'concurrent jurisdiction involving a foreign tribunal will rarely, if ever, withstand the request for an anti-suit injunction.' 67 Chief Judge Garza preferred the standard followed by the Second, Sixth and D.C. Circuits which, he said, more satisfactorily respects the principle of concurrent jurisdiction and safeguards the

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63 Ibid 629.
64 Ibid.
65 Again, reminiscent of Hughes v Cornelius (1680) 2 Shower 232, 'If you are aggrieved you must apply your self to the King and Council'
66 76 F3d 624, 631 (5th Cir, 1996).
67 Ibid.
important interests of international comity. Under this stricter standard, a district court should look to only two factors in determining whether to issue an anti-suit injunction: (1) whether the foreign action threatens the jurisdiction of the district court; and (2) whether the foreign action was an attempt to evade important public policies of the district court.\textsuperscript{68} He found none of these factors to be present.

Chief Judge Garza distinguished the earlier decisions relied on by the Fifth Circuit. \textit{Unterweser} was an in rem proceeding which justified a more permissive approach,\textsuperscript{69} and in \textit{Bethell} an anti-suit injunction was issued only after a judgment had been entered upon a motion for summary judgment. Considerations of international comity were not discussed. Chief Judge Garza held that these cases were exceptions permitted by the stricter approach as described in \textit{China Trade}\textsuperscript{70} and \textit{Laker}\textsuperscript{71} and that therefore accepting that stricter standard would not require the Fifth Circuit to overrule any of its prior decisions.\textsuperscript{72}

The Ninth Circuit adopted the liberal test propounded by the Fifth Circuit in \textit{Unterweser} and \textit{Bethell}, in \textit{Seattle Totems Hockey Club, Inc v National Hockey League}.\textsuperscript{73} The owners of the Seattle Totems, an ice hockey team, brought a private antitrust action in the federal district court against a number of hockey leagues and clubs claiming unlawful monopolization of the ice hockey industry in North America and seeking to have certain agreements relating to the sale and management of the Seattle Totems declared void and unenforceable. The defendant commenced action in Canada with respect to the same agreements that were the subject of the US action. The plaintiff moved for an anti-suit injunction in the US court to enjoin the defendant from pursuing its contract claim in Canada. The Court simply found, without any consideration of comity principles, that parallel proceedings were vexatious.

\textsuperscript{68} Ibid 632.
\textsuperscript{69} Ibid 633. "Where jurisdiction is based on the presence of property within the court's jurisdictional boundaries, a concurrent proceeding in a foreign jurisdiction poses the danger that the foreign court will order the transfer of the property out of the jurisdictional boundaries of the first court, thus depriving it of jurisdiction over the matter. This concern of course is not present in this \textit{in personam} proceeding." \textit{Gau Shan Co.}, 956 F.2d at 1258.
\textsuperscript{70} 837 F2d 33, 36 (2\textsuperscript{nd} Cir, 1987).
\textsuperscript{71} 731 F2d 909, 928 (DCC, 1984).
\textsuperscript{72} 76 F3d 624, 633.
\textsuperscript{73} 652 F2d 852 (9\textsuperscript{th} Cir, 1981).
The Ninth Circuit expressed concern that allowing two separate trials to proceed could result in a race to judgment and/or inconsistent rulings.\textsuperscript{74} The Court weighed factors including 'the efficient administration of justice', 'convenience to the parties and the witnesses' and the 'potential prejudice' to the parties.\textsuperscript{75} The lax or liberal approach adopted by the Fifth and Ninth Circuits is clearly not a difficult one to satisfy. As noted by Najarian, 'appellate courts need only conclude that the foreign litigation involves the same parties and issues as the domestic suit, a situation which will often result in potential prejudice to a party.'\textsuperscript{76}

\textit{The Posner approach}

The approach taken by the Circuits adopting the laxer standard was apparently affirmed by the Seventh Circuit. Their approach is a little unclear but it does highlight the distinction in the way in which considerations of comity are understood. Chief Judge Posner 'incline[d] toward the laxer standard' in \textit{Philips Medical Systems International B.V. v Bruetman},\textsuperscript{77} where he called comity a 'rather vague consideration'\textsuperscript{78} and said that 'Fear of that consequence had led some courts to withhold injunctive relief in such cases unless necessary to head off an "irreparable miscarriage of justice"'.\textsuperscript{79} In an interesting, if somewhat bizarre, twist to the debate, Chief Judge Posner declined to believe that injunctive relief could have a negative effect on US relations with foreign states absent actual objection from the foreign state.\textsuperscript{80} He doubted that an injunction would 'jeopardize amicable relations between the United States and Argentina'.\textsuperscript{81}

In another judgment, delivered a few days later, \textit{Allendale Mutual Insurance v Bull Data Systems, Incorporated ('Allendale')},\textsuperscript{82} Chief Judge Posner stated that the difference between the two approaches,

\begin{itemize}
  \item \textsuperscript{74} Ibid 856.
  \item \textsuperscript{75} Ibid.
  \item \textsuperscript{76} H. Najarian, "Granting comity its due: a proposal to revive the comity-based approach to transnational antisuit injunctions" (1994) 68 St. John's Law Review 961, 969, citing Gau Shan 956 F2d 1349, 1353 (6th Cir, 1992).
  \item \textsuperscript{77} 8 F3d 600 (7th Cir, 1993).
  \item \textsuperscript{78} Ibid 604.
  \item \textsuperscript{79} Ibid 604-5.
  \item \textsuperscript{80} Ibid 605.
  \item \textsuperscript{81} Ibid.
  \item \textsuperscript{82} 10 F3d 425 (7th Cir, 1993).
\end{itemize}
...has to do with the inferences to be drawn in the absence of information. The strict cases presume a threat to international comity whenever an injunction is sought against litigating in a foreign court. The lax cases want to see some empirical flesh on the theoretical skeleton. They do not deny that comity could be impaired by such an injunction but they demand evidence ... that comity is likely to be impaired in this case. 83

*Allendale* involved a warehouse fire in France that destroyed a very great deal of computer equipment. The insured was a financially troubled subsidiary of an entity more than ninety percent owned by the French Government and was accused of starting the fire by the insurers, who therefore refused payment pending an arson investigation by a French examining magistrate (juge d'instruction). The insurers sought a ruling in the US District Court that they were not liable because of the insured's supposed arson. The insured brought claims in the US against one insurer and a broker and in France against another insurer. The US District Court granted an injunction, upheld by the Court of Appeals, to stop the French proceedings in the Commercial Court of Lille.

Chief Judge Posner began his judgment by admitting that, 'at first glance the action of an American judge in enjoining what is practically an arm of the French state ... from litigating a suit on a French insurance policy in a French court may seem an extraordinary breach of international comity.' 84 He went on to find however that comity did not prevent an injunction and that there was no reason to treat a government owned entity any differently from a private one. And that, in any case, no-one had alleged government involvement in the arson. The role of the government was that of a private investor. 85

Chief Judge Posner, as noted, held that comity could weigh into the balance only if there were 'empirical flesh on the theoretical skeleton'. He specified that such 'flesh' would mean proof that comity would be harmed in the individual case. 'When every practical consideration supports the injunction, it is reasonable to ask the opponent for some indication that the issuance of an injunction really would throw a monkey wrench, however small, into the foreign relations of the United States.' 86 In the instant

83 Ibid 431.
84 Ibid 428.
85 Ibid.
86 Ibid 431.
case he would require proof that the relations between the United States and France would be harmed by an injunction, such as 'A representation by the State Department ... [or] a representation by the Foreign Office of France, or by the French agency that administers the French government's insurance investment in [the insured].' This is a highly novel and bizarre notion, that government officials, both domestic and foreign, could be called upon to advise the Court on their respective government's interest or otherwise in a given matter. And even assuming such advice was forthcoming, what if it was contradictory? The possibilities for serious harm to international relations are indeed frightful.

In finding that there was no breach of comity in *Allendale*, Chief Judge Posner also called into question the standing of the French commercial court, which, he said, 'although called a “court”, it is actually a panel of arbitrators, composed of businessmen who devote part time to arbitrating.' Chief Judge Posner held that the US court was much better placed to litigate the matter. This on the grounds that the primary insurance policy was issued in the US, and the insurer, broker and insured were all US citizens. Chief Judge Posner also made direct comparisons about the nature and proceedings of the US and French courts. He believed that the 'institutional superiority' of the District Court made the French forum an unwise choice. Chief Judge Posner was critical of the procedures of the French court, doubting its ability to sift through the massive documentation provided under US discovery procedures — '...it is difficult enough for courts staffed with legal professionals to cope with massive documentary records; it borders on the inconceivable that businessmen serving as part-time arbitrators could do so.' He also doubted that such a court would find arson without a prior criminal conviction. As Professor Swanson points out, Chief Judge Posner, 'dismissed the fact that a French commercial court had done just that in an earlier case. After all, this earlier case involved a discotheque, not a warehouse containing $100 million of computer equipment. Obviously, French courts have the capacity to handle dance halls, but nothing complex like computers.'

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87 Ibid.
89 *Allendale* 10 F3d 425, 429 (7th Cir. 1993).
90 Above n 88, n249.
Chief Judge Posner did state that,

[T]his conclusion has nothing to do with the relative merits of the French and American procedural systems, an issue on which it would be impertinent for us to express a view. We have arbitral bodies, some with exclusive jurisdiction, such as the National Railroad Adjustment Board ... and the French have courts staffed by professional judges. We can imagine a mirror-image case in which a French court was asked to enjoin an American firm from proceeding in the National Railroad Adjustment Board because that Board was not equipped to do justice between the parties in the particular circumstances of their dispute.91

This statement rings just as hollow as that of the English Court of Appeal’s attempted justification for its action in granting an injunction in Laker. One can as readily imagine the rejoinder with which such a condescending put-down of a national tribunal would have been greeted by Judge Harold Green. Whatever the basis of Chief Judge Posner’s reasons it is clear that he had made a judgment about the French Court and found it inferior to that of the US District Court. Chief Judge Posner is guilty of second-guessing the capabilities and standing of the Commercial Court of Lille and of assuming the role of foreign policy arbiter. His actions are chauvinistic and reminiscent of the 19th century. There are obvious parallels with the jingoism condemned by the House of Lords in Amin Rasheed Shipping Corp v Kuwait Insurance Co:92

In my opinion, it would have been wholly wrong for an English court, with quite inadequate experience of how it works in practice for a particular country, to condemn as inferior to that of our own country a system of procedure for the trial of issues of fact that has been adopted by a large number of both developed and developing countries in the modern world.93

And likewise in the Abidin Daver,94 where Lord Diplock said that there must be ‘positive and cogent evidence’ not just ‘tenuous innuendoes’ that justice will not be done in the foreign forum.95

Chief Judge Posner justified upholding the grant of an injunction by saying that, if the proceedings had been allowed to continue in both the US and France, there would have been an, ‘absurd duplication of effort. This is an argument in favour of the issuance of an injunction, although an alternative would be to hope that the other tribunal would

91 Allendale 10 F3d 425, 430 (7th Cir. 1993).
93 Ibid 67-68.
stay the case before it (or in this case refuse to lift a stay already granted). Chief Judge Posner declined to entertain this 'alternative' despite the fact that the French Court, as noted, had already stayed their proceedings pending the report by the Juge d'instruction, and showed no sign of lifting that stay. Chief Judge Posner had no reason to believe that there were serious defects with the French commercial court procedures or their ability to handle the case, certainly nothing like the situation in the two cases cited by Lord Mansfield in Mostyn v Fabrigas, where his Lordship observed: "There are no local Courts among the Esquimaux Indians of the Labrador coast, and therefore whatever any injury has been done there by any of the King's officers would have been altogether without redress, if the objection would have been held." In Allendale, the French Commission de Controle des Assurances (Insurance Commission), the regulatory body of the French insurance industry, did provide an amicus brief in support of the insured's right to litigate within the French legal system. The brief denounced the US Court description of the Commercial Court of Lille as insulting. Chief Judge Posner, however, declined to find his 'flesh' in this brief, and held that the Commission should not be seen as representing France, extraordinary given the role and standing of the French Commission.

Chief Judge Posner did, however, find evidence in support of maintaining the action in the US because the insurer was American and the United States has an interest in protecting its citizens, including its corporate citizens, from trumped-up multimillion dollar claims. In particular it has an interest, well recognized in American insurance law ... in providing a forum that will enable the insurer to establish by a preponderance of the evidence ... that it is being victimized by a fraudulent claim ... in a situation in which a foreign forum for the presentation of such evidence is, as a practical matter, unavailable. So even if [the insured] had brought a 'note from home' (the relevant home being the Quai d'Orsay) and brought it to a court that takes the strict view, it is far from clear that it would prevail.¹⁰¹

¹⁰¹ Ibid.
Here, Chief Judge Posner not only manages to insult the French court again, deeming it essentially a non-entity, but he dismisses the likely value of any representation by the French government, if it is made, and decides American policy with respect to protection of the domestic insurance industry. He also seemingly decides the case in favour of the insurer (‘trumped up’, ‘fraudulent’ claims).

The reason that the attitude of the Seventh Circuit, essentially Chief Judge Posner’s attitude, is unclear, is that the basis for the findings hinge very much on a finding of fact that the relations between the United States and the relevant foreign jurisdiction would be adversely affected. His slighting remarks about the procedures of the foreign courts or willingness to engage in US foreign policy from the bench aside, in Allendale, Chief Judge Posner in fact held that the injunction would pass both the liberal and stricter standards. Najarian has observed that Chief Judge Posner would have achieved the same outcome by adopting the stricter approach, and thereby bringing more uniformity to the US approach at the same time as maintaining comity. The Laker approach allows for issuance of an injunction if it would be contrary to US public policy to allow the foreign proceedings to continue. ‘For a US corporate citizen to be precluded from having a claim with substantial ties to the US adjudicated in an American court would be contrary to US public policy.’

The position of the Eighth Circuit is also unclear although it appears to favour the liberal approach. In Medtronic, Inc v Catalyst Research Corp, Circuit Judge Bright affirmed the anti-suit injunction granted by the District Court without expanding on the issue in any relevant sense. Senior District Judge Larson, although advertsing to the need for ‘extreme care and restraint’ in any consideration of granting an anti-suit injunction, stated that, ‘exercise of the power is dependent to a significant degree on the similarities between the litigation before the court and the litigation in the foreign court. The parties must be the same; the issue must be the same; and resolution of the first action must be dispositive of the action to be enjoined.’ Judge Larson found in favour of an injunction because, inter alia, the relief sought was limited, a ‘balancing of hardships’ exercise recommended it, there had not been any judgment granted in the

102 H. Najarian above n 76, 976.
104 Ibid 955.
105 Ibid.
foreign actions, the contract was entered into in the US, and duplicate litigation would be avoided. These ‘equitable considerations’ would be prejudiced ‘if the Court strictly adhered to the principle of comity’.  

Professor Swanson notes that further guidance on the Eighth Circuit’s attitude might be gleaned from Judge Bright’s ‘sitting-by-designation’ opinion in *China Trade*, where he said:

> It seems to me that in this day of exceedingly high costs of litigation, where no comity principles between nations are at stake in resolving a piece of commercial litigation, courts have an affirmative duty to prevent a litigant from hopping halfway around the world to a foreign court as a means of confusing, obfuscating and complicating litigation already pending for trial in a court in this country. This is especially true when that court has been processing the case for almost two years and has acquired personal jurisdiction over the parties and subject matter jurisdiction over the claim.  

4.4 Summation

Today, because of the split approach taken by different US Circuits, it is quite impossible to predict how a US District Court will rule on a motion for an anti-suit injunction to enjoin foreign proceedings before a foreign court, without knowing the exact location of the court. As a result, the fate of domestic and foreign entities involved in disputes that could potentially confer jurisdiction on both American and foreign courts may be determined by an accident of geography. It seems quite arbitrary that the US Circuit in which an entity chooses to do business might effectively determine whether or not that entity can maintain a lawsuit in a foreign forum.  

As will be discussed in the next chapter, the English Court of Appeal, in its decision in *Airbus*, provided an excellent and timely example of the dangers inherent in adopting the laxer approach where the determinative test is largely based on a subjective balancing of multiple variables, and one which put US courts on the receiving end of the medicine that some Circuits have so thoughtlessly doled out.

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106 Ibid 955-956.
107 S. Swanson, above n 88, 21. *China Trade* 837 F.2d 33, 40 (2d Cir, 1987). There is also a decision of the Minnesota Federal District Court which very clearly adopts the liberal approach, *Cargill, Inc v Hartford Accident and Indemnity Co* 531 F Supp 710 (D. Minn, 1982).
108 E. Roberson, above n 8, 430.
Chapter 5.

Anti-suit injunction: the Anglo-Australian approach and the triumph of vexation and oppression

In a world where comity was universally respected and the courts of countries which are the potential fora for litigation applied consistent principles with respect to the stay of proceedings, anti-suit injunctions would not be necessary.¹

5.1 English development of the law

With the early and mid-nineteenth century cases of Bushby v Munday² and Carron Iron v McLaren ("Carron Iron"),³ English courts had applied a broad approach to the exercise of the discretion both to grant orders to stay matters in the local jurisdiction and anti-suit injunctions. The courts were primarily concerned with the ‘ends of justice’ and expediency; the avoidance of inconvenience and unnecessary duplication of proceedings. The reasoning was simple and chauvinistic; even perhaps ‘parochial’, as the Supreme Court of Canada described the decision in Bushby v Munday.⁴ Although there was reference to caution or concern with regard to interference in the processes of foreign courts, issues of judicial comity did not fall for much consideration. Arguably that situation has not changed a great deal, as will be discussed.

The flexible but largely undefined and potentially unbound¹ ‘ends of justice’ formulation would, if it had evolved into something more akin to the Scots doctrine of forum non conveniens, with respect to stay of matters in the local jurisdiction, have been appropriate for responding to the changing and growing realities of a shrinking and more transnationally conscious and commercially-driven world; one that demanded increased respect for principles of comity in the exercise of judicial discretion. As has been discussed, however, it took a very long time for this approach to be adopted, at least by English courts. Australian courts, as also has been discussed, took a different approach. In doing so, however, courts in both jurisdictions made it

¹Amchem Products Inc v British Columbia (Workers’ Compensation Board) (‘Amchem’) [1993] 1 SCR 897, 914.
²(1821) 5 Madd 297.
³[1855] 5 H.L. Cas 416.
⁴Amchem[1993] 1 SCR 897, 912.
clear that anti-suit injunctions were to be treated differently from orders to stay matters in the local jurisdiction, although there has been confusion about the different jurisdictional bases, as will be discussed below.

In England, prior to the decision of the Privy Council in *Aerospatiale*, and subsequent to the changed approach to stay of local jurisdiction on *forum non conveniens* grounds, the view was held for a time that the principles to be applied in exercising the court’s discretion to stay proceedings in the local jurisdiction and to grant an injunction to restrain proceedings in a foreign jurisdiction were the same. This view was stated by the House of Lords in *The Atlantic Star*, the case that started the transition to *forum non conveniens* in England.

As discussed in chapter two, the approach with respect to stay of local jurisdiction was modified by the House of Lords in *The Atlantic Star*. Their Lordships chose to treat the epithets ‘vexatious’ and ‘oppressive’ as ‘illustrating’ but not confining the jurisdiction. In effect the majority watered them down in order to reach the result they obviously felt to be required by common sense in that case. A Dutch ship had collided with a Belgian barge in Belgian waters. The matter was underway in Belgium. Belgian law governed it and the proceedings were only commenced in England because the defendant owners of the Dutch ship thought they had a somewhat better chance of avoiding liability under English Admiralty jurisdiction. Under the old, strict understanding of vexation and oppression, however, it could not be said that the bringing of the English proceedings could be so labelled, and therefore there could not be a stay, despite there being clear grounds for this on any practical and realistic view of the facts (although of course *The Atlantic Star* minority did not see it that way). Acknowledging the changing times and the competency of foreign courts, their Lordships commenced the dilution of the traditional doctrine that would ultimately see the acceptance of *forum non conveniens* in English courts.

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5 [1987] 1 AC 871.
Lord Wilberforce said that the 'critical equation' was between 'any advantage to the plaintiff' and 'any disadvantage to the defendant'. His Lordship emphasised that although this was essentially a matter for the court's discretion, it was possible to 'make explicit' some elements:

The cases say that the advantage must not be 'fanciful' – that a 'substantial advantage' is enough ... A bona fide advantage to a plaintiff is a solid weight in the scale, often a decisive weight, but not always so. For the disadvantage to the defendant to be taken into account at all this must be serious, more than mere disadvantage of multiple suits; ... I think too that there must be a relative element in assessing both advantage and disadvantage – relative to the individual circumstances of the plaintiff and defendant.

The Atlantic Star formulation was reinterpreted by Lord Diplock in MacShannon v Rockware Glass. Continuing the Atlantic Star 'watering down' his Lordship opted to drop entirely the use of the words 'vexatious' and 'oppressive', a view endorsed by Lord Scarman in Castanho v Brown & Root (UK) Ltd ('Castanho') (an anti-suit injunction case). Lord Diplock reformulated Scott LJ's St.Pierre conditions as:

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

It had been uncertain, after The Atlantic Star, whether these same newly developed principles would apply to anti-suit injunctions. The preceding chapter dealt with the two different approaches developed by different Circuits of the US Court of Appeals to the issue. The remainder of this chapter will deal with the way in which the courts of England and Australia have responded to this problem and the solutions that have been devised. Reference will also be made to the development of the law in this area in Canada.

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[9] Ibid.
a) Castanho v Brown & Root (UK) Ltd

The issue was first considered by the House of Lords in Castanho, a clear anti-suit injunction rather than a stay of local jurisdiction case. Castanho himself was a Portuguese citizen, resident there, who was severely injured while employed on an American ship by a Panamanian company, while the ship was lying in an English port. He sued both the English company that provided shore services to the ship and the Panamanian owners for damages. Interim orders for damages were made by the English court. However, both defendants were associates of a large Texas-based group of companies and Castanho was persuaded by Texas-based attorneys to bring proceedings in Texas, where higher damages could be obtained. The Atlantic Star reformulation was directly considered and interpreted by Lord Scarman to mean that to justify the grant of an anti-suit 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 [foreign] jurisdiction.13

Lord Scarman emphasised that the formulation was not to be construed as a statute, and emphasised flexibility and adaptation to the circumstances of the cases:

No time should be spent in speculating as to what is meant by ‘legitimate’. It, like the whole of the context, is but a guide to solving in the particular circumstances of the case the ‘critical equation’ between advantage to the plaintiff and disadvantage to the defendants.14

In a decision rendered not long after, in Bank of Tokyo Ltd v Karoon,15 Robert Goff LJ (as Lord Goff of Chieveley then was), said that:

Lord Scarman did not apparently consider it necessary to give reasons for his opinion that the principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings, and that it is therefore unnecessary, having regard to the decisions of the House of Lords in the Atlantic Star [] and MacShannon’s case [], both of which related only to a stay of English proceedings, to examine earlier case law in restraint of foreign proceedings.16

14 Ibid.
16 Ibid 61-62. [citations omitted].
It should be no surprise, however, that, after the more than a decade transition to *forum non conveniens* with respect to stay applications, and in light of the fact that both stay of the local jurisdiction and injunctions to halt proceedings before foreign courts had been so long treated alike, even though with different jurisdictional bases, that their Lordships would, at least initially, have been attracted to a formulation that continued to treat the two alike. Lord Scarman’s speech in *Castanho*, with which the other four participating Law Lords unanimously agreed, is certainly straightforward and initially attractive in its simplicity. His Lordship explained that the jurisdiction is exercised ‘where it is appropriate to avoid injustice’, and that ‘the width and flexibility of equity’ are not to be undermined by categorisation. He accepted the *MacShannon* interpretation of *The Atlantic Star* as an invitation to drop the use of the words ‘vexation’ and ‘oppression’, and ‘transposed’ it to fit the situation of anti-suit injunctions.

As noted, Lord Scarman emphasised that this formulation was not to be construed as a statute but rather as a ‘guide to solving in the particular circumstances of the case the “critical equation” between advantage to the plaintiff and disadvantage to the defendants.’ On the basis of this reasoning in relation to the facts of the case, Lord Scarman found that it would not be just to grant an injunction. That although it would possibly be less expensive to sue in England, an injunction would deprive the plaintiff of a legitimate personal or juridical advantage in Texas: viz, the higher damages available there. ‘Texas is a natural and proper forum for suing a group of Texas-based companies as England – even though England, as the scene of the accident, is also a material and proper forum.’

Despite Robert Goff LJ’s remarks, although Lord Scarman had clearly adopted the natural forum approach being advocated, even if not yet in name, by the House of Lords, he had not done so unreservedly with respect to anti-suit injunctions. The House of Lords was already of the view that ‘something else’ would be required before they would grant an injunction. It was not enough that England was a natural forum if the

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18 Ibid.
19 Ibid 575.
20 Ibid 576.
plaintiff would be deprived of a legitimate personal or juridical advantage in the foreign forum.

b) The Laker litigation and subsequent cases

Much of the saga of the Laker litigation was recounted in the previous chapter. Not mentioned in the earlier discussion was that the House of Lords overruled the decision of the Court of Appeal. They held that the litigation in the US, pursuant to the US Clayton and Sherman Acts, disclosed no cause of action that was justiciable in an English court. The alleged acts of the airlines, under English rules of conflicts of laws, were purely territorial in their application. The only court competent to deal with the matter was an American one—a foreign court: 'For an English court to enjoin the claimant from having access to that foreign court is, in effect, to take upon itself a one-sided jurisdiction to determine the claim upon the merits against the claimant but also to prevent its being decided upon the merits in his favour.'

Their Lordships noted that the principles expounded in Castanho were concerned with a right that was justiciable in England, clearly distinguishable therefore from the circumstances in the Laker litigation. This can be seen as the first restriction placed on Lord Scarman's 'critical equation' in Castanho, one later confirmed in different circumstances by the House of Lords in Airbus Industrie G.I.E. v Patel ('Airbus'), (discussed below), and which gave rise to a differentiation between cases justiciable in alternative fora, like Aerospatiale, Castanho, Cigna and Airbus, and those only justiciable in a single forum, like Laker. If the claim is not justiciable in England, the matter is ended unless it would be unconscionable to allow the foreign proceedings to continue. But the very notion of the critical equation was itself attacked in Laker. In the course of his speech to the House of Lords, Lord Diplock stated caustically that,

As a metaphor drawn from mathematics, its appropriateness to questions involved in forum non conveniens cases in the context of which it was used is flawed by the fact that the essential characteristic of an equation is that there are two sides to it and each side is equal to the other; it is neither more nor less. In cases where there are alternative fora available one nevertheless understands the idea that is meant to

21 [1985] 1 AC 58.
22 [1985] 1 AC 58, 79.
23 [1985] 1 AC 58, 80.
convey, whereas in a single forum case there are not even two sides for comparison with one another.\textsuperscript{23}

Lord Scarman, in a brief concurring judgment stated that even where there is no remedy available in the English court, an injunction will still be granted,

[If] the bringing of the suit in the foreign court is in circumstances so unconscionable that in accordance with our principles of a wide and flexible equity it can be seen to be an infringement of an equitable right of the applicant. The right is an entitlement to be protected from a foreign suit the bringing of which by the defendant to the application is in the circumstances unconscionable and so unjust. This equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice. Cases will, therefore, be few: but the jurisdiction exists and must be sustained.\textsuperscript{26}

In the event, the US litigation was held not to be unconscionable and therefore British Airways were not entitled to an injunction to halt it. It was clear, said the House of Lords, that the airlines involved were subject to US legislative jurisdiction, invoking US antitrust laws. Only the US court was competent to hear the claim. After \textit{Laker}, it was clear that, for an anti-suit injunction to be granted, the claim at issue must be justiciable in England - which must therefore be a natural forum. This is the case with respect to \textit{alternative} forum cases like \textit{Castanho}, where a claim might be justiciable in either forum and a choice must be made between them. In \textit{single} forum cases like \textit{Laker}, however, where a claim is only justiciable in one forum, the local court might still grant an anti-suit injunction if the bringing of the foreign suit is unconscionable.

This actually happened in the subsequent, related decision, \textit{Midland Bank plc v Laker Airways Ltd.}\textsuperscript{27} The English Court of Appeal granted an injunction restraining the liquidator for Laker from joining the English Midland Bank to the American proceedings, because the lack of any connection between the bank and the US action made it unconscionable for an English liquidator to seek to apply US law to it. Despite the then recent decision of the House of Lords in \textit{Laker}, and the fact that that would naturally have inclined the Court of Appeal towards caution in such cases, the Court said that the Midland Bank was in a very different situation to the airlines in \textit{Laker}. The Court found that the liquidator's conduct in seeking to join the bank to the US

\textsuperscript{23}[1985] 1 AC 58, 93.
\textsuperscript{26}Ibid 95.
\textsuperscript{27}[1986] QB 441.
proceedings was unconscionable and unjust and contrary to public international law. It should be noted that it is only because of the lack of connection between the bank and the US action that the injunction was granted. Dillon LJ emphasised this, saying:

...the United States courts claim that any person in any part of the world who, with knowledge of the primary conspiracy, takes steps in his own country in defence of his own legitimate interests may be held to have made himself a party to the conspiracy and to be liable to an antitrust suit before a United States jury in a United States court even though what he did subjected him to no civil or criminal liability by the law of his own country ... Prima facie, therefore, in view of the oppressive nature, to English minds, of the United States procedures, it is unconscionable and unjust for a person who is subject to the jurisdiction of the English courts to seek to invoke the United States jurisdiction under these United States Acts against an English company or individual who is not subject to United States jurisdiction ... It seems to me all the more important ... to insist on keeping the United States statutory provision of the Sherman and Clayton Acts within the territorial jurisdiction of the United States in accordance with accepted standards of international law.

Lawton LJ wrote in similar terms:

Clearly someone subject to English jurisdiction can act in breach of the United States antitrust legislation and anyone aggrieved by such acts should, prima facie, be allowed to seek compensation in a United States court using United States procedure and having his suit judged by United States standards, not English. It would be wrong ... for English judges to regard themselves as examining magistrates, deciding whether the plaintiff in the United States court had made out a case fit for trial. That is the function of the United States judge. ... Cases might occur ... in which it was plain that the United States suit was bound to fail so that the making of it was frivolous and vexatious. In such cases an English court could interfere; but they are likely to be rare.

In relation to US antitrust laws the Court of Appeal said that considerations of comity were legitimate in deciding whether they should be allowed to proceed in respect of foreign nationals. Legitimate considerations which might call for a halt would include the degree of injury, the degree of contact with the United States by the foreign party, and evidence of strong foreign interests.

The next decision of importance in this area was that of the House of Lords in *South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provincien' NV*,

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26 Ibid 700.
27 Ibid.
28 Ibid.
('The South Carolina'). The case concerned a 're-re-insurance' contract. A US insurer, South Carolina Insurance Co, re-insured various risks with another US insurer (the re-insurer), which in turn re-re-insured them, using a London agent, with insurance companies from the Netherlands and elsewhere. These latter companies refused to pay certain claims when called upon to do so and proceedings were commenced in London by South Carolina. Subsequently, the re-re-insurers commenced proceedings in a US district court in Washington State, seeking discovery of documents from South Carolina. The American insurance company sought an anti-suit injunction from the English Court to halt these proceedings. This was allowed, at first instance, by Hobhouse J, and his order was upheld by the Court of Appeal.\[33\] The House of Lords allowed the appeal and overruled the lower courts.

In *South Carolina*, Lord Brandon of Oakbrook, delivering the principal speech to the House of Lords, said that the power of the court to grant injunctions is limited to two situations:

Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable.\[34\]

His Lordship confirmed the *Castanho* principle, that the court has power to grant an anti-suit injunction to forestall foreign proceedings when 'there is another forum in which it is more appropriate, *in the interests of justice*, that the dispute between the parties should be tried.'\[35\] [emphasis added]. In the instant case Lord Brandon found that situation (1) was not satisfied. In considering situation (2) he first held that it would be unwise to seek to define unconscionable conduct in anything like an exhaustive manner and then stated that, 'In my opinion, however, it includes, at any rate, conduct which is oppressive or vexatious or which interferes with the due process of the Court.'\[36\] He thus restored to use these two terms, or epithets, which had only recently been discarded by Lord Scarman in *Castanho* and, incidentally, adverted to the inherent jurisdiction. Lord Brandon found no unconscionable conduct on the part

\[33\] [1985] 3 WLR 739.
\[34\] [1997] 1 AC 24, 40.
\[35\] Ibid.
\[36\] Ibid.
of the re-re-insurers, who were simply trying to equip themselves for trial in England by obtaining all of the relevant information to which they believed they were entitled. Neither did this constitute interference with the processes of the English Court.

Lord Goff of Chieveley, in a brief concurring judgment, voiced his reluctance to see the power to grant injunctions restricted to exclusive categories: 'In my opinion, restraint of proceedings in a foreign forum simply provides one example of circumstances in which, in the interests of justice, the power to grant an injunction may be exercised.' He then referred to his 1984 judgment in Bank of Tokyo Ltd v Karoon, which was annexed as a Note to the report of South Carolina. In that judgment, as Robert Goff LJ, he reviewed the then recent decision of the US Court of Appeals, of Judge Wilkey, in Laker Airways Ltd v Sabena, Belgian World Airlines, and compared the development of United States and English law. He said, in words which harked back to the early English decisions in Bushby v Munday and Carron Iron, that, 'At bottom, the fundamental principles appear to have developed along similar lines. Thus, the jurisdiction is very wide, being available for exercise whenever justice demands the grant of an injunction.' In most respect this remains the basis for the exercise of the jurisdiction but, in effect, as we shall see, its use has been greatly restricted.

Bank of Tokyo Ltd v Karoon is an interesting decision in that it was decided shortly after the US Court of Appeals decision in Laker and it is the first decision by Lord Goff of Chieveley (as he became) on anti-suit injunctions. He referred extensively to Judge Wilkey's opinion in the course of his judgment, comparing the English and American approaches to the matter, and although he found them to have a similar basis, he held that the two approaches had diverged and, at the time, were likely to lead to dissimilar outcomes, because of Lord Scarman's speech in Castanho.

Robert Goff LJ found that the approaches had diverged because, under the US approach in Laker, the grant of an anti-suit injunction was considered to be founded on

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57 Ibid 44.
58 [1987] 1 AC 45.
60 [1987] 1 AC 45.
different and more restrictive principles than a stay of jurisdiction, as expressed by the Supreme Court in *Piper Aircraft v Reyno*;\(^43\) the US approach calling, where there is a clash of jurisdiction, 'for a stay of proceedings to be considered by the court seized of the matter rather than for a court to establish its own forum as the more appropriate forum by granting an injunction restraining proceedings in the foreign forum.' Lord Scarman’s approach was quite different and, arguably at least, made it much easier for an English court to find in favour of an injunction.

It was in *Bank of Tokyo Ltd v Karoon* that Robert Goff LJ developed his short-lived and broad-based theory, to the effect that the jurisdiction to grant an anti-suit injunction is underpinned *entirely* by the need to protect the jurisdiction of the local court.\(^44\) His Lordship was able to extend the principle to cases where a party was proceeding abroad vexatiously because ‘a party who attempts to reap the benefit of proceeding vexatiously is interfering with the proper course of administration of justice here.’\(^45\) Robert Goff LJ considered the approach taken by Lord Scarman in *Castanho*, where he had held that the principles developed with respect to stay cases and anti-suit injunctions were henceforth the same, and that consideration of the earlier authorities was no longer necessary. His Lordship was strongly critical of this approach, identifying the essential flaw in Lord Scarman’s reasoning. He said that Lord Scarman had taken,

> [T]he principle of *forum non conveniens* as developed in relation to a stay of English proceedings where it was developed in order to adopt a *less* nationalistic approach, i.e. to render the English courts *less* tenacious of proceedings started within its jurisdiction, and has applied it *inversely* in cases of restraint by the English courts of foreign proceedings. The effect would appear to be, not only that in cases of restraint of foreign proceedings the very restrictive principle of the protection of the English jurisdiction has been abandoned, but also that the English court will now be more free to grant injunctions restraining foreign proceedings than it was in the past under the old case law.\(^46\)

[emphasis in original]

This statement is an important precursor to the principles later formulated by Lord Goff in *Aerospatiale*. As noted above, Lord Goff referred to his decision in *Bank of Tokyo Ltd v Karoon*, in *South Carolina*, and doubted whether the speech of Lord

\(^{42}\) [1987] AC 45n, 59.
\(^{44}\) [1987] 1 AC 45, 60.
\(^{45}\) Ibid.
Scarman in *Castanho* contained the last word on the subject.\(^{47}\) His Lordship himself took his chance later that year in *Aerospatiale* and re-emphasised and further developed the English doctrine in his more recent speech in *Airbus*.\(^ {48}\) With respect, it is doubtful that Lord Goff, either, has had the last word on the subject.

His Lordship stated the rationale for the jurisdiction to grant anti-suit injunctions in his speech in *Aerospatiale* thus:\(^ {49}\)

Their Lordships refer, in particular, to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer such great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there. In normal circumstances, application of the now very widely recognised principle of *forum non conveniens* should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction, especially as the existence of any particular advantage to the plaintiff in that jurisdiction (e.g., availability of assets for execution within the jurisdiction) can usually be protected, if thought appropriate, by granting a stay upon terms. But a stay may not be granted; and if, in particular, the English court concluded that it is the natural forum for the adjudication of the relevant dispute, and that by proceeding in the foreign court the plaintiff is acting oppressively, the English court may, in the interests of justice, grant an injunction restraining the plaintiff from pursuing the proceedings in the foreign court. As Bowen LJ said in *Peruvian Guano Co v Bockwoldt* the court will interfere when a party is acting under colour of asking for justice `in a way which necessarily involves injustice’ to others.\(^ {50}\)

The Judicial Committee, in *Aerospatiale*, devised a test for in cases where a remedy for a particular wrong is available in both the English and a foreign court,

[T]he English ... court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English ... court must conclude that it provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the Court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages of the foreign forum of which it would be unjust to deprive him.\(^ {51}\)

\(^{44}\) Ibid 63.
\(^{47}\) [1987] 1AC 24, 45.
\(^{48}\) [1999] 1AC 119.
\(^{49}\) [1987] AC 871.
\(^{50}\) Ibid 894.
\(^{51}\) Ibid 896.
Lord Goff is here stating a two-step test for the grant of an anti-suit injunction, but a much stronger one than that put forward by Lord Scarman in *Castanho*. The English court must *first* conclude that it is ‘the natural forum for the adjudication of the dispute.’ Only then will it turn to consideration of the second criterion, which also must be satisfied, to discover whether the plaintiff is acting oppressively by proceeding in the foreign court, and the preceding discussion has illustrated the difficulties involved in proving *that*. Grounds for grant of an anti-suit injunction would also be established if the foreign proceedings would interfere with the integrity of the local court’s processes — the inherent jurisdiction. This test applies in respect of alternative forum cases. Where England is not a natural forum, then Lord Goff indicated that an anti-suit injunction may still be granted on grounds of unconscionable conduct on the part of the plaintiff in bringing the proceedings, especially in breach of a promise not to litigate in the forum or in breach of an undertaking to arbitrate. These circumstances will be discussed in more detail below and in the next chapter.

*Aerospatiale* was the first occasion, post the *Spiliada* reformulation of the test with respect to stay applications, on which the issue of anti-suit injunctions was considered. The Judicial Committee of the Privy Council, in emphasising the breadth and flexibility of the jurisdiction and that everything depends on the circumstances of the case, pointed out that ‘new circumstances have emerged which were not, perhaps, foreseen by our Victorian predecessors.’ They referred specifically, in the well-known passage extracted above, to the ‘forum-shopping’ employed by many litigants because of the availability of exceptionally broad jurisdiction, punitive damages and the rest.

In *Aerospatiale*, their Lordships finally dismissed the view put forward by Lord Scarman in *Castanho*, discussed above, to the effect that the criteria which should govern a stay of proceedings and the grant of an injunction were the same, and that because of this the earlier case-law need not be examined. This was necessitated, they said, because the approach to stay of proceedings had itself undergone a fundamental change in the series of decisions commencing with *The Atlantic Star* in 1973, and

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52 Ibid.
culminating, in 1987, in *Spiliada*, with confirmation that English courts had adopted the Scottish principle of *forum non conveniens* in respect of stay cases. It was argued that Lord Scarman's approach, if followed subsequent to *Spiliada*, would have the result that an English court would grant an injunction once it determined that it was the natural forum, without more. Such an approach would be inconsistent with comity, and 'indeed to disregard the fundamental requirement that an injunction will only be granted where the ends of justice so require.' This is somewhat unfair. Lord Scarman's approach in *Castanho* (unanimously supported by the other Law Lords) clearly has it that an anti-suit injunction will not be granted in circumstances where the plaintiff would suffer the loss of a legitimate juridical or personal advantage in the foreign court. It is hard to believe that the effect of the decision in *Spiliada* would have been to remove all constraint on the exercise of the jurisdiction by English courts.

As discussed, for all the same very good reasons put forward for dropping reference to vexation and oppression in relation to stay cases in English courts, and modifying the traditional usage of the expressions in Australian courts, they could not, if some observance of comity was to be maintained, be abandoned with respect to anti-suit injunctions. Or else some other measure would have to be found. Said Lord Goff in *Aerospatiale*:

Their Lordships cannot think that this is right. Not only does it conflict with the observation of Brett M.R. in *Hyman v Helm* ... but it leads to the conclusion that, in a case where there is simply a difference of view between the English court and the foreign court as to which is the natural forum, the English court can arrogate to itself, by the grant of an injunction, the power to resolve that dispute ... But with all respect, such a conclusion appears to their Lordships to be inconsistent with comity, and indeed to disregard the fundamental requirement that an injunction will only be granted where the ends of justice so require.

In *Aerospatiale*, Lord Goff considered whether it would be vexatious or oppressive to allow the Texas proceedings to continue. This involved a further weighing up of the relative advantages and disadvantages - of depriving the plaintiff of the benefits to her from proceeding in Texas and of the defendants proceeding in Brunei. The issue of punitive damages in an inappropriate forum was not considered because the plaintiff had given undertakings not to pursue them. The grounds upon which their Lordships

57 Ibid.
finally held that pursuit of the Texas proceedings would be oppressive to SNIAS and lead to a 'serious injustice' to them, was that because SNIAS, if the matter proceeded to trial in Texas, would be unable to claim contribution from Bristow Malaysia, the operators of the helicopter. Bristow Malaysia was not within the Texas jurisdiction. SNIAS would in such a case be exposed to a second set of of proceedings, in Brunei, over the issue of liability.\(^{59}\)

Their Lordships noted that the claim being made by the plaintiff against SNIAS in Texas would amount to over SUS20 million.

In the event, an anti-suit injunction to halt the Texas proceedings was granted after the Privy Council first concluded that Brunei was the natural forum for the trial of the action, and then after a further consideration of the connecting factors and balancing or weighing the injustice to the plaintiff against the injustice to the defendant, and the finding of the special circumstances referred to, which were sufficient to deem the Texas proceedings to be oppressive. It was not enough, on its own, to find that Brunei was the natural forum, the circumstances of the continuing action in Texas had to be vexatious or oppressive to the plaintiff as well.

For precisely the reverse reasons, therefore, as given in all those decisions from 1974 to 1987 about the difficulties of establishing vexation or oppression, which led to a fundamental change in English common law, including Lord Diplock's scathing summary in *The Atlantic Star*, the terms were retained with respect to anti-suit injunctions. Just as so many stay applications had failed because of the difficulties highlighted in these decisions, so it must continue to be with anti-suit injunctions, out of respect for comity, and therefore vexation or oppression must be retained. This was the intent. Maintenance of comity requires greater readiness on the part of courts to stay local jurisdiction, but, even greater reluctance to interfere in the processes of foreign courts.

In *Aerospatiale* Lord Goff confirmed that the older cases were of continuing importance and relevance, in holding that vexation and oppression are not to be defined and that interpretation must vary with the circumstances of each case. Lord

\(^{59}\) [1987] 1 AC 871, 901.
Goff approved his test in *Aerospatiale* in his more recent speech to the House of Lords in *Airbus* and developed and enhanced it.\(^{60}\) It thus represents the current test for issuance of an anti-suit injunction in England, except in respect of ‘breach of bargain’ cases, which will be discussed in the next chapter.

In *Airbus* Lord Goff emphasised that, ‘the broad principle underlying the jurisdiction is that it is to be exercised when the ends of justice require it. Generally speaking this may occur when the foreign proceedings are vexatious or oppressive.’\(^{61}\) Lord Goff did advert, without comment, to the decision of the Canadian Supreme Court in *Amchem*,\(^{62}\) where Sopinka J had ‘expressed a preference for a formulation of the principle based simply on the ends of justice, without reference to vexation and oppression.’\(^{62}\) Sopinka J said that,

*[Aerospatiale]* was decided on the basis of the injustice to *[Aerospatiale]* by reason of the loss of juridical advantages in Brunei but not available to it in Texas. The characterization of this loss as oppressive added nothing to the analysis. This is especially so since neither ‘oppressive’ nor ‘vexatious’ was satisfactorily defined in *[Aerospatiale]* nor, from my reading of the case, anywhere else. If flexibility is the desired objective, it is achieved by the use of the term ‘injustice’ .... \(^{64}\)

His Honour went on to endorse the kind of weighing up of relative advantages and disadvantages to the plaintiff and defendant undertaken by the Privy Council in *Aerospatiale*. It must be remembered that Lord Goff, one of the chief craftsmen of the change to *forum non conveniens* in *Spiliada*, and therefore of the ‘burial’ of vexation and oppression with respect to stay cases, specifically returned to it in *Aerospatiale*. He did not do so lightly but with good reason. In *Airbus*, it was unnecessary to further consider the issue because Lord Goff was readily able to conclude that England was not a natural or appropriate forum to hear the matter, ‘It follows that the question of oppression does not arise.’ But he kept it alive nevertheless and for good reasons, the point of which Sopinka J missed. Yes, those terms have not been satisfactorily defined — except that they are, as demonstrated by the cases, only capable of being shown in very clear and *very rare* cases. That is the point.

\(^{60}\) [1999] 1 AC 119.

\(^{61}\) Ibid 133.

\(^{62}\) [1993] 1 SCR 897.

\(^{63}\) [1999] 1 AC 119, 133.

\(^{64}\) [1993] 1 SCR 897, 932-933.
In *Arab Monetary Fund v Hashim & Others (No.6)*, Hoffmann J (now Lord Hoffmann) emphasised that an anti-suit injunction will be granted, ‘only if the prosecution of the foreign proceedings appears to be “vexatious or oppressive”’. The Judge noted that these terms had been given a very restrictive interpretation. He then proceeded to give some examples of what would constitute vexation or oppression, which are usefully included here at length:

The cases show that it is not sufficient that the action should be vexatious or oppressive in the ordinary domestic sense in which such actions may be summarily struck out under the rules of court. That is a decision which ought properly be left to the court before which the proceedings are pending. There must be some good reason why the decision has to be made here rather than there. It may be because there is a conflict of national policy between England and the foreign tribunal. ... The injunction may be needed to protect the jurisdiction of the forum or to prevent a litigant from evading its important public policies. So for example injunctions have been granted to restrain creditors from evading the forum’s bankruptcy jurisdiction and its policy of rateable division among creditors by bringing proceedings to execute against assets abroad. The anti-suit injunctions which have been granted in anti-trust actions, whether to preserve or counter the jurisdiction of the United States courts, fall within the same category. On the other hand, when the question is simply one of justice between the litigants, uninfluenced by differences of national policy, the normal assumption is that this court has no superiority over a foreign tribunal in knowing what justice requires. There are cases in which it is so plain and obvious that the foreign proceedings are vexatious or oppressive that even requiring a party to apply for a stay or dismissal in the foreign court would be unjust. For example, as Judge Wilkey said in the Laker Airways case, the domestic court will be willing to use injunctions to protect its jurisdiction from collateral attack by attempts to relitigate abroad a question which it has already decided. These are cases in which the domestic tribunal is fully seised of the facts and in which it would be a hardship to one of the parties to have to litigate before another tribunal even if only for the purpose of demonstrating that the issue has already been determined in his favour. And although this is a matter of some delicacy, there may be cases in which although there is no overt clash of national policy, the realities of litigation before the foreign tribunal may be such as to satisfy the court that justice can be achieved only by enjoining the foreign suit. In the Aerospatiale case, Lord Goff made it plain that the circumstances in which an injunction might be granted could not be exhaustively categorised. But one way or another, the court must be satisfied that the foreign proceedings are vexatious or oppressive in a sense which is likely to result in injustice unless the court grants an injunction rather than leaving the matter to the foreign court.

In *Re Maxwell Communications Corporation plc (No.2); Barclays Bank plc v Homan & Ors* (‘Homan’), decided in the same year, Hoffmann J again confirmed the

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65 (Unreported, Chancery Division, 14 July 1992).
66 Ibid.
67 Ibid.
importance of leaving the matter to the forum court in most cases, once again adverting to the importance of comity:

[B]oth comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue. The principle, as Lord Scarman said in British Airways Board v Laker Airways Ltd [1985] AC 58 at 95, is that:

'[T]he equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice.'

In other words, there must be a good reason why the decision to stop the foreign proceedings should be made here rather than there. Although the injustice which can justify an anti-suit injunction must inevitably be judged according to English notions of justice, it will usually be assumed that a similar quality of justice is available in the foreign court. So the fact that the proceedings would, if brought in England, be struck out as vexatious or oppressive in the domestic sense, will not ordinarily in itself justify the grant of an injunction to restrain their prosecution in a foreign court. The defendant will be left to avail himself of the foreign procedure for dealing with vexation or oppression: Midland Bank plc v Laker Airways Ltd [1986] QB 689 at 700, per Lawton LJ.

Glidewell LJ, in the English Court of Appeal, in upholding the decision of Hoffmann J to dismiss the application for an anti-suit injunction, said that the judgment of the Judicial Committee in Aerospatiale can be summarised as follows:

(1) If the only issue is whether an English or a foreign court is the more appropriate forum for the trial of an action, that question should normally be decided by the foreign court on the principle of forum non conveniens, and the English court should not seek to interfere with that decision.

(2) However, if exceptionally, the English court concludes that the pursuit of the action in the foreign court would be vexatious and oppressive and that the English court is the natural forum, i.e. the more appropriate forum for the trial of the action, it can properly grant an injunction preventing the plaintiff from pursuing his action in the foreign court.

(3) In deciding whether the action in the foreign court is vexatious and oppressive account must be taken of the possible injustice to the defendant if the injunction is not granted, and the possible injustice to the plaintiff if it is. In other words, the English court must seek to strike a balance. The Court of Appeal had again emphasised the vital point that it would not be sufficient to find that England was the natural forum for the trial of the action. Something more would have to be found to make the case exceptional, some factor which would make it unjust to proceed in the foreign court. And that factor is made

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difficult to establish by being cloaked with the necessity that it be proven vexatious or oppressive. Interestingly, the Court of Appeal considered it at least arguable that US antitrust legislation differed so radically from English law with respect both to its discovery regime and the provisions for the award of large damages to successful plaintiffs under the Clayton Act, 'that the way in which such proceedings are conducted in the US is itself a relevant factor in deciding whether such proceedings are oppressive or vexatious'.

A recent article by Anderson, referred to below, in respect of errors about the substance and extent of Texas law and procedure, made by the Court of Appeal in respect of claims in *Airbus*, however, should provide a salutary warning to any counsel taking such an analysis.

Hoffmann J, in *Arab Mo. Int. v. I. O.* extracted above, noted the delicacy of considering the merits of a claim brought by a foreign tribunal, a matter that has received some consideration of English courts, although it is contended that the approach has been a very varied one. What is called for is a hands off approach in normal circumstances, but a willingness to take cognisance of, and act on salient facts, in abnormal circumstances, as with the case in some recent US decisions, discussed in chapter two in the context of *forum non conveniens*. The House of Lords has stated in *Amin Rasheed Shipping Corp v. Kuwait Insurance Co.*, that it is not permitted to make invidious comparisons between the legal systems of foreign jurisdictions, however it has been recognised that there may be circumstances where it would be proper to consider the deficiencies of foreign legal systems, as discussed in the context of the

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70 Ibid 701.
71 There is obviously a 'history' between the US and the UK when it comes to the extraterritorial reach of US antitrust legislation – the most notable example being the Laker litigation. That Australia is not necessarily so concerned was reflected in some remarks made by Gummow J during argument in the *Cigna* hearings. He was responding to counsel for Cigna's endeavours to persuade the Court to take a negative view of CSR's Sherman Act claims, and relying on the English Court of Appeal decision in the *Midland Bank* case. In noting the extensive reach of the remedies incorporated in the Australian Trade Practices Act, and that these could shock Americans, Gummow J observed that 'forensic reliance on English complaints about the Sherman Act need not necessarily cut all that much ice, I think, here.' CSR Limited v Cigna Insurance Australia Limited & Ors S119/1996 (Transcript of argument, 14 November 1996) (http://www.austlii.edu.au/au/other/hca/transcripts/1996/S119/2.html)
73 (Unreported, Chancery Division, 14 July 1992).
recent decisions by US courts. The speech of Lord Diplock in the *Abidin Dover* is in line with these developments.\(^{75}\)

[T]he possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the court, or the unavailability of appropriate remedies.

In order to maintain judicial comity and avoid a return to judicial chauvinism, Lord Diplock said, in *Amin Rasheed*, that there must be 'positive and cogent evidence' not just 'tenuous innuendoes' that justice will not be done in the foreign forum.\(^{76}\) This was advice apparently ignored by the English Court of Appeal in *Airbus*, a matter discussed below.

There have been a number of cases where English courts have found inadequacies in foreign fora as reasons for granting a stay or an anti-suit injunction. These have included factors such as likelihood of substantial delay in the foreign forum,\(^{77}\) the unavailability of a particular remedy sought by the plaintiffs in the foreign court,\(^{78}\) and a bar to recovery in the foreign jurisdiction.\(^{79}\) It will also be appropriate in some cases for a court to take account of the political or social situation in the foreign country. Mustill LJ observed in *Muduraglu Ltd v TC Ziraat Bankasi*\(^{80}\) that: 'The court must not be too unworldly. It must recognise that there are parts of the world where things are very badly wrong.'\(^{81}\) An English court would therefore very seriously consider the situation in a foreign jurisdiction where the rule of law does not prevail (Burma for instance) or where political and civil order has totally collapsed (Somalia, or East Timor in recent memory). In *Muduraglu* Lord Mustill did not take into account, with comity in mind, the fact that if the plaintiff did pursue his rights in Turkey he would be at some risk of criminal prosecution for taking action against the Turkish state, and for *scandalum magnatum* with respect to his statements about the involvement of a former Turkish Prime Minister in the dispute.\(^{82}\)

\(^{75}\) [1984] AC 398, 411.

\(^{76}\) Ibid.


\(^{79}\) *Banco Atlantico SA v British Bank of the Middle East* [1990] 2 Lloyds Rep 504.

\(^{80}\) [1986] 1 QB 1225.

\(^{81}\) Ibid 1248.
The attitude of Australian courts to this issue is as yet unclear, although it will be remembered that one of the principal reasons the High Court declined, in Voth, to adopt the Spiliada test for forum non conveniens, was that 'there are powerful policy considerations which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case.' And that, 'in deciding whether to grant or refuse a stay, the court does not, indeed cannot, evaluate the justice or relative merits of the substantive laws of the available forums.'

c) Advantage

It is apparent from a review of the decisions that an anti-suit injunction must not deprive a plaintiff of legitimate juridical or personal advantages that he or she might derive from proceeding in that foreign forum. The principal advantages with which the cases are concerned are damages and the availability of contingency fees. The principal issue is whether the availability of these advantages constitutes a legitimate advantage of which a plaintiff must not be deprived by way of an anti-suit injunction.

In Castanho, for the purposes of deciding the 'critical equation' between the advantage to the plaintiff and the disadvantage to the defendant, the prospect of higher damages in the foreign jurisdiction (Texas) was considered to be a legitimate juridical advantage for a plaintiff. The circumstances of the case may be compared with those in Cigna where grant of an anti-suit injunction would have deprived CSR of a legitimate juridical advantage, available in the foreign, New Jersey, forum – substantially higher damages. Although the rationale was not presented that way, rather the High Court proceeded on the basis that a major statute-based claim of the plaintiff, CSR, could only be dealt with in a US court.

In Aerospatiale, it was suggested that the Texas proceedings in that case might be vexatious or oppressive, 'on the ground that the plaintiffs are seeking, in an inappropriate forum, to impose a strict liability or liability for punitive damages which

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82 Ibid 1248-49.
83 (1990) 171 CLR 538.
84 Ibid 559.
85 Ibid 560.
would not be available in the natural forum. But that point was not determined because the plaintiffs had given undertakings not to pursue them. In the end, the Privy Council granted an anti-suit injunction because, (a) there was no injustice to the plaintiffs, because of the undertakings they had given with respect to strict liability, punitive damages etc, and (b) the defendants would potentially suffer injustice if proceedings went forward in Texas because they might not be able to claim against Bristow Malaysia (operators of the downed helicopter) which had contested the jurisdiction of the Texas court, and that therefore they would have to proceed separately in Brunei:

[Aerospatiale] would be exposed to two sets of proceedings in which the same issue of liability would have to be tried, and so would be exposed to the danger of inconsistent conclusions on that issue, with the conceivable result that they might be held liable to the plaintiffs in Texas without any right over against Bristow Malaysia in that court, and might be held not liable to the plaintiffs in Brunei, in which event they would have no claim over against Bristow Malaysia, even though negligence on the part of Bristow Malaysia may in fact have been a substantial cause of the accident.

The conduct of the proceedings in Texas, if continued, would lead to ‘serious injustice’ that could therefore properly be described as oppressive. What though if the plaintiffs had not waived their Texas rights of strict liability, liability for punitive damages, jury trial and contingency fees? Would deprivation of such advantages be deemed ‘injustice’ to the plaintiffs that would tilt the balance against exercise of the discretion to grant an anti-suit injunction?

In *Castanho*, it was held that the availability of punitive damages in Texas was a legitimate advantage of which it would be unjust to deprive the plaintiff. The difference is, and this will be discussed below in relation to a more recent English decision, that Brunei was deemed to be the natural forum in *Aerospatiale*, and in *Castanho* Texas was not an inappropriate forum for the resolution of the matter. In *Cigna*, New South Wales was held the High Court to be a clearly inappropriate forum.

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87 [1987] 1 AC 871, 899.
88 Ibid 901.
89 Ibid 902.
In considering the factors which connected the *Aerospatiale* litigation with Texas and Brunei, the Privy Council noted that, with reference to the punitive damages and other relief available in Texas (with which relevant comparison can be made to the facts in *Cigna*) that 'the matters relied upon ... are not so much connecting factors which now render Texas the natural forum as advantages to the plaintiff in Texas of which, they submit, it would be unjust to deprive them.'

In the course of the litigation the plaintiffs withdrew their reliance on these factors so the outcome was not influenced by them.

To the objective observer, the result in *Aerospatiale* must appear to have been the correct one. Having determined the approach, which essentially calls for an investigation to consider the relative merits, connecting factors, etc, of the respective forums, the Judicial Committee of the Privy Council found, in respect of the *Aerospatiale* litigation, that Brunei was the natural forum. The crash occurred there, the deceased and his family resided there, Brunei law would govern the matter. These factors outweighed those connecting Texas - speedy trial, contingency fees, etc, which were not, in fact, said the Privy Council, connecting factors, but advantages to the plaintiffs, of which it was necessary to consider whether or not it would be unjust to deprive them. Their Lordships held that because of the plaintiffs undertakings not to pursue the punitive damages in Texas, there would be no injustice to them. The importance or otherwise of such a factor must therefore remain in some doubt for the present in England, although in *Castanho* it was, as noted, considered to be a legitimate juridical advantage; the difference being that, in that case, Texas was a natural forum.

The issue was considered more recently in England in *Simon Engineering PLC v Butte Mining PLC (No.2)*, where grounds for justification of an anti-suit injunction were considered in a case involving competing actions in England and Montana. Both Rix J and Miss Dohmann QC (sitting as a Deputy Judge of the High Court of Justice) granted injunctions in separate proceedings before the English Commercial Court. Rix

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91 [1987] 1 AC 871, 899.
92 It turned in the end on the double litigation that would have resulted if the matter had proceeded in Texas - when all matters could have been dealt with in Brunei.
J and later Miss Dohmann both followed the reasoning of Hoffmann J in *Homan*.\(^{95}\) Both held that England was the natural forum, in reliance on a range of connecting factors. With respect to the issue of the higher damages available in the United States in the action, Rix J referred to the decisions in *Smith, Kline & French Laboratories v Bloch*,\(^{96}\) and *Castanho*,\(^{97}\) and noted that in *Aerospatiale*, although the matter was not put to the test, 'there was no suggestion that these were legitimate juridical advantages; the inference, if anything, may have been to the contrary.'\(^{98}\) He referred to the uncertainty which the authorities appeared to throw on the issue and said,

> It would seem, however, that where the foreign court is viewed as an appropriate forum the local remedies as to damages may have to be accepted as normal attributes of the jurisdiction (*Castanho*). Where, however, the English Court would regard England, and not the foreign jurisdiction as the natural forum, the position may well be reversed (*Smith, Kline & French, Aerospatiale*). The United States anti-trust legislation, with its treble damages and extensive procedures, in particular appears to be regarded in a case in which there is little contact with the American jurisdiction, as being contrary to English notions of accepted principles of international law (*Midland Bank plc v Laker Airways Ltd* and see *Homan* at pp726G-H and 763D-F).\(^{99}\)

Both Rix J and Miss Dohmann found that pursuit of the Montana proceedings would be oppressive, because they would lead to unnecessary duplication of proceedings and proceedings in Montana would not resolve all of the issues, some of which would have to be relitigated in England, with respect both to the treble damages and punitive damages and contingency fees (not permitted in England), in the circumstances of the case where England was the natural forum for the trial of the action. The higher US damages were not legitimate advantages in such circumstances.

The situation in Australia would seem to be in accord with this principle, given that the High Court in *Cigna* found New South Wales to be a clearly inappropriate forum. If they had found it to be the appropriate forum, as did Rolfe J and Brennan CJ, it is submitted that the availability of the higher US damages would not have been a factor.

To summarise, the situation with respect to availability of higher damages in the foreign forum seems to be that they are regarded as a legitimate juridical advantage, of

\(^{96}\) [1983] 1 WLR 730.
which it would be unjust to deprive the plaintiff, if the foreign forum is a natural forum (in England), or, in Australia, if the loc^n forum is clearly inappropriate. If the reverse is true then the availability of higher damages in the foreign forum will not be taken into account in determining whether to grant an anti-suit injunction.

d) Connection with the jurisdiction

An important consideration preliminary to a determination of whether to grant an anti-suit injunction is whether there is a sufficient connection with the jurisdiction (at least in the equitable jurisdiction; presumably there must be a connection to invoke the inherent jurisdiction). If there is not then the court will not proceed.

The necessity for connection between the jurisdiction and the matter at issue was confronted by the House of Lords ten years after Aerospatiale, in Airbus. Like Aerospatiale the case also involved an aircraft crash and a plaintiff seeking to litigate in Texas. This time it was the crash of an Airbus passenger airliner at Bangalore airport in India. The killed and injured included two British families of Indian origin, the Patels. Their legal representatives commenced proceedings in India against the employer of the pilots and the Bangalore airport authority. The Indian investigation concluded that the crash was due to pilot error but also placed some liability on Bangalore airport. Recovery in India for crash victims and their families was limited to a relatively small sums. The Patels also commenced action in Texas against Airbus (among others). Although Airbus had designed and assembled the aircraft in France, jurisdiction was established in Texas on the basis that Airbus had in the past done business with a Texas-based corporation. The usual Texas advantages of contingency fees, speedy trial and the availability of punitive damages were the reason for the institution of the proceedings in that jurisdiction.

The Bangalore Court issued orders restraining the Patels from proceeding elsewhere and Airbus sought an injunction in England restraining the Patels from proceeding with the Texas action on the grounds that pursuit would be contrary to justice and/or vexatious and oppressive.

99 Ibid.
100 [1999] 1 AC 119.
The *Airbus* litigation was unique. The English parties were proceeding in Texas, despite an injunction by the Bangalore Court in India to prevent them. Airbus thought that an English court would have more power over the Patels than the Indian court, because they resided in the jurisdiction and had property there (which they did not in India). They therefore sought an injunction in England. The matter was unprecedented because Airbus sought the help of an English court to compel English citizens to sue in India and not to sue in Texas. Airbus was asking the English court to 'act as an international policeman',\(^{101}\) and referee between the courts of two foreign jurisdictions. '[T]he English court is being required to adjudicate between two or more foreign jurisdictions and to conduct a comparative evaluation of the appropriateness of proceedings in different foreign courts'.\(^{102}\)

In the High Court, at first instance before Colman J, Airbus lost. Colman J found that he did have the authority to issue an injunction where a party was within the jurisdiction of the English court, by dint of residence in this case, and the party pursues a claim in a foreign jurisdiction which is not the natural forum. Colman J found that Texas was not a natural forum, but after evaluating the evidence and weighing the various factors, noting that the families of the US crash victims would continue to proceed in Texas, that the Patels could only proceed in Texas because of the financial advantages offered by that State's contingency fee system, and that the Indian trial and appeal process might well last another 14 to 16 years, he concluded that the Texas proceedings were not vexatious or oppressive and that therefore it would not be appropriate to grant an anti-suit injunction in that case.

Airbus applied to the Court of Appeal which over-ruled Colman J's decision and issued an anti-suit injunction to enjoin the Patels from proceeding in Texas against Airbus. The Court of Appeal confirmed the general basis for Colman J's decision, but they reconsidered and rebalanced the various factors identified in the High Court proceedings, distinguishing both legally and factually the weight given to these by Colman J. The Court of Appeal applied a modified three part balancing test in the course of their decision: to determine where the natural forum was and was not,\(^{103}\)

\(^{101}\) Ibid 121 – words of S.Kentridge QC, English barrister for the Patels.
whether Airbus was prejudiced by having to defend the action in Texas, and whether the Patels claimed a legitimate advantage by proceeding in that jurisdiction.

The Court of Appeal held that India was a natural forum, and that France probably would also be a natural forum. They held, however, that Texas was ‘clearly inappropriate’, and that therefore the conduct of the Patels was prima facie oppressive. Their finding, however, was based principally on the erroneous ground (discussed below) that there was no basis on which proceedings in Texas courts could be challenged on forum non conveniens grounds. Lord Hobhouse said, ‘unless an English court is prepared to give its own decision, the question (forum non conveniens) will not be decided by any Court having jurisdiction to do so. The Texas Court will not do so.’¹⁰³ This issue will be discussed further in the next chapter, in the context of 'breach of bargain' cases. English courts, it seems, are more ready to issue anti-suit injunctions where they consider that the foreign court has applied principles different to those that would be applied by English courts in reaching their determination not to stay.

The Court of Appeal held that Airbus would be prejudiced by proceeding in Texas; that the Texas court would impose Texas product liability law and would impose punitive damages, therefore there would be substantial injustice to Airbus. There would be further injustice to Airbus because of their inability to get contribution from the Indian defendants in Texas.

The Court of Appeal held further that the advantages that the Patels derived from proceeding in Texas, in particular the contingency fee system, which enabled them to continue, were 'illegitimate' advantages.¹⁰⁴ They concluded that Colman J had 'wrongly evaluated the factors'.¹⁰⁵ 'Texas [was both] clearly oppressive and cause[d] significant injustice to Airbus'.¹⁰⁶

The House of Lords reversed that decision and denied the injunction. In delivering the judgment of the House of Lords, Lord Goff of Chieveley reaffirmed the principles laid down (by himself) in Aerospatiale. His Lordship noted the adoption of these principles

¹⁰³ [1997] 2 Lloyds Rep 8, 16.
¹⁰⁴ Ibid 18-19.
¹⁰⁵ Ibid 18.
¹⁰⁶ Ibid 19.
throughout the Commonwealth – in Amchem in Canada, and in Cigna in Australia – and stressed again the importance of the need to have regard to comity, which calls for caution in the exercise of the jurisdiction.\textsuperscript{107}

The essential problem in Airbus was whether an English court could grant an anti-suit injunction in a case where there was no connection between England and the proceedings in question, save that the defendants were residents of England and subject to the jurisdiction and could therefore be effectively restrained by an injunction granted by an English court. The question, said Lord Goff, can arise both in ‘alternative forum cases’, such as Airbus, where there are two relevant forums – India and Texas - but also in ‘single forum cases’ where, e.g., the English court is asked to restrain a party from proceeding in a foreign court, which alone has jurisdiction over the dispute: \textsuperscript{108}

\textsuperscript{10} In both categories of case, the basis for the jurisdiction has been traditionally stated in broad terms which are characteristic of the remedy of injunction as used in our domestic law. In alternative forum cases, it has been stated that the jurisdiction will be exercised as the ends of justice require, and in particular where the pursuit of the relevant proceedings is vexatious or oppressive; in single forum cases, it is said that an injunction may be granted to restrain the pursuit of proceedings overseas which is unconscionable. The focus is, therefore, on the character of the defendant’s conduct, as befits an equitable remedy such as an injunction. In particular, although it has frequently been stated that comity requires that the jurisdiction to grant an anti-suit injunction should be exercised with caution, no requirement has been imposed specifically to prevent the grant of an anti-suit injunction in circumstances which amount to a breach of comity. The present case raises for the first time, and in a stark form, the question whether such a requirement should be recognised and, if so, what form it should take.\textsuperscript{109}

In considering this question, Lord Goff said that comity will generally require an English court to have a sufficient interest, or connection with the matter in question such as to ‘justify the indirect interference with the foreign court which an anti-suit injunction entails’,\textsuperscript{110} before an anti-suit injunction can properly be granted. In an alternative forum case, this will involve consideration of whether the English court is the natural forum for the resolution of the dispute.\textsuperscript{111} In the event, Lord Goff and the House of Lords held that they would not grant the injunction sought as to do so would

\textsuperscript{107} [1999] 1 AC 119.  
\textsuperscript{108} Ibid 133.  
\textsuperscript{109} Ibid 134.  
\textsuperscript{110} Ibid, 138.  
\textsuperscript{111} Ibid.
be to offend comity, because the English court had no interest in or connection with the matter in question.

In a world which consists of independent jurisdictions, interference, even indirect interference, by the courts of one jurisdiction, with the exercise of the jurisdiction of a foreign court, cannot in my opinion be justified by the fact that a third jurisdiction is affected but is powerless to intervene. The basic principle is that only the courts of an interested jurisdiction can act in the matter; and if they are powerless to do so, that will not of itself be enough to justify the courts of another jurisdiction to act in their place.\footnote{112}

Not only henceforth would foreign proceedings have to be vexatious or oppressive, but comity requires a finding that the English court has a ‘strong interest’ in the case. In contrast to the decisions of the lower courts, Lord Goff, delivering the principal speech, narrowed the scope of English jurisprudence on the issue of anti-suit injunctions and held that comity requires the court to focus not only on the possible vexation or oppression of the foreign proceedings but also on the connection of the suit to England. Under this formulation, England’s connection to the case was considered an essential independent element rather than just one of many factors. The House of Lords’ approach translates into a practical two part test:

i) Does the court issuing the injunction have a sufficient interest in the case and, if so,

ii) Is the foreign proceeding vexatious or oppressive sufficient to justify interference?\footnote{113}

Lord Goff related this approach in terms of the split approach adopted by different Circuits of the US Court of Appeals,\footnote{114} calling that adopted by the House of Lords the ‘stricter’ approach, in contrast with the ‘laxer’ approach adopted by the lower English courts.\footnote{115}

The House of Lords held that considerations of comity require English courts only to grant injunctions where there is a need to protect the local jurisdiction or prevent evasion of domestic public policies, noting that this approach had been followed by the superior courts of Canada, Australia and part of the United States. The English test will

\footnotesize{\begin{itemize}
\item \footnote{112} Ibid 141.
\item \footnote{113} K. Anderson, above n 72, 211.
\item \footnote{114} See chapter 4 for a discussion of the US situation.
\item \footnote{115} [1999] 1 AC 119, 137.
\end{itemize}}
be satisfied in most instances if a party proves that England is the natural forum, but *Airbus* has strengthened the test by changing the focus of English courts from looking to the appropriateness or otherwise of the foreign court to that of the *domestic* court. Under the ‘laxer’ standard applied by the lower courts in the *Airbus* litigation, they first looked at whether or not Texas was the natural forum. It is more in accord with modern approaches to comity to question whether one’s own forum is the appropriate one, before questioning proceedings in a foreign forum. This, of course, aligns the approach of English courts closer to that of the Australia, which is to focus on the connection with the home jurisdiction. The High Court of Australia adopted a similar stance in *Cigna*, and the Supreme Court of Canada went even further in *Amchem*.

The House of Lords in *Airbus* did recognise two exceptions to the rule they proposed. In ‘single forum cases’ where a claim only exists in the foreign jurisdiction, and where they will be more reluctant to interfere, they left open the possibility that an English court might still issue an anti-suit injunction as long as there was *some* connection with the jurisdiction, as in the case of *Midland Bank* for instance. And in an ‘extreme case’ they might issue an anti-suit injunction even where there was no connection, to ensure that comity was not applied ‘too rigidly’.116 The guidance the House of Lords offered in respect of this exception to the general rule was to the effect that it might apply to situations where an English court would not normally give comity respect to a foreign jurisdiction’s laws. They noted that Texas’ alleged failure to consider *forum non conveniens* did not constitute such an exception. This could hardly be so given that the entire civil law world does not recognise the principles of *forum non conveniens*. They also held that it did not matter if a court, such as that the Bangalore Court in *Airbus*, could not act to protect its own jurisdiction.117 They summarised the basic principle as being that only the courts of an interested jurisdiction can act in the matter; and if they are powerless to do so, that would not of itself be enough to justify the courts of another jurisdiction to act in their place.118 As noted, the situation of an foreign exclusive jurisdiction clause or an agreement to arbitrate also constitutes an exception to the principles expounded in *Airbus*: ‘...those cases in which the choice of

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116 Ibid 140.
117 Ibid 141.
118 Ibid.
forum has been directly or indirectly, the subject of a contract between the parties. Such cases do no fall to be considered in the present case.119

The _Airbus_ litigation is an excellent case study in support of the need to adopt a stricter approach, more in accord with principles of international comity, as spelled out by the House of Lords. Why this is so is clearly demonstrated by the Court of Appeal’s judgement that was overruled by the House of Lords. As Anderson has persuasively demonstrated, the Court of Appeal’s conclusions were grounded in incorrect interpretations and assumptions governing Texas law.120

In fact the _forum non conveniens_ doctrine was available in Texas. A US Federal District Court in Texas was apparently originally prepared to dismiss the action on _forum non conveniens_ grounds, but Airbus lost this opportunity through errors in strategy on the part of their counsel.121 And the State of Texas itself did recognise _forum non conveniens_ principles, in fact had applied them since at least the 1890s, some eighty years before England, but they were different in scope and application.122 As Anderson says though, 'rarely are mere differences in the scope accorded to a discretionary theory justification for infringing on the jurisdiction of another nation's courts'.123

The Court of Appeal also apparently was mistaken in its assumptions as to the application of Texas products liability law.124 And the disparaging remarks about Texas contingency fees and their 'illegitimacy' were a circular argument with no citation of authority or source and no justification in principle either: 'The Court failed to identify and respect Texas’s arguably valid public policy reasons for allowing contingency fees.'125 As Anderson points out, far from being an illegitimate advantage to the Patels, this was their only means of financing the case and an important advantage, as Colman J in fact held at first instance.

119 Ibid 138, per Lord Goff of Chieveley.
120 K. Anderson, above n72, 215.
121 Ibid.
122 Ibid.
124 Ibid 222-3.
125 Ibid 224.
That the Court of Appeal's findings were incorrect, as Anderson says, "exemplifies the dangers inherent in trying to make a discretionary decision that requires balancing the justice offered by a system which is not one's own."126 "Because the court is not familiar with the practice or law of the foreign jurisdiction, blatant errors and, more commonly, mistaken assumptions are inevitable."127 That a foreign court should issue an order to halt local proceedings on the basis of its own errors of judgment and its own ideas about what constitutes acceptable legal policy and procedure is intolerable.

The decision of the House of Lords in Airbus has the effect that English judges must respect the principles of comity and not make subjective evaluations of foreign legal systems. "Exactly the type of test a nation would hope that its global neighbours would employ."128 This approach, one that has regard to international comity offers respect for the judicial and legal systems of other countries and, "precludes a court from making demeaning case-by-case inquiries into the adequacies or inadequacies of a foreign system."129 The alternative approach, discussed in chapter four, adopted by some Circuits of the US Courts of Appeal, is to actually engage in such interference on the basis that one's own citizens are better protected thereby – both from vexatious litigation and the inconvenience of concurrent foreign suits.

The difficulties, even the enormities that might result from applying subjective standards to evaluate unfamiliar foreign legal systems are apparent from the Court of Appeal's decision in Airbus, which resulted in a decision to halt proceedings in a foreign country, effectively denying the families of the British crash victims any substantial redress. And this was done as a result of incorrectly understanding the foreign legal system and making judgments about its practices and procedures without full information. This happened in a case between two 'sister' legal systems in which the differences are less than the similarities. Consider the situation involving a civil law system and different languages and the reality becomes much starker, the solution adopted by the House of Lords more fundamentally unarguable. The House of Lords has provided new and persuasive authority in favour of an approach grounded in comity, one that conforms to a developing international standard, however, that

126 Ibid 225-6.
127 Ibid 226.
128 Ibid 226.
129 Ibid.
standard and the approach of the House of Lords provide no certainty, particularly when it is remembered that it does not apply to 'breach of bargain' cases; that the categories are not closed with respect either to the equitable or inherent jurisdictions and the House of Lords, in Airbus, also left the door open to granting an anti-suit injunction in cases where the foreign forum was the only forum with jurisdiction, so as to ensure that 'comity was not applied too rigidly'. Although Airbus may be considered a move in the right direction, it is not sufficient to provide certainty in this vexed area of law – that will ultimately only be achieved through international agreement over the terms of allocating and declining jurisdiction.

5.2 Cigna and the Australian approach

The majority in Cigna set out to clarify the law with respect to the principles governing the consideration of anti-suit injunctions by Australian courts. In doing so they held that there are two grounds of jurisdiction that may be relied upon, and they formulated a different test for each. The majority adopted the view of the Privy Council in Aerospatiale, that stay orders and anti-suit injunctions are not governed by the same principles, and also acknowledged that in some cases the power to grant anti-suit injunctions is an aspect of the power which authorises a court to stay its own proceedings, and that in other cases an anti-suit injunction will not be granted before the court first considers staying its own proceedings.130

The Court confirmed and emphasised that there are indeed two separate bases for the jurisdiction to grant an anti-suit injunction, although they may overlap. At times, Courts have treated them as one and the same and no small amount of confusion has followed. The majority in Cigna noted this, complaining that,

Given that, in England, the power to grant injunctions has for many years been conferred by statute, it is not surprising that the cases decided in that country in recent years do not make a clear distinction between injunctions granted in exercise of the inherent power and those granted in the exercise of equitable jurisdiction.131

In their decision in Cigna, the majority stated that there is a need for a stronger test for determining whether an injunction should be granted to stay foreign proceedings than for determining stays of proceedings in the local jurisdiction. This in part because an

anti-suit injunction is effectively a final determination on where the matter or some aspect of it is to be litigated, and in part out of consideration for maintenance of the principles of judicial comity. If it is decided that an anti-suit injunction is to be granted, then the matter will be fully determined in the local court. The local court, in effect, determines the matter for the foreign court. If the local court restrains the plaintiff from recovery in the foreign court, the plaintiff may be denied remedies that would be available there, or indeed any remedy. Thus the importance of the discretion. The cases on restraining proceedings in foreign courts have always emphasised that the jurisdiction operates in personam but, that, ‘nevertheless it interferes with the processes of the foreign court and may well be perceived as a breach of comity by that court’. The *Cigna* majority accepted the definition of comity as being ‘relevantly explained’ by the US Supreme Court in *Hilton v Guyot*. As stated in the first chapter, in the discussion of comity, it is contended that little turns on what is a fairly vague definition of the concept, one that simply serves to underline the attitude of the courts with respect to interference in the proceedings of foreign courts.

The formulation of the view adopted by the *Cigna* majority with respect to the exercise of the jurisdiction owes much to the approach adopted by the Privy Council in *Aerospatiale*. As stated by Lord Goff of Chieveley, the principles for exercise of the discretion to grant a stay order and those on which the discretion to grant an anti-suit injunction might be based could not be the same; further justification was required before a court could be allowed to take the extraordinary step of interfering in the processes of a foreign court.

Because of the preclusive nature of an anti-suit injunction and the importance of comity, which calls for caution in any contemplation of the restraint of foreign court proceedings, the High Court of Australia in *Cigna* also formulated a two step approach that should be followed in any exercise of the discretion. In doing so they considered

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131 Ibid 394.
132 Ibid 397.
133 Ibid.
134 Ibid.
135 Ibid 395.
136 Ibid 396.
137 (1895) 159 US 113.
and rejected, as being unsuitable as a general rule (but not in total),\(^\text{139}\) the approach of the Canadian Supreme Court in *Amchem*.\(^\text{140}\) In effect *Amchem* reverses the *forum non conveniens* approach adopted by English and Australian courts, which is to consider first whether the local court is the appropriate (or inappropriate forum). Sopinka J, in *Amchem*, stated that the principles outlined in *Aerospatiale* should be the foundation for the test of whether to grant an anti-suit injunction applied in Canadian courts.\(^\text{141}\) These principles, he said, 'should be applied having due regard for the Canadian approach to private international law', an approach exemplified by the Court's decision in *Morguard Investments Ltd v De Savoye*.\(^\text{142}\) In formulating the test for Canada, Sopinka J held that, because of the importance of comity, the decision of the foreign court should not be pre-empted 'until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed.'\(^\text{143}\) If a stay is not granted in the foreign forum, the domestic court will then proceed to entertain the application, but only if it is alleged to be the most appropriate forum and is potentially an appropriate forum.

As with *Cigna*, *Amchem* concerned claims of death and injury wrought by exposure to asbestos. *Amchem*, however, involved a suit by a number of claimants against companies involved in the mining and processing of asbestos. It was brought in Texas, for the usual reasons, at a time when the doctrine of *forum non conveniens* was supposedly not followed in that jurisdiction (although as will be discussed below, the situation was more complex than this). *Amchem* sought an anti-suit injunction in British Columbia (where no proceedings were pending) to halt the Texas proceedings. This was granted by Esson CJSC\(^\text{144}\) and an appeal was dismissed by the Court of Appeal.\(^\text{145}\)

The Supreme Court of Canada confronted squarely for the first time and determined on what principles a Canadian court should exercise its discretion to grant an anti-suit

\(^{139}\) *Cigna* (1997) 189 CLR 345, 396.
\(^{140}\) [1993] 1 SCR 897.
\(^{141}\) Ibid 932.
\(^{142}\) [1990] 3 SCR 1077.
\(^{143}\) [1993] 1 SCR 897, 931.
\(^{144}\) Supreme Court of British Columbia, (1989) 65 DLR (4th) 567.
injunction and how those principles should be applied. Glenn notes that the anti-suit injunction has been little used in Canada (like Australia) because ‘Canadians have a disconcerting habit of not suing, especially not abroad, and there has been little to enjoin.’ The Supreme Court stressed the importance of adherence to the principles of comity and said that an application for an anti-suit injunction should only be entertained because of failure by a foreign court to determine jurisdiction in circumstances where a serious injustice would be occasioned.

In applying the first step in the *Aerospatiale* formulation, Sopinka J reversed it. This step is to determine whether the local court is the natural forum, having regard to the connecting factors with the action and the parties. In order to conform to comity, Sopinka J preferred to adopt the test for determining *forum non conveniens* – whether there is another forum that is clearly more appropriate – so that where no one forum is the most appropriate, the domestic forum does not win out by default.

In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions.

Where the local court concludes that the foreign court assumed jurisdiction contrary to principles of *forum non conveniens*, this is not the end of the matter. It must then apply the second step of the *Aerospatiale* formulation, although Sopinka J preferred to apply this step on the basis of injustice to the plaintiff to deprive him of some personal or juridical advantage available in the forum, rather than with reference to the terms vexation and oppression which he found could not satisfactorily be defined.

In determining when ‘injustice’ would occur, Sopinka J held that there could be no reasonable expectation of advantage ‘available in a jurisdiction with which the party

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145 Court of Appeal, (1990) 75 DLR (4th) 1.
147 [1993] 1 SCR 897, 931.
148 Ibid 931-932.
149 Ibid 932-933.
and the subject-matter of the litigation has little or no connection. 150 'Any loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum.' 151 Loss of juridical advantage, he noted, will be the most common potential cause of injustice but not the only one. 152 There will also be personal disadvantage as where a party may be required to litigate in a distant forum with which he or she has no connection. 153 The following extracts from his judgment are important enough to include here at length:

The result of the application of these principles is that when a foreign court assumes jurisdiction on a basis that generally conforms to our rule of private international law relating to the forum non conveniens that decision will be respected and a Canadian court will not purport to make the decision for the foreign court. The policy of our courts with respect to comity demands no less. 154

It has been suggested that by reason of comity, anti-suit injunctions should either never be granted or severely restricted to those cases in which it is necessary to protect the jurisdiction of the court issuing the injunction or prevent evasion of an important public policy of the domestic forum. A case can be made for this position. In a world where comity was universally respected and the courts of countries which are the potential fora for litigation applied consistent principles with respect to the stay of proceedings, anti-suit injunctions would not be necessary. A court which qualified as the appropriate forum for the action would not find it necessary to enjoin similar proceedings in a foreign jurisdiction because it could count on the foreign court staying those proceedings. In some cases both jurisdictions would refuse to decline jurisdiction as, for example, where there is no one forum that is clearly more appropriate than another. The consequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases.

While the above scenario is one we should strive to attain, it has not yet been achieved. Courts of other jurisdictions do occasionally accept jurisdiction over cases that do not satisfy the basic requirements of the forum non conveniens test. Comity is not universally respected. In some cases a serious injustice will be occasioned as a result of the failure of a foreign court to decline jurisdiction. It is only in such circumstances that a court should entertain an application for an anti-suit injunction. This then indicates the general tenor of the principles that underlie the granting of this form of relief. 155

150 Ibid 933.
151 Ibid.
152 Ibid.
153 Ibid 933-934.
154 Ibid 934.
155 Ibid 914-915.
Regard for the principles of international comity to which I have referred suggests that in considering an anti-suit injunction the fact that a foreign court has assumed jurisdiction in circumstances which are consistent with the application [of forum non conveniens] principles is an important factor militating against granting an injunction.\textsuperscript{156}

One matter requires special comment. I do not agree that because an anti-suit injunction does not directly operate on the foreign court, but \textit{in personam} on the party in that court, comity is not involved. The reactions of Wilkey J in \textit{Laker}, supra, and indeed of Esson CISC in this case demonstrate that, whatever the form of restraint, the court whose proceeding is effectively restrained regards it as an interference with its jurisdiction.\textsuperscript{157}

Fawcett has summarised the differences between the Canadian and English approaches as follows:

First, in Canada the courts ask whether the foreign forum is \textit{forum non conveniens}, rather than whether the local forum is the natural forum for the trial.

Secondly, when it comes to the trial abroad, the language of vexation and oppression is not used in Canada. An injunction will only be granted if the foreign court’s assumption of jurisdiction was inequitable, i.e. an injustice results to a litigant or would-be litigant before the Canadian courts.

Thirdly, in examining the question of injustice, the domestic court should weigh up the loss of advantage to the foreign plaintiff if the injunction is granted, against the loss of advantage to the defendant is the action is tried abroad.\textsuperscript{158}

The High Court majority in \textit{Cigna} said that there may be cases where the Canadian rule would be applicable but that the different circumstances in which injunctions may be granted to restrain foreign proceedings do not permit of such a blanket approach. It would serve no purpose, for example, in circumstances where the inherent jurisdiction may be exercised to protect the proceedings or processes of the domestic court, nor where the foreign proceedings are clearly unconscionable, matters discussed below.\textsuperscript{159}

It is apparent from the outcome in \textit{Cigna}, and a number of observations made from the bench during argument in that case, that the Supreme Court of Canada and the High

\textsuperscript{156} Ibid 922.  
\textsuperscript{157} Ibid 940.  
\textsuperscript{159} \textit{Cigna} (1997) 189 CLR 345, 396-397.
Court of Australia are not so very far apart on this issue. In terms of restricting the occasion for employment of anti-suit injunctions, this is no bad thing.

Under the two step approach developed by the Cigna majority, in cases in which an anti-suit injunction is sought on equitable grounds, an Australian court must first determine that it is an appropriate forum to hear the matter - in the Voth sense of it not being clearly inappropriate. If the Australian Court is a clearly inappropriate forum then that is the end of the matter. If the Australian Court is not clearly an inappropriate forum, then the court must proceed to decide whether an anti-suit injunction should be granted in accordance with the practice which ordinarily applies with respect to interlocutory relief - by determining ‘whether there is a serious issue to be tried and, if so, whether the balance of convenience favours the grant of an interlocutory injunction’.\textsuperscript{160}

If, however, the jurisdiction is founded on the inherent jurisdiction, the need to protect the proceedings or processes of the court, that is the end of the matter (i.e., in the sense of determining the appropriate jurisdiction) – as will be discussed below. The domestic court is the only one with any interest in the matter.

The Cigna majority also referred to the equitable jurisdiction to grant an injunction in support of a choice of forum or arbitration clause, although they did not discuss it except in passing.\textsuperscript{161} That particular issue will be discussed at length in the next chapter.

It should be noted that the Court held that it is ‘theoretically possible’ that there will be cases where ‘the matter urged in support of the grant of an anti-suit injunction in the exercise of equitable jurisdiction cannot be raised in the foreign proceedings in respect of which the injunction is sought.’\textsuperscript{162} They held that, in respect of such cases, comity would still require an Australian court to first consider whether it is an appropriate forum for the resolution of the matter before making interlocutory orders.\textsuperscript{163}

\textsuperscript{160} Ibid 398.
\textsuperscript{161} Ibid 392.
\textsuperscript{162} Ibid.
\textsuperscript{163} Ibid.
a) Inherent Jurisdiction

The first ground of jurisdiction stated by the High Court majority in Cigna is the inherent power of a court to protect the integrity of its own processes once set in motion.\(^\text{164}\) On the basis of this inherent power, 'a court may grant an injunction to restrain a person from commencing or continuing foreign proceedings if they, the foreign proceedings, interfere with or have a tendency to interfere with proceedings pending in that court.'\(^\text{165}\) The power is not restricted to defined and closed categories, but is to be exercised when the administration of justice demands or when necessary for the protection of the court's own proceedings or processes.\(^\text{166}\) The jurisdiction was said to be as stated in the following terms by Lord Goff in Aerospatiale:\(^\text{167}\)

One such category of case arises where an estate is being administered in this country, or a petition in bankruptcy has been presented in this country, or winding up proceedings have commenced here, and an injunction is granted to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of certain foreign assets. In such cases, it may be said that the purpose of the injunction is to protect the jurisdiction of the English court. Indeed, one of their Lordships has been inclined to think that such an idea generally underlies the jurisdiction to grant injunctions restraining the pursuit of foreign proceedings: see South Carolina Insurance Co v Assurantie Mattrschappij 'De Zeven Provincien' N.V. [1987] AC 24, 45 per Lord Goff of Chieveley; but their Lordships are persuaded that this is too narrow a view.\(^\text{168}\)

Lord Goff was there referring to his own judgment in Bank of Tokyo Ltd v Karoon,\(^\text{109}\) where he said (as Robert Goff LJ) that,

The golden thread running through the rare cases where an injunction has been granted appears to have been the protection of the jurisdiction; an injunction has been granted where it was considered necessary and proper for the protection of the exercise of the jurisdiction of the English court. This can be said not only of cases where assets were being administered by the English court but also of cases where proceedings abroad were restrained as vexatious, for a party who attempts to reap the benefit of proceeding vexatiously is interfering with the proper course of administration of justice here.\(^\text{170}\)

\(^{164}\) Ibid 391.
\(^{165}\) Ibid 392.
\(^{166}\) Ibid.
\(^{167}\) [1987] AC 871.
\(^{168}\) Ibid 892-893.
\(^{169}\) [1987] 1 AC 45, 60.
\(^{170}\) Bank of Tokyo Ltd v Karoon [1987] AC 45, 60.
As discussed, Lord Goff later rejected his view in this decision as being too narrow.  

Briggs says that it is unfortunate that the High Court majority in *Cigna* did not develop their analysis of the inherent power of a court to control and protect its own proceedings because,  

[The language of ‘protecting the integrity of local proceedings’ leaves it arguable that if a decision has been taken not to stay domestic proceedings, competing proceedings in a foreign jurisdiction inevitably run the risk of impairing their integrity. After all, the issues raised in the local action may be put beyond judicial investigation by a plea of *res judicata* founded on the foreign adjudication; the enforceability of the local judgment may be reduced or overridden, and so forth ... ]

[It is unfortunate that a formulation which appears to be as ambiguous as this was left, as it were, lying around for future abuse. In England, once *Aerospatiale* had put right earlier misunderstandings and had explained that the rules regulating stays and injunctions were divergent, courts ... recognised that there would be cases where parallel claims had to be left to run their course. Though this single aspect of *Aerospatiale* was itself said to be correct, it is still not clear why the existence of a parallel claim in a foreign court may not be said to impair the integrity of local proceedings. It may be that this aspect of the majority judgment will have to be read as being confined to cases of judicial administration of assets or estates. If not, it is very hard to see how any coherent limit may be placed around it.]

Briggs' comments appear to miss the further discussion in the majority judgment, however, where the Court referred to other cases, including *National Mutual Holdings P/L v Sentry Corporation* (*Sentry*), where Gummow J, in the Federal Court, granted an anti-suit injunction in a situation where foreign (American) proceedings interfered, or at least had a tendency to interfere with, proceedings which had been instituted before his Court. In *Sentry*, Gummow J considered important the indication in *Aerospatiale* that,

[O]ne tendency manifest in the decisions, which indicates what provides sufficient equity to found the jurisdiction, is a concern with the integrity of the processes of the domestic court. The conduct of foreign proceedings which have a tendency to interfere with the due process of the domestic court may, in the circumstances of a particular case, generate the necessary equity to enjoin those foreign proceedings as vexatious or oppressive.

He added three observations:

171 *Aerospatiale* [1987] 1 AC 871, 893.
174 Ibid
175 Ibid 234.
[First] in Australia, there is the further consideration that where a court has begun to exercise the judicial power of the Commonwealth in relation to a particular matter, it has the exclusive right to exercise or control the exercise of the functions which form part of that power or are incidental to it: cf Pioneer Concrete (Vic) PIL v Trade Practices Commission...

[Secondly] it is also to be asked whether effectual relief can be obtained in the courts of the foreign country...: cf White and Tudor's Leading Cases in Equity (9th ed., Volume 1, pp635-6).

[And lastly,] a relevant consideration is the existence of substantial reasons of benefit for the plaintiff in bringing the foreign proceedings: [Aerospatiale, at S93-4].

Gummow J cited Aerospatiale in referring to the 'force of the precept that equity acts in personam' and observed that, 'Accordingly, it is rather beside the point, as their Lordships recognised in Aerospatiale ..., to seek to divide into categories the cases in which the jurisdiction may be exercised.' In the end, Gummow J granted the anti-suit injunction because he found that there was interference with the conduct of the litigation in the Australian court where, 'one party seeks in the courts of another country to enjoin its former solicitors from acting as solicitors for an opposing party in the litigation in this Court. It is a procedure apt to bring about a situation whereby that other party changes his solicitor, a step of primary and paramount concern to this Court.'

Problematically, however, Gummow J based his consideration of the question whether to restrain the foreign (New York) proceedings in that case firmly on the equitable jurisdiction of the court to enjoin resort to vexatious and oppressive foreign suits. His Honour took pains to emphasise the equitable nature of the jurisdiction, perhaps not surprising from the joint author of the leading Australian text on the subject. He observed that, 'I mention these matters because the juridical root of this well-established jurisdiction has perhaps not been appreciated as well as it might have been in the recent British decisions.' It is contended, however, that this reasoning is incorrect, in the same way as Robert Goff LJ was incorrect in his judgment in Bank of Tokyo v Karoon, in thinking that the inherent jurisdiction could be the sole basis of

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176 Ibid 234.
177 Ibid.
178 Ibid 233.
179 Ibid 230.
180 Ibid 232.
jurisdiction to grant injunctions. Robert Goff LJ later retreated from that line of reasoning and it may be that so has Gummow J, as he was a member of the *Cigna* majority, which did not support this view, as the above-mentioned complaint about lack of distinction between the jurisdictional bases indicates, although his failure to write a concurring judgment puts the issue in some doubt.

*Sentry* was followed in *Re Siromath P/L (No.3).* 181 McLelland J, in the Equity Division of the New South Wales Supreme Court, stated that:

The control by the court over the circumstances on which, and the extent to which, its own officers are to be subjected to personal pecuniary liability in respect of their activities in the course of the performance of their official duties falls clearly within the concept of the protection by the court of its own processes. 182

The case involved a court appointed liquidator and provisional liquidator joined in proceedings in Pennsylvania. McLelland J referred, because of reasons of international comity, to the need to exercise great caution in the exercise of the discretion, but that, 'the protection of the administrative processes of the Court requires that the injunction remains in place.' 183

Nothing more was said about the inherent jurisdiction in *Cigna*, which is unfortunate, but in the light of the rest of the reasoning and the conclusions reached, it would be a mistake to interpret the jurisdiction too broadly, and it is quite clear that the majority did not accept that the mere existence of local proceedings could be used as a justification for interference. 184 Briggs is so far the only *Cigna* commentator to have discussed the issue of the inherent jurisdiction in any detail. Bell and Gleeson (who appeared as junior counsel in *Cigna*), in an article published not long after the decision was handed down, discussed the equitable ground of jurisdiction, but simply noted the existence of the inherent jurisdiction, without comment. 185

182 Ibid 28.
183 Ibid 30.
184 Followed by Tamberlin J in the Federal Court, in *KC v Shiley* (Unreported, Federal Court of Australia, 12 August 1997).
It is submitted that this basis of jurisdiction, the inherent power of a court to protect its own processes, is, in fact, on all fours with the principles developed in the US Court of Appeal decision in *Laker*. In *Laker* Judge Green and later the US Court of Appeals were able to issue injunctions to halt the English proceedings to protect that already under way in the US – which was the only jurisdiction with an interest in the matter. It is submitted that the Australian approach to the inherent jurisdiction is, and will be, approached in like manner, in circumstances in which the Court feels that it must protect proceedings under way before it. It will not be confined to cases of judicial administration of assets or estates. As the *Cigna* majority said, ‘As with other aspects of that power, it is not to be restricted to defined and closed categories.’

*b) Equitable jurisdiction*

The second ground of jurisdiction prescribed by the High Court majority in *Cigna* is derived from the court’s equitable jurisdiction to restrain unconscionable conduct or the unconscientious exercise of legal rights:

> If the bringing of legal proceedings involves unconscionable conduct or the unconscientious exercise of a legal right, an injunction may be granted by a court in the exercise of its equitable jurisdiction in respect of those proceedings no matter where they are brought.

The *Cigna* majority confined their consideration to two categories of conduct in which an injunction may be granted by a court in the exercise of its equitable jurisdiction. The jurisdiction may be exercised in aid of legal rights - the ‘auxiliary jurisdiction’ as it has been called by some. As note 1 above, this category will be fully considered in the next chapter. It was not an issue in the majority judgment as they did not consider that there had been a contract not to sue. An injunction may also be granted in the exercise of the jurisdiction where the proceedings in the foreign court are, according to the principles of equity, vexatious or oppressive – the category now under consideration.

185 *731 F2d 709 (DC Cir, 1984).*
188 A.Bell & J.Gleeson, above n 185, 963.
The High Court of Australia, in the guise of the Cigna majority, having decided that the 1992 Cigna/CSR correspondence did not constitute an agreement not to sue, or at least that the issue was not arguable,190 confined their consideration of unconscionable conduct to a determination of whether or not the foreign proceedings could be said to be vexatious or oppressive in the traditional sense. It is important to note that they reverted to the traditional usage of the terms, instead of applying Deane J's Oceanic Sun formulation. They did so for the same reason that the terms were used by Lord Goff of Chieveley in Aerospatiale – the very difficulty of defining them so as to satisfy a court that the conditions implied by the terms had been fulfilled. It might have been easier to find in favour of granting an anti-suit injunction if Deane J’s definitions were adopted – but that was precisely what was not wanted.

In considering whether the criteria implicit in the old definitions were met, the High Court majority followed the reasoning of Robert Goff LJ in Bank of Tokyo Ltd v Karoon.191 In reliance on that decision, which they likely preferred over Aerospatiale because of the specific examples of what constitutes vexation and oppression provided, and which they specifically approved, the majority limited their consideration of the terms to holding that vexation or oppression may be found where ‘complete relief is available in the local forum; that mere co-existence of proceedings in different countries does not constitute vexation or oppression and that foreign proceedings are to be viewed as vexatious or oppressive only if there is nothing to be gained by them over and above what may be gained in the local proceedings.192 In Bank of Tokyo Ltd v Karoon, Robert Goff LJ said that,

It was for the party seeking an injunction to prove that the proceedings abroad were vexatious; for that purpose, he had generally to show that the plaintiff in the foreign court could not obtain an advantage from the foreign procedure, which he could not

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192 (1997) 189 CLR 345, 393-4. Cigna was applied by Tamberlin J in the Federal Court, in KC v Shiley Incorporated (Unreported, 12 August 1997). The respondents sought to restrain the applicants from continuing proceedings in California concerning the gathering of evidence in relation to proceedings already before the Australian court. Tamberlin J relied on the Hilton v Guyot formulation of comity and the decisions in Peruvian Guano v Bockwoldt and Bank of Tokyo Ltd v Karoon in holding that ‘coexistent foreign proceedings are not in themselves sufficient to justify grant of an anti-suit injunction; that they must be vexatious or oppressive or ‘involve harassment’. Tamberlin J dismissed the application for an anti-suit injunction. He found that the proceedings in California included different considerations that did not duplicate the Australian proceedings and there was no interference with matters before his court. The Californian proceedings could not be said to be vexatious or oppressive and there was no suggestion of harassment.
obtain in the English court. See in particular *Hyman v Helm*¹⁹³ and *Cohen v Rothfield*.⁰⁹⁴ That criterion was very rarely fulfilled. There are very few examples reported of cases where the criterion was fulfilled. For examples where it was fulfilled, see *Armstrong v Armstrong*,¹⁹⁵ *Moore v Moore*¹⁹⁶ and *Christian v Christian*.¹⁹⁷

This is a rather Delphic statement, consisting as it does of two double negatives. However it becomes apparent from a reading of the cases referred to by Robert Goff LJ where he said that the criterion *had* been fulfilled, that he meant that although the plaintiff might obtain some advantage in the foreign court, he would not be permitted to use it in an English Court – assuming that he wanted to do so. In those circumstances, the continuance of the foreign proceedings would therefore be vexatious.

Given that there are apparently so few reported cases where this criterion *was* fulfilled, it is worth brief consideration of two of the cases adverted to by Robert Goff LJ himself. In *Armstrong v Armstrong and the Duke of Orleans*,¹⁹⁸ a case of alleged adultery at the Hotel Sacher in Vienna, the petitioner, the husband, took action in the Court of Vienna to summon witnesses (hotel staff) and take evidence. Jeune J in England restrained those proceedings because they would be useless, as the petitioner would obtain no advantage from it in the English proceedings where evidence taken in Vienna could not be heard – 'such a proceeding ought not to be allowed if a person can only obtain an illusory advantage from it'.¹⁹⁹ Jeune J also considered that allowing the Vienna proceedings to continue might be injurious to the proper course of proceedings in his Court, because even though the evidence taken in Vienna could not be produced in the English proceedings, the petitioner would gain an unfair advantage by finding out all that the witnesses had to say, under foreign procedures which would not necessarily be allowed in England.²⁰⁰

¹⁹³ [1883] 24 ChD 531.
¹⁹⁴ [1919] 1 KB 410.
¹⁹⁵ [1892] P 98.
¹⁹⁶ (1896) 12 TLR 221.
¹⁹⁷ (1897) 67 LJP 18.
¹⁹⁸ [1892] P 98.
¹⁹⁹ Ibid 104.
²⁰⁰ Ibid.
In Moore v Moore, the husband in a divorce case started proceedings in Austria subsequent to those begun in England. The Court of Appeal upheld an injunction issued by Gorell Barnes J. Lord Justice Kay asserted that, 'the husband has shown no reason why he should be allowed to drag his wife out to Austria, where neither party was domiciled, to defend a suit which he had commenced there after proceedings, in which the same issue was raised, had been properly instituted by the wife in this country, and after a commission had been appointed to take evidence in Austria as to the validity of the marriage.'

The Cigna majority did say that the power to grant injunctions in restraint of foreign proceedings, because it derives from equity, is not confined to these examples, 'Rather, it is a power the limits of which are determined by the dictates of equity and good conscience.' But the matter was not further discussed because, following this reasoning, the majority were able to hold that the New Jersey proceedings were not vexatious or oppressive – the statute-based remedies only being available in the US.

5.3 Summation

In respect of those aspects of the two bases of jurisdiction to issue an anti-suit injunction discussed in this chapter, the situation in Australia, following the decision of the High Court in Cigna, seems to be now very much akin to the of England as described by Lord Goff in Aerospatiale and Airbus. The first step for an Australian court, following Cigna, is to determine whether Australia is an appropriate forum, in the sense that it is not a ‘clearly inappropriate forum’. And even then, ‘it may be expedient to require the applicant to seek a stay or dismissal of the foreign proceedings’. With respect to the inherent jurisdiction, the High Court said that, 'In cases where anti-suit injunctions are sought to protect the proceedings or processes of a court, no question arises whether that court is an appropriate forum for the resolution of that issue: it is the only court with any interest in the matter.' This is also in line with the English attitude to protection of the local jurisdiction.

201 (1896) 12 TLR 221.
202 Ibid 222.
203 Ibid 394.
205 Ibid.
206 Ibid.
The Canadian Supreme Court in *Amchem*,207 as noted, went even further, essentially holding that an anti-suit injunction will not be issued until the foreign court has first had an opportunity to stay its own proceedings, if that be appropriate. They did not appear to make an exception for protection of their own court's proceedings. This was one of the criticisms of *Amchem* made by the High Court of Australia in *Cigna*;208 one of the reasons why they declined to follow the Canadian approach.

The majority in *Cigna* supported the view of the Judicial Committee in *Aerospatiale* to the effect that stay orders and anti-suit injunctions are not to be governed by the same principles. That 'tendency' was 'corrected' in *Aerospatiale*.209 And they noted that, "in some cases, the power to grant anti-suit injunctions is an aspect of the power which authorises a court to stay its own proceedings.' And, like Lord Goff in *Aerospatiale*, the *Cigna* majority preferred to adhere to the doctrine established by the nineteenth century English cases on vexation and oppression because of the stricter, very difficult to meet standards they require in determining whether to grant an anti-suit injunction in the equitable jurisdiction. These cases dealt with all the circumstances which are *not* vexation and oppression without clearly providing guidance as to what *is* — in so doing, making clear that very little is. The High Court majority specifically adverted to and relied on the decision of Robert Goff LJ in *Bank of Tokyo Ltd v Karoon*,210 where he said that foreign proceedings are to be viewed as vexatious or oppressive only if there is nothing which can be gained by them over and above what may be gained in local proceedings.211 And that, on the other hand they are vexatious and oppressive if there is complete correspondence between the proceedings or if 'complete relief' is available in the local proceedings.212 The fact of the US statute-based damages sought by CSR, only available in the US, was sufficient to take the matter outside that definition.

Under the first ground of jurisdiction identified by the High Court in *Cigna*, the inherent power of a court to protect its own processes, little is required in the way of justification, where this ground is established, as the Australian court is the only court

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207 [1993] 1 SCR 897.
209 Ibid 390.
211 (1997) 189 CLR 345, 393.
with jurisdiction, although principles of comity will certainly be taken into account.\textsuperscript{213} This ground of jurisdiction is not limited and it certainly includes interference with the court's processes and the need to protect the important public policies of the forum. Under the second ground of jurisdiction identified by the High Court, there are two limbs or steps which must be satisfied, although if the first limb (whether Australia is a clearly inappropriate forum) is not satisfied it is unnecessary to proceed to the second.

In order to satisfy the second limb, if the Australian court is not a clearly inappropriate forum, the court should consider whether the bringing of the foreign proceedings evidences any unconscionable conduct. Clear breach of an agreement not to sue, or not to bring proceedings in the foreign forum may be held to be unconscionable (a matter discussed in detail in the next chapter).

Proceedings which plead a cause of action not available within an Australian forum will most likely not be deemed vexatious or oppressive, and this is where the Court has possibly left the door ajar to potential abuse in the form of forum shopping undertaken by a party pleading speculative statutory claims to attract the jurisdiction of a foreign court. Vuong, for one, has said that Cigna, "encourages clever pleading of foreign claims to include matters, especially statutory matters, not available locally to ensure that the dispute is heard in the foreign forum."\textsuperscript{214} And Whincop condemns the High Court majority for what he sees as providing encouragement to foreign forum shopping.\textsuperscript{215} He considers that Cigna was a clear case where an anti-suit injunction should have been granted.

Although there is undeniably a danger that parties will plead speculative statutory claims to attempt to secure their forum of choice, it is submitted that the High Court has chosen a path to bring some degree of certainty to this area. Their approach recognises the realities of international litigation and that the processes of foreign courts should not be interfered with, except in the last resort and in extraordinary circumstances. They have sought to bring a degree of certainty to the issue in

\textsuperscript{212} Ibid 393-4.

\textsuperscript{213} \textit{KC v Sixley Inc}, Unreported, [1997] 769 FCA (12 August 1997) Tamberlin J.

\textsuperscript{214} E. Vuong, above n 185, 176.

accordance with comity by preferring to leave the determination to the foreign court, subject to the exceptional cases noted above. It is still open to an Australian Court to find that the bringing of foreign proceedings, is unconscionable – vexatious or oppressive following the traditional meaning of the terms.

In argument before the High Court, counsel for Cigna said that a rule which gives the order in which the proceedings are commenced determinative or even powerful weight would overthrow the Voth approach:

The focus would cease to be the inappropriateness of the local court to deal with the controversy and would switch mechanically to an examination of whether the party seeking the stay had struck first in a foreign forum. A mandatory or even prima facie 'first filed' rule would discourage the parties from attempting to resolve disputes before the commencement of litigation in a transnational context. Since it would become critical to have commenced the first set of proceedings, it would be in the interests of each party to commence proceedings in the forum of its choice before attempting to settle or even notify the dispute.\(^{216}\)

Counsel for Cigna missed the point that it is one thing for a court to decide whether it is the appropriate or inappropriate forum, but another thing entirely to forestall proceedings already begun before a foreign court. Something more is needed.

Those terrible epithets, vexation and oppression, with all their negative baggage are necessary now more than ever with respect to anti-suit injunctions, if comity is to have a meaningful existence in circumstances where the Amchem approach is not followed. The situation in England, subsequent to Aerospatiale and Airbus, is that the putative anti-suit injunction seeker must persuade the court, (a) that it is the natural forum; (b) that he would suffer 'injustice' if the foreign proceedings were allowed to continue; and (c) that the plaintiff will not suffer injustice if an anti-suit injunction is granted. For all of which the Court must then proceed to undertake the sort of balancing and examination of connecting factors recommended in the cases from The Atlantic Star to Spiliada, under the forum non conveniens approach and in fact undertaken by the Privy Council in Aerospatiale. 'An injunction will only be granted to prevent injustice, and, in the context of a case such as the present, that means that the Texas proceedings must be shown in the circumstances to be vexatious or oppressive.'\(^{217}\) Although it has been


\(^{217}\) [1987] 1 AC 871, 899.
said, by Sopinka J in Amchem\textsuperscript{218} for one, that the formulation loses nothing if the two terms are not included, it is submitted that, precisely because of the very difficulty attendant upon proving them that they \textit{are} necessary. Injustice is a subjective concept. Vexation and oppression, although also ill-defined, if retained, because of the examples provided in the recorded cases, make it very difficult for a court to exercise its discretion to grant an anti-suit injunction. This is as it should be. This is the key.

In the result, it is submitted, the approach of the High Court in \textit{Cigna} is in line with the approach of several of the Circuits of the US Court of Appeals and that which will be followed by English courts applying \textit{Aerospatiale} and \textit{Airbus}. The Canadian approach would seem to go even further. It is further submitted, therefore, that the approach of the major common law jurisdictions has reached a degree of consistency in paying at least lip service to principles of comity. However, as discussed in chapter seven, an international convention is still the only solution to this problem, because despite developments in cases such as \textit{Cigna}, \textit{Amchem}, and \textit{Airbus}, courts will still grant anti-suit injunctions in cases where, arguably at least, they should not (some of these will be discussed in the next chapter) and, as Carter has shown, there is no sign that the employment of anti-suit injunctions is on the wane.\textsuperscript{219}

The High Court, in \textit{Cigna}, identified two grounds of jurisdiction for the grant of an anti-suit injunction. The substance of what can be said about the inherent and the equitable jurisdiction to restrain conduct in foreign proceedings that is vexatious or oppressive has been said above. The equitable jurisdiction to issue an anti-suit injunction in support of the enforcement of contractual rights will be considered in detail in the next chapter.

\textsuperscript{218} [1993] 1 SCR 897, 932.
\textsuperscript{219} P. Carter, "Anti-suit injunctions in private international law", Europa Institute at Universitat des Saarlandes (1997).
Chapter 6.

Anti-suit injunction: Enforcement of contractual rights

6.1 Background

In *Cigna*, the High Court majority described the jurisdiction to enforce contractual rights in the following terms:

In some cases, the equitable jurisdiction to restrain unconscionable conduct may be exercised in aid of legal rights. Thus ... if there is a contract not to sue, an injunction may be granted to restrain proceedings brought in breach of that contract, whether brought here or abroad. Similarly, an injunction may be granted in aid of a promise not to sue in a foreign jurisdiction constituted, for example, by an agreement to submit to the exclusive jurisdiction of the courts of the forum.\(^1\)

The *Cigna* majority did not further consider this ground of jurisdiction as they did not consider that there had been a contract not to sue in the circumstances of that case, or alternatively that the American corporations were not parties to any such agreement if it did exist. There is, however, *dicta* in other decisions of the High Court to the effect that enforcement of exclusive jurisdiction clauses or arbitration clauses, is to be treated differently. In *Oceanic Sun Line Special Shipping Co Inc v Fay ("Oceanic Sun")*,\(^2\) Brennan J stated that,

>A case where the plaintiff seeks the exercise of a discretion to refuse to give effect to a contractual stipulation that a nominated court should have exclusive jurisdiction requires justification of a different order from that required in a case where the plaintiff has simply chosen to sue in one forum rather than another, both being available to him.\(^3\)

In the same case, Gaudron J said:

>Where there is an agreement to submit to another jurisdiction, the power to grant a stay rests on the principle that the courts will, except where the plaintiff adduces strong reasons against doing so, require the parties to abide by their agreement.\(^4\)

In *Akai v PIC*,\(^5\) the majority implied support for the dicta of Dixon J in *Huddart Parker Ltd v The Ship “Mill Hill”*,\(^6\) supportive of English authority holding that where there is a foreign jurisdiction clause: "the courts begin with a firm disposition in favour of

\(^1\) *Cigna* (1997) 189 CLR 345, 392.
\(^3\) Citing as authority the English Court of Appeal in *Aratra Potato Co. Ltd v Egyptian Navigation Co (The ‘El Amria’) (1981) 1 Lloyds Rep 119.
\(^4\) *Oceanic Sun* (1988) 165 CLR 197, 259.
\(^6\) (1950) 81 CLR 502, 508-509.
maintaining that bargain unless strong reasons be adduced against a stay, it being the
policy of the law that parties who have made a contract should be kept to it.\footnote{7}

English courts have considered the issue on more numerous occasions in recent years
and taken a much more interventionist approach. In \textit{Donohue v Armco},\footnote{8} the English
Court of Appeal recently held that, 'The first governing principle is that the English
Courts possess jurisdiction to grant such an injunction in order to protect their own
jurisdiction, to which the parties have by agreement entrusted the adjudication of their
disputes.'\footnote{9} They were following the reasoning of an earlier Court of Appeal in \textit{Aggeliki
Charis Compania Maritima S.A. v Pagnan S.p.A.} (the '\textit{Angelie Grace}'),\footnote{10} where the
Court made it clear that they treated the principles applicable to injunctions to stay
foreign court proceedings in favour of arbitration in the forum, as substantially the
same as those applying to exclusive jurisdiction clauses. In so doing, their Lordships
referred to their decision in \textit{Continental Bank N.A. v Aeakos Compania Naviera S.A.}\footnote{11}
('\textit{Continental Bank}\'), where an anti-suit injunction was issued to halt proceedings
brought in Greece, in breach of an English exclusive jurisdiction clause. In his
judgment in the \textit{Angelie Grace}, Millett LJ said:

\begin{quote}
I see no difference in principle between an injunction to restrain proceedings in
breach of an arbitration clause and one to restrain proceedings in breach of an
exclusive jurisdiction clause as in [\textit{Continental Bank NA}]. The justification for the
grant of an injunction in either case is that without it the plaintiff will be deprived of
its contractual rights in a situation in which damages are manifestly an inadequate
remedy.\footnote{12}
\end{quote}

And Leggatt LJ quoted with approval from the judgment of Steyn LJ in \textit{Continental
Bank}:

\begin{quote}
In our view the decisive matter is that the bank applied for the injunction to restrain
the defendant's clear breach of contract [bringing proceedings in Greece in breach
of the contract to litigate in the United Kingdom] ... If the injunction is set aside, the
defendants will persist in their breach of contract, and the bank's legal rights as
enshrined in the jurisdiction agreements will prove to be valueless.\footnote{13}
\end{quote}

\footnote{7} (1996) 188 CLR 418, 445. Dawson and McHugh JJ, in their dissenting judgment, indicated a
much stronger level of support for the proposition (at 427).
\footnote{8} [2000] 1 Lloyds Rep 207.
\footnote{9} Ibid 594.
\footnote{10} [1995] 1 Lloyds Rep 87.
\footnote{11} [1994] 1 Lloyds Rep 505.
\footnote{12} [1995] 1 Lloyds Rep 87, 96.
\footnote{13} Ibid 94.
Steyn LJ also described the facts in *Continental Bank* as, 'the paradigm case for the grant of an injunction restraining a party from acting in breach of an exclusive jurisdiction agreement.'\(^{14}\) There was a 'total absence of special countervailing factors.'\(^{15}\) It is apparent that the power to grant a stay in both arbitration and exclusive jurisdiction cases is based on the same principle - that the Court makes people abide by their bargains - *pacta sunt servanda*. This principle is not a new one as shown by the reference to the High Court's decision in *Huddart Parker* and of course it is also a major underlying rationale for the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention').\(^{16}\)

This principle is supported in the United States, where the Supreme Court, in *The Bremen v Zapata Off-Shore Co.*,\(^{17}\) reversed previous US hostility to forum selection clauses and upheld an exclusive jurisdiction clause in favour of English courts. The Court recognised that expanding world trade and commerce required a new attitude to judicial comity, that one country could not expect to govern world trade and commerce exclusively on its own terms and by its own laws and in its own courts.\(^{18}\) Chief Justice Burger stated that there are, 'compelling reasons why a freely negotiated private international agreement ... should be given full effect.'\(^{19}\) His Honour, in referring to the importance of maintaining such bargains said that, 'the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting.'\(^{20}\) Wisdom J, in the US Court of Appeal decision in that matter, said that the courts should do nothing to encourage 'welching' on bargains.\(^{21}\) Chief Justice Burger stated that:

*This approach is substantially that followed in other common-law countries including England. It is the view advanced by noted scholars and that adopted by the Restatement of the Conflict of Laws. It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world. Not surprisingly,*

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\(^{15}\) Ibid.
\(^{16}\) Article II(2) "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."
\(^{17}\) 407 US 1, 12-14 (1972).
\(^{18}\) Ibid 9.
\(^{19}\) Ibid 12.
\(^{20}\) Ibid 13-14.
\(^{21}\) 446 F2d 907, 909 (1971).
foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.22

... in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.23

In Australia, in the Federal Court, in Leigh and Mardon P/L v PRC Inc,24 Beazley J referred to the foregoing cases in exercising her discretion to uphold an exclusive jurisdiction clause. And, as noted above, it can be inferred that there is at least some support in the High Court from their decision in Akai v PIC,25 in favour of such a disposition. The majority in that case also noted that the courts nevertheless retain the discretion to refuse to stay proceedings,26 according to principles that will be discussed below. In Akai v PIC the majority refused a stay and thereby declined to hold the parties to their English exclusive jurisdiction clause, on grounds of overriding public policy -- which will also be discussed below.

In Cigna, at first instance, in granting an anti-suit injunction to stop proceedings in New Jersey, Rolfe J followed English decisions in Apple Corps Ltd v Apple Computer Inc27 (exclusive jurisdiction clause), and the Angelic Grace. His Honour paid homage to comity in doing so, saying that an anti-suit injunction has been described as an extraordinary remedy that will only be granted in the most exceptional circumstances and after the exercise of great judicial restraint because of principles of comity.28 Rolfe J said, however, that these principles are not to be applied with such stringency if it can be established that there is an agreement not to sue, or an agreement only to sue in the jurisdiction in which the injunction is sought.29 The need for observance of comity and

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22 407 US 1, 11 (1972).
23 Ibid 15.
26 Ibid 447.
28 Cigna Insurance Australia Ltd and Ors v CSR Ltd and Ors (Unreported, Supreme Court of NSW, Commercial Division, Rolfe J, 15 August 1995) para 35.
29 Ibid.
the need for caution was stated, but, as noted in chapter one, if justification is otherwise proffered, it may be readily swept aside.

The Cigna majority might have agreed with Rolfe J to this extent, if they had agreed with him as to the facts. They cited English decisions on point including Pena Copper Mines v Rio Tinto, Continental Bank and the Angelic Grace, indicating that they might be supportive of the lead of English courts in a future case on point. And the majority specifically declined to follow the Canadian Supreme Court's approach in Amchem, discussed in the previous chapter, in part because that approach would not allow the Court to issue an anti-suit injunction, without first allowing the foreign court to consider whether it would stay its own jurisdiction, even in cases where the proceedings were a clear breach of contract.

The jurisdiction to stay foreign proceedings, brought in breach of a contract only to sue in a particular forum or to arbitrate in the forum, has been recognised since at least the decision of the English Court of Appeal in Pena Copper Mines v Rio Tinto, where their Lordships made it abundantly clear, and in robust terms, that they had no difficulty in issuing an injunction to stop proceedings in Spain, in a case where both parties had contracted to submit to English arbitration. 'It is beyond doubt that this court has jurisdiction to restrain the Rio Tinto Company from commencing or continuing proceedings in a foreign country if those proceedings are in breach of contract.' Farrell LJ referred to Carron Iron Co v Maclaren as being decisive as to the jurisdiction to restrain actions in foreign courts. Since the Pena Copper Mines decision in 1911 English courts have repeatedly stressed that the discretion to grant an injunction to stay foreign proceedings should be used sparingly and with regard to judicial comity and non-interference with the processes of foreign courts. It need hardly be said that this has not stopped them doing so.
In the Angelic Grace the English Court of Appeal went even further and cast aside what has been referred to as this ‘ritual incantation’, with respect to arbitration and exclusive jurisdiction cases at any rate, in clear cases of ‘breach of promise’. In doing so, the Court gave primacy to the principle of *pacta sunt servanda*, a view summed up in the words of Lord Justice Millett who said that, ‘there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple grounds that the defendant has promised not to bring them.’

6.2 The Angelic Grace: the paradigm case

The Angelic Grace concerned a charter party to carry grain from Rio Grande to Italian ports. The owners were Panamanian, the charterers Italian. The contract contained a clause referring disputes to arbitration in London. A dispute arose after a collision that occurred during a storm when the ship was unloading grain at Chioggia (near Venice), and the Italian charterers began proceedings in the Court of Venice, in clear breach of the arbitration clause. The Panamanian owners brought proceedings in England seeking an anti-suit injunction to stay the Italian action.

In seeking to stay the English proceedings, counsel for the Italian charterers argued that foreign courts, particularly those which are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’), are obliged by that Convention, if there is a dispute pursuant to its terms, to stay proceedings brought by a party in breach of an agreement to refer disputes to arbitration. That being so, the resolution of the matter should be left to the Italian Court; that English Courts should trust the Italian Court not to interfere; that any purported attempt to halt those proceedings by a foreign court was unnecessary and an

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38 The words were used by Millett LJ in the Angelic Grace (1995) 1 Lloyds Rep 87, 96. Such clarion calls are not confined to English courts. The US Court of Appeal, in *Kaepa Inc v Achilles Corporation* 76 F3d 624, 627 (1996), said, ‘We decline ... to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action’.

39 Ibid.

40 Adopted at New York on 10 June 1958. The Convention has been implemented in Australia by the International Arbitration Act 1974 (C’th).
unwarranted interference in the other jurisdiction and would offend principles of judicial comity. It was for just such reasons that a line of English cases has emphasised, at least ostensibly, that the jurisdiction to grant an injunction should be used ‘sparingly’. It does of course beg the question why the charterers commenced action in Italy in the first place. That aside there is clearly an argument for the proposition that the validity of the arbitration clause should be determined by the court whose jurisdiction is invoked apparently in breach of it, along the lines of the reasoning of the Supreme Court of Canada in *Amchem*, and that the ‘home’ court should trust the foreign court to ‘do the right thing’. This argument will be revisited below in relation to more recent decisions of the English Court of Appeal that have started a possible retreat from the *Angelic Grace* to a position arguably more consistent with principles of comity. Unfortunately this ‘retreat’ is neither consistent nor unanimous and arguably confined to cases where obligations, such as those under the New York Convention, may be said to govern jurisdiction.

Leggatt and Millett LJJ both dismissed the need for caution in the circumstances.\(^{41}\) Leggatt LJ said that, ‘the exercise of caution does not involve that the Court refrain from taking the action sought, but merely that it does not do so except with circumspection.’\(^{42}\) Millett LJ said that there is certainly need for caution when issuing an injunction in matters of *forum non conveniens* or on the ‘general ground that the foreign proceedings are vexatious and oppressive’.\(^{43}\) But, as noted above, he said that when a party has promised not to bring proceedings there is ‘no good reason for diffidence’ in seeking to hold the party to his promise.\(^{44}\) His Lordship emphasised that the injunction, ‘...is not granted for fear that the foreign Court may wrongly assume jurisdiction but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to the Court at all’.\(^{45}\)

As to considerations of judicial comity, Millett LJ said that he could not accept ‘the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised *not* to invoke and which it

\(^{41}\) Lord Justice Neill agreed with their reasoning.
\(^{42}\) *The Angelic Grace* [1995] 1 Lloyds Rep 87, 92.
\(^{43}\) Ibid 96.
\(^{44}\) Ibid.
\(^{45}\) Ibid.
was its own duty to decline.\footnote{46} Leggatt LJ stated that the law is not normally an ass and that comity does not require it to behave like one.\footnote{47} Their Lordships’ reasoning was to the effect that the Italian Court would hardly be offended by an English Court putting a halt to parties who were simply trying their luck by instituting duplicate proceedings in their own jurisdiction, in a situation where the charter was governed by English law, according to English law the arbitration clause extended to claims in tort and proceedings in the foreign court were in breach of the contract. If an English Court could dispose of the proceedings more quickly and at less cost than proceedings not yet commenced in Venice then, under the Convention, it was open to them to do so. This issue of timing will be discussed further below. In the Angelic Grace, Leggatt LJ referred to a number of complications which the granting of an injunction would avoid, including the risk to the owners of a binding judgment on the merits in Italy - which would render their rights to arbitration nugatory. His Lordship pointed out that if, as was possible, the Italian Court did decline jurisdiction, then the proceedings in that country would have been a waste of time and money.\footnote{48} If, however, the Italian Court did accept jurisdiction, then any injunction would be in direct conflict with that assumption and there would also be two proceedings instead of the one envisaged by the contract.\footnote{49} Further, there would be the question of whether an Italian judgment would be recognised or enforced in the United Kingdom,\footnote{50} and in addition, the situation (envisaged in Tracomin) where an arbitrator’s award might possibly conflict with that of the Court - the ‘unseemly situation’ of a trade arbitrator deciding whether a decision of a court is right or wrong.\footnote{51}

Leggatt LJ referred to the decision of Rix J at first instance, where he said that, ‘No evidence has been put before me of any argument or interest under Italian law why an Italian Court would do other than stay the proceedings under the mandatory provisions of the New York Convention. [They have] not even raised a scintilla of an argument as to why their rights in Italy should be any different.’\footnote{52} Rix J concluded that for the

\footnote{46} Ibid.
\footnote{47} Ibid.
\footnote{48} Ibid 94.
\footnote{49} Ibid.
\footnote{50} Ibid 95.
\footnote{51} Ibid 94.
\footnote{52} Ibid 92.
charterers to push on in Italy would have been vexatious. In upholding this finding, in an apparently ground-breaking interpretation of the Convention, Leggatt LJ said that the provisions of the Convention do not confer exclusive jurisdiction on the Courts of the Contracting State in which proceedings are first brought; and it is consonant with the Convention that the Courts of another Contracting State should make an order procuring the same result. His Lordship pointed out that Article II, para 3 of the Convention makes it mandatory for a Contracting State Court to refer a matter to arbitration, where the parties have agreed to do so.

The reasoning of Millett and Leggatt LJJ evaded the issue, however. If it was the duty of the Italian Court to decline jurisdiction, then they ought to have trusted it to do so. Acting first makes it appear that, in fact, the English Court did not trust the Italian Court, a circumstance that would surely offend comity in the eyes of that Court. Italy is a signatory to the New York Convention. Why would their courts do otherwise than comply with its terms?

Colman J, in Societe Cargill, in dicta, took this point further than Leggatt LJ. He referred to argument by counsel, to the effect that the Convention obliges a Court to injunct proceedings brought in breach of an agreement to arbitrate; that there is no discretion. His Honour said that matters such as forum non conveniens or the risk of inconsistent decisions are entirely extraneous to the regime created by the Convention and he would therefore treat them as having little weight. Colman J noted that the foreign (French) courts were obliged, as signatories to the Convention, to stay the proceedings. But in what can only be called a display of chauvinism, that any risk that they would not should be avoided,

[P]articularly in view of the fact that a judgment of the French Court on jurisdiction or the merits might well be enforceable in another Convention country. Accordingly, countervailing considerations of very great weight must be shown if an injunction is not to be granted to give effect to the plaintiff's rights under the contract.

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53 Ibid.
54 Ibid 94.
55 Ibid.
57 Ibid 110.
58 Ibid.
59 Ibid 111.
No doubt seeking to cover all possibilities, the owners in the *Angelic Grace* also sought a stay in Italy - but the Court of Appeal obviously considered that they should not have been put to that trouble and expense. Colman J’s reasoning was possibly in accord with the Convention, although this must be doubted. His reasoning was certainly in accord with the decision in the *Angelic Grace*, however.

Mr Justice Colman’s reasoning was not disputed by the Court of Appeal, which held that he did not err in principle in this respect. However, the Court of Appeal, in a unanimous judgment (Staughton, Phillips and Robert Walker LJJ), made plain their antipathy to the decision of their brethren in the *Angelic Grace* and commenced a possible retreat in this respect. They said:

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art II.3 requires the Court of a Contracting State to refer the parties to arbitration when an action is commenced in disregard of a binding arbitration clause. It might be thought that there would be much to be said, both as a matter of comity and in the interests of procedural simplicity, if a defendant who was improperly sued in disregard of an arbitration agreement in the Court of a country subject to the New York Convention were left to seek a stay of proceedings in the Court in question. It seems, however, that litigants in cases governed by English arbitration clauses are not prepared to trust foreign Courts to stay proceedings in accordance with the New York Convention. For it has become the habit to seek anti-suit injunctions such as that sought in the present case. In the *Angelic Grace*, the Court of Appeal gave its approval to this practice.

And, tellingly, ‘we would not wish it to be thought that we have independently endorsed these sentiments.’ And, ‘The point will be open to argument in a higher tribunal’. This last was a reference to the fact that the Court had referred a number of questions to the European Court of Justice for resolution. Plainly this Court of Appeal did not agree with the decision in the *Angelic Grace*.

One commentator has observed that,

Further developments, however, suggest that the downgrading of comity as a relevant factor in breach of contract cases needs reconsideration. First, contrary to Millett LJ’s stated expectation in the Angelic Grace, experience has shown that

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61 Ibid 386.
62 Ibid.
63 Ibid.
64 As the case was settled, the reference did not proceed.
some foreign courts do regard such injunctions as an interference, and even an infringement of national sovereignty. As a result a later Court of Appeal itself suggested a reconsideration of the new English practice. Secondly, the Court of Appeal in Toepfer v Cargill was plainly uncomfortable with The Angelic Grace and referred also to the 'widespread controversy' provoked by Continental Bank v Aeakos. Although accepting that it was bound by the earlier cases, it pointedly refrained from endorsing their approach, stating that the point was open to a higher court. Thirdly it has been suggested that the approach of Continental Bank and the Angelic Grace is inconsistent with the scheme of the Brussels Convention.

As has been discussed, the jurisdiction is said to act in personam against the party attempting to bring the foreign legal proceedings and is not directed to the foreign court. This argument or principle - or excuse - has been continually re-emphasised since the earliest cases, and later by Atkin LJ who said in Ellerman Lines Ltd v Read.

The principle upon which an English Court acts in granting injunctions is not that it seeks to assume jurisdiction over the foreign Court, or that it arrogates to itself some superiority which entitles it to dictate to the foreign Court, or that it seeks to criticise the foreign Court or its procedure; the English Court has regard to the personal attitude of the person who has obtained the foreign judgment. If the English Court finds that a person subject to its jurisdiction has committed a breach of covenant or has acted in breach of some fiduciary duty or has in any way violated the principles of equity and conscience, and that it would be inequitable on his part to seek to enforce a judgment obtained in breach of such obligations, it will restrain him, not by issuing an edict to the foreign Court, but by saying that he is in conscience bound not to enforce that judgment.

The principle was restated by the Judicial Committee of the Privy Council in its definitive statement on the law regarding anti-suit injunctions, in Aerospatiale. Despite these statements, as Rhidian Thomas notes, 'the indirect or consequential effect of the grant of an anti-suit injunction is to interfere with the functioning of a

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66 Philip Alexander Securities & Futures Ltd v Bamberger (Unreported, Court of Appeal, 12 July 1996).
67 [1994] 1 WLR 588. The 'widespread controversy' refers to the issue of whether such exclusive jurisdiction clauses override the articles of the Brussels Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters, as held by the Court of Appeal in Continental Bank.
68 See, for example, Bushby v Munday (1821) Madd 307, where Leach V-C said: 'Where parties Defendants are resident in England, and brought by subpoena here, this Court has full authority to act upon them personally with respect to the subject of the suit, as the ends of justice require; and with that view, to order them to take, or to omit to take any steps and proceedings in any other Court of Justice, whether in this country, or in a foreign country.'
69 [1928] AC 144.
70 Ibid 155. See also Scrutton LJ at 151.
foreign court. It may readily be so perceived by the foreign forum itself. Indeed, it is surprising that none of their Lordships, in the Angelic Grace, nor apparently counsel for the charterers, referred to the cautionary words of Neill LJ in Marc Rich & Co AG v Societa Italiana Impianti P.A.73 (The Atlantic Emperor). His Lordship quoted from the judgment of Hobhouse J, at first instance, who said,

These words of caution are ... even more imperative where ... the foreign jurisdiction is one which the British Government has by treaty undertaken to recognise and where the jurisdiction assumed by the foreign Court is one which under that treaty the foreign Court is entitled to assume. It is of course true ... that the injunction only enjoins the litigant and does not affect the foreign Court as such. But it does affect the foreign Court indirectly and has as its subject matter acts which are going to be done within the territorial jurisdiction of that Court and relate to its procedure. Whatever the niceties, such injunctions are justifiably seen by the foreign Court as an interference with its exercise of its legitimate jurisdiction.

Stronger language was used by Judge Green of the US District Court in Laker Airways v Pan American World Airways:74

The British Court appears to have rationalised its action on the ground that its injunctions operate only on the plaintiff, not this Court. At least in this country, as the Supreme Court held over a century ago, there is no difference between addressing an injunction to the parties and addressing it to the foreign Court itself. Mr Justice Parker has also stated that the type of injunction he issued "does not represent an interference by one court with the proceedings of another." With utmost respect, this Court must differ. It can hardly be said that an order which, for example, directs a party not to file further papers in the Court ... is anything other than a direct interference with the proceedings of this Court.75

The Canadian Supreme Court has also held that, whatever the language, anti-suit injunctions do interfere with foreign courts.76 Likewise the High Court of Australia in Cigna.77

The English Court of Appeal, in the Angelic Grace, however, referred to other cautionary decisions, notably that in Mike Trading & Transport Lid v R Payman & Fratelli (The Lisboa),78 and it is quite clear from their judgment they were more than disposed to find that caution has its limits, at least in clear cases which concern the

74 559 F.Supp 1124 (DCDC, 1983).
75 Ibid 1128.
76 Amchem Products Inc v Workers’ Compensation Board [1993] 1 SCR 897.
upholding of bargains. In the *Angelic Grace*, the English Court of Appeal nailed its flag to the masthead in no uncertain terms, effectively dismissing considerations of international comity as a concern.

Before moving to a consideration of the boundaries that define what might seem to be the extensive reach of English courts following the *Angelic Grace*, it is appropriate to note that the cases discussed in this chapter all concern instances in which litigation was undertaken abroad in the face of agreements that called for arbitration in England. In matters that called for arbitration outside of England, it might be thought that the Courts would have no jurisdiction to interfere. However the decision of the House of Lords in the *Channel Tunnel Case*\(^79\) indicates that the reach of English Courts may not be so confined. Lord Mustill stated, in that case, that the principle that is derived from the *Siskina*\(^80\) line of cases (*Siskina*, *Castanho*\(^81\) and *Laker*\(^82\) 'put at its highest', is

That the right to an interlocutory injunction cannot exist in isolation, but is always incidental to or dependent on the enforcement of a substantive right, which usually, although not invariably, takes the shape of a cause of action. If the underlying right itself is not subject to the jurisdiction of the English Court, then the Court should never exercise its power under s37(1) [of the Supreme Court Act 1981] by way of interim relief.\(^83\)

His Lordship then stated that, if this was a correct appreciation of the doctrine, it did not apply in the instant case even though in cases where the seat of jurisdiction is abroad, the source of jurisdiction of the English court is cut off, 'because the court may have jurisdiction in some other way'.\(^84\) And that therefore the additional foreign element 'should not make any difference to the residual jurisdiction of the court over the dispute, and hence to the existence of the power to grant an injunction in support'.\(^85\) On the facts of the case, Lord Mustill considered that, although the commencement of the action (seeking an injunction to prevent work on the Channel Tunnel being halted) was a breach of an agreement to arbitrate in Belgium and that in fact, since the respondents were not 'properly' before the English Court, the Court nevertheless had power to issue an injunction sought in support of the arbitration, in the same way as

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\(^79\) *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.
\(^82\) *British Airways Board v Laker Airways Ltd* [1985] AC 58.
\(^83\) *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 363.
\(^84\) Ibid.
the issue of an order to stay proceedings brought in breach of that agreement to arbitrate. In the *Channel Tunnel* case, however, it was not thought appropriate to exercise the discretion in favour of granting the injunction. Lord Mustill justified his decision in the following terms:

There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail. The court has stayed the action so that the panel and the arbitrators can decide whether to order a final mandatory injunction. If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide.  

6.3 Boundaries of the paradigm

Not all cases are clear, straightforward matters of breach of a bargain. There are many with more complex fact situations that call for further consideration as to the exercise of the jurisdiction. A preliminary matter for decision in the *Angelic Grace* was whether the claims made were in fact within the arbitration clause. In that case, the issue was a claim in tort arising from the collision between the two vessels at Chioggia. Leggatt LJ held that the 'collision claims' were disputes which were within the arbitration clause. The discharging operation at Chioggia which gave rise to the claims was an integral part of the contractual adventure. Leggatt LJ followed the decision of the Court of Appeal in the *Playa Larga*, to the effect that a tortious claim does 'arise out of' a contract containing an arbitration clause if there is a sufficiently close connection between the tortious claim and a claim under the contract. His Lordship said that,

In order that there should be a sufficiently close connection ... the claimant must show either that the resolution of the contractual issue is necessary for a decision on the tortious claim, or, that the contractual and tortious disputes are so closely

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85 Ibid.
86 Ibid 367-368.
88 Ibid.
knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other.\textsuperscript{90}

\textit{a) 'Distance travelled' by the foreign court}

An important aspect of the Court of Appeal's willingness to grant an injunction to halt the foreign proceedings in the \textit{Angelic Grace}, was the fact that those proceedings had not yet commenced. Their Lordship's decision was, in that sense, clearly distinguished from that of Lloyd J in \textit{The Golden Ann}.\textsuperscript{91} In that case, proceedings in the United States District Court in Florida were far advanced and intervention at that late stage would have clearly been unwarranted and against comity. Lloyd J recognised that any injunction by him would stay the Florida proceedings and clearly usurp the function of that Court. This was also the case in \textit{The Eastern Trader},\textsuperscript{92} where the parties sought an injunction after an Algerian tribunal had delivered judgment. Rix J said that, 'For an English Court to injunct a party from reliance on its foreign judgment is a far greater interference in the judicial process than occurred in the \textit{Angelic Grace}, where the foreign proceedings were only in their infancy.'\textsuperscript{93} His Honour held that it was for the courts of countries where enforcement of judgment was sought to determine whether or not to do so according to the law of their respective jurisdictions.

In \textit{Toepfer},\textsuperscript{94} the defendants sought to stay proceedings which had continued for some years - relying on the \textit{Angelic Grace} for support. Mance J said however that, '...it has never been the law that a foreign defendant could with impunity allow foreign proceedings to continue practically to judgment and then seek at the last minute relief in England which would halt or undermine them'.\textsuperscript{95} His Honour referred to the judgment of Millett LJ in the \textit{Angelic Grace} who clearly qualified his statement about diffidence in granting an injunction when he said, 'provided it is sought promptly and

\textsuperscript{91} [1984] 2 Lloyds Rep 489.
\textsuperscript{92} [1996] 2 Lloyds Rep 585.
\textsuperscript{93} Ibid 603.
\textsuperscript{94} [1996] 1 Lloyds Rep 510.
\textsuperscript{95} Ibid 516.
before the foreign proceedings are too far advanced. 96 The Golden Ann was also
distinguished in Societe Cargill,97 where French proceedings had not advanced beyond
jurisdictional issues. Colman J said that to refuse an injunction would be entirely
inconsistent with the approach of discretion of the Court of Appeal in the Angelic
Grace.98

In Akai v PIC,99 in the English Commercial Court, discussed further below, Thomas J
referred to these decisions, noting that, 'The longer the delay that occurs before the
application is made, the more likely a Court is to refuse it.' Despite these remarks and
although there had been considerable delay occasioned by PIC first applying to the
Courts of Singapore for relief, Thomas J considered that the delay was not a
sufficiently strong reason for refusing injunctive relief in that case. That it was
preferable to allow the anti-suit injunction but compensate Akai by way of an
indemnity against all the expenses incurred in the Singapore action.

And in Donohoe v Armco Inc,100 Brooke LJ said, 'The applicants for an anti-suit
injunction based on their rights under an English exclusive jurisdiction clause, should
apply promptly for the relief they seek. An injunction is an equitable remedy, and
equity has never come to the assistance of those who sleep on their rights.'101 In that
case there was held to be reasonable excuse for the delay despite the New York
proceedings being well advanced.

b) Submission to the foreign court

In The Atlantic Emperor,102 the Court of Appeal refused to grant an injunction to halt
proceedings before the Court of Genoa because counsel for the Marc Rich Corporation
had ‘submitted’ to the jurisdiction of the Italian Court. The Court of Appeal made an
important distinction between proceedings commenced in a foreign court to challenge
the jurisdiction - which would not have the effect of a submission, and further

98 [bid 109.
100 (Unreported, Court of Appeal, 29 March 2000).
101 Ibid para 63.
submissions, 'dealing with the merits of the claim', which would. Neill LJ held that there was a 'plain and unequivocal' submission to the jurisdiction of the Italian Court.\textsuperscript{103} Once submission to the foreign jurisdiction has taken place, this is taken to cover the whole proceedings and rules out any challenge to their validity or competence.

An interesting point about the nature of 'submission' was considered in \textit{The Eastern Trader}.\textsuperscript{104} The plaintiff had lodged a counterclaim in the Algerian Tribunal of Anaba, where the defendant had commenced proceedings in alleged breach of the arbitration clause (which called for arbitration in London). Under English law, filing of a counterclaim is taken as clear evidence of submission to the jurisdiction. Under Algerian procedure, however, there is no procedure for contest of the jurisdiction \textit{simpliciter}. Argument to contest the jurisdiction in Algeria has to be made along with other submissions including counterclaims.\textsuperscript{105} Rix J followed \textit{The Atlantic Emperor}, where the Court of Appeal held that if 'the defendant makes it clear in his first defence that he is contesting the jurisdiction that will not amount to a submission even though there is some additional material which constitutes a plea the merits of the case.'\textsuperscript{106} His Honour, in finding that the plaintiff had not submitted to the jurisdiction of the Algerian tribunal, also followed the decision of Scott J in \textit{Adams v Cape Industries plc},\textsuperscript{107} who held that if the foreign court, applying its domestic law would not regard certain steps as a submission to the jurisdiction, neither should they be so taken by an English court.

c) \textit{Error or negligence}

In \textit{Tracomin},\textsuperscript{108} at first instance, Leggatt J (as his Honour was) declined to exercise his jurisdiction in favour of granting an injunction. He did so because of the negligence or mishandling by the Sudanese sellers in \textit{not alerting the Swiss Courts to the fact that English law governed the contract. The Court of Appeal, however, said that in doing so Leggatt J had made an error of principle and that the negligence of the sellers did not

\textsuperscript{103} Ibid 633.
\textsuperscript{104} [1996] 2 Lloyds Rep 585.
\textsuperscript{105} Ibid 598.
\textsuperscript{106} Ibid 601.
\textsuperscript{107} [1990] Ch 433.
‘cancel out’ the blameworthiness of the Swiss buyers in seeking to deny their own covenant to arbitrate. In the opinion of Sir John Donaldson MR, this action caused the scales to drop very heavily against the sellers. The Master of the Rolls made it clear that breaking one’s word is something that will not be countenanced by English courts and that this was the major factor in swaying the discretion in favour of granting the injunction.

In *Tracomin*, the Court of Appeal granted an injunction, but made it conditional upon payment by the sellers of the cost of the Swiss proceedings beyond first instance. Without their negligence those further proceedings would not have taken place. A similar course was adopted by Thomas J in *Akai v PIC*.\(^\text{109}\) He granted an anti-suit injunction to halt the New South Wales proceedings, but gave Akai an indemnity against the cost of the proceedings which, he held, had been wrongly brought in Singapore.

d) ‘Strong cause’ or ‘good reason’

The *Angelic Grace* has been followed in a number of decisions including *Svendbord v Wansa Estonian Shipping Co*,\(^\text{110}\) *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpin Interlending GmbH* (*DVA*),\(^\text{111}\) *Alfred C Toepfer International GmbH v Molino Boschi Srl*\(^\text{112}\) (*Toepfer*), where Mance J said that it had put a ‘new slant on the exercise of the jurisdiction to enjoin foreign proceedings’,\(^\text{113}\) and in *Ultisolv v Bouygues*.\(^\text{114}\) In the last-mentioned case Clarke J noted that in his concluding words in the *Angelic Grace*, Millett LJ said that, ‘good reason needs to be shown why [the jurisdiction to grant an injunction] should not be exercised.’\(^\text{115}\) In *Donohue v Armco*,\(^\text{116}\) the Court of Appeal indicated that the correct language should be ‘strong cause’ or ‘strong reason’.\(^\text{117}\)

\(^{111}\) [1997] 1 Lloyds Rep 179.
\(^{113}\) Ibid 516.
\(^{114}\) [1996] 2 Lloyds Rep 140.
\(^{117}\) Ibid 589 per Stuart-Smith LJ.
It was noted, in *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* ('*Credit Suisse*'), by Rix J in the English Commercial Court, that the Angelic Grace was a very straightforward case, with the facts ‘all one way’. And that, ‘One will therefore look in vain in the Angelic Grace for guidance in more difficult cases where ‘good reason’ is advanced in argument as to why the court’s discretion should be exercised differently from the prima facie rule’. In *Ultisol v Bouygues*, Clarke J said that the test of good reason is the same test applied where a stay of English proceedings is sought on the grounds of a foreign exclusive jurisdiction clause. The party in breach must show ‘good reason’ or ‘strong cause’ why it should not be held to its agreement because of the prima facie desirability of holding the parties to their agreement.

The terms ‘strong cause’ or ‘strong reason’, and sometimes, although incorrectly, ‘good reason’ are used interchangeably in the cases. In *The Ferhman*, Willmer J said: ‘Clearly it requires a strong case to satisfy the court that the agreement [an express agreement to submit to a foreign tribunal] should be overridden.’ In *Unterweser Reederei GmbH v Zapata Off-Shore Company (The ‘Chaparral’)*, Diplock LJ used the expression ‘very strong reasons’ and Widgery LJ said it required ‘strong grounds’. And in Australia, although from a minority, dissenting judgment of the High Court:

Even though there is a ‘strong bias in favour of maintaining the special bargain’ where there is a submission to the exclusive jurisdiction of the courts of another country, the courts of this country nevertheless retain a discretion to refuse a stay of proceedings if sufficient cause is shown.

In *Ultisol v Bouygues*, Clarke J followed the authoritative test developed by Lord Justice Brandon in *The Eletheria* (and confirmed by him in *The El Amria*). The

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119 Ibid 780.
120 Ibid.
121 [1996] 2 Lloyds Rep 140.
122 [1957] 1 Lloyds Rep 511.
123 Ibid 514.
125 Ibid.
126 Ibid 164.
test provides that the following matters, where they arise, may properly be regarded
(subject to the burden of proving strong cause being on the party in breach):

a) In what country the evidence on the issues of fact is situated, or more readily
available, and the effect of that on the relative convenience and expense of trial as
between the English and foreign Courts.

b) Whether the law of the foreign Court applies and, if so, whether it differs from
English law in any material respects.

c) With what country either party is connected and how closely.

d) Whether the defendants genuinely desire trial in the foreign country, or are only
seeking procedural advantages.

e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court
because they would: (i) be deprived of security for their claim; (ii) be unable to
enforce any judgment obtained; (iii) be faced with a time-bar not applicable in
England; or (iv) for political, racial, religious or other reasons be unlikely to get a
fair trial.

It must be noted that Brandon LJ went on to consider a number of circumstances which
might be relevant but emphasised that, 'the court should give full weight to the prima
facie desirability of holding the plaintiffs to their agreement' and should 'be careful not
just to pay lip service to the principle involved, and then fail to give effect to it because
of a mere balance of convenience.' The issue was considered anew by the English
Court of Appeal in Donohoe v Armco:

36. We have been referred to a number of cases where different factors have been
considered. I do not think one can derive much assistance from them since they
tend to turn on their own particular facts. But some principles can be discovered.
First, many factors which may have an important bearing on an alternative forum
case will be of little or no weight, because they are either irrelevant or the parties

127 [1970] P 94, 103
128 (Unreported, Court of Appeal, 29 March 2000).
must be deemed to have taken them into account where they have deliberately chosen a forum. Thus little or no weight should be paid to the convenience or availability of witnesses (except possibly in an extreme case like The El Amria where one of the considerations was the presence of all the experts on both sides), the availability of documents, the fact that the party sought to be restrained may have a juridical advantage in the other jurisdiction...

39. There are however considerations which are potentially of greater weight. If there are independent third parties, not bound by the EJC, involved in litigation elsewhere than the chosen forum in respect of the same subject matter, this may be a sufficiently strong reason. Examples of this are to be found in The El Amria and Bouygues Offshore SA v Caspian Shipping Co [1998] 2 Lloyd's Rep 461. In the former case Brandon LJ gave as the second of his reasons for finding that there was strong cause not to give effect to the EJC:

...the fact that the plaintiffs have on foot, as a consequence of the defendants' own allegations, their parallel action against the Mersey Docks & Harbour Co., and that it is essential, in order to avoid the risk of different decisions on the same issues by Courts in two different countries, that the two actions should be tried together.”

Strong reason for not holding the parties to their bargain was advanced and accepted by the High Court of Australia in *Akai v PIC*. The majority (Toohey, Gaudron and Gummow JJ) considered a contract with English exclusive jurisdiction and choice of law clauses, which had been agreed by the parties, but refused to stay the New South Wales proceedings that had been brought in breach of it. The relevant contract had been entered into in New South Wales between an Australian company and a Singapore company. Both had settled on English law to govern the contract, as being that of a third, neutral, forum. The High Court majority refused the stay because there was an overriding Australian public policy manifested in the Insurance Contracts Act 1984 (C'th). That Act contained certain remedial provisions which would probably not be applied in England but which likely would be if the dispute was tried in New South Wales.

The majority said that, “A stay may be refused where the foreign jurisdiction clause offends the public policy of the forum whether evinced by statute or declared by judicial decision”. They cited as authority decisions of the High Court, the United

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133 Ibid paras 36-39, per Stuart-Smith LJ.
134 (1996) 188 CLR 418.
States Supreme Court,\textsuperscript{137} the House of Lords\textsuperscript{138} and the Federal Court of Canada,\textsuperscript{139} where stays had been refused, despite exclusive jurisdiction clauses providing for litigation in other forums because to do so would be to evade the public policy of the local forum as expressed by the statute.

They also held that considerations of public policy were not limited to statute:

\begin{quote}
[Considerations of public policy present in an Australian court may follow from, even if not expressly mandated by the terms of, the Constitution or statute in force in the Australian forum. Thus, the courts may disregard or refuse effect to contractual obligations which, while not directly contrary to any express or implied statutory prohibitions, nevertheless contravene 'the policy of the law' as discerned from a consideration of the scope and purpose of the particular statute.\textsuperscript{140}
\end{quote}

The majority held that:

The present application is to be dealt with on the footing that an English court would not apply the Act as part of the lex causae. The grant of a stay would involve the State court so exercising its discretion as to stay its process in favour of an action in a court where the statute would not be enforced. This stay would be granted on the basis that in so doing a contractual obligation would be implemented. But the policy of the Act ... is against the use of private engagements to circumvent its remedial provisions. To grant a stay in the present case would be to prefer the private engagement to the binding effect upon the state court of the law of the parliament. This indicates a strong reason against the exercise of the discretion in favour of a stay. The policy of the law and the Constitution militates against a stay.\textsuperscript{141}

The matter did not end there, however. PIC brought proceedings in London against Akai,\textsuperscript{142} and sought an anti-suit injunction to halt the New South Wales proceedings, which had continued after the High Court of Australia refused a stay. Akai sought a stay of the English proceedings. Mr Justice Thomas, in the English Commercial Court, refused to stay the English proceedings and granted an anti-suit injunction to halt those under way in New South Wales. He held that comity did not require him to override the effect of the bargain freely made between the parties, who had selected English law as the governing law of the contract, and the Courts of England, and give effect to the

\textsuperscript{137} The Bremen\textsuperscript{v} Zapata Off-Shore Co 407 US 1, 12-14 (1972).

\textsuperscript{138} The Hollandia [1983] 1 AC 565.

\textsuperscript{139} Agro Co of Canada Ltd\textsuperscript{v} The 'Regal Scout' (1983) 148 DLR (3d) 412.

\textsuperscript{140} Akai\textsuperscript{v} PIC (1996) 188 CLR 418, 447.

\textsuperscript{141} Ibid. In their minority dissenting judgment, Dawson and McHugh JJ disagreed with the majority about the effect of the Insurance Contracts Act, holding that it did not preclude exclusive jurisdiction clauses. They would have held the parties to their bargain to litigate in England.
decision of the High Court of Australia which had overridden that bargain and that choice. He found that the High Court decision and its consideration of the forum selection clause was of no account because the Australian courts had not applied principles relating to jurisdiction akin to those that would be applied by English courts. Although he held that Australian courts generally did apply such principles, they had not done so in the instant case because of the 'mandatory requirements of Australian legislation affecting the substantive rights of the parties.'

J's reasoning was based largely on earlier English decisions to the effect that the court should ascertain what was the bargain of the parties and give effect to that bargain barred by a provision of foreign law that bound the Court. He found, and the High Court acknowledged, that the Australian legislation did not have extraterritorial effect. Although Thomas J acknowledged that the High Court had formulated its decision based at least in part on English authority with respect to overriding public policy (The Hollandia), that was not, he held, a material consideration. Mr Justice Thomas concluded that:

"It is clear that the parties to the insurance policy bargained for English law. This Court should therefore give effect to that intention, unless it would be contrary to English public policy (which includes international public policy) to give effect to the enforcement of the jurisdiction clause which is otherwise valid."

In this case, however, the Court is concerned with the enforceability of the parties' freely chosen choice of law and jurisdiction in a credit insurance policy. In contracts of this kind between commercial enterprises, there is no equivalent restriction in English law or Community law on the parties' choice of law. In my judgment therefore this Court should give effect to the bargain of the parties and their freely negotiated choice of law and jurisdiction. It should not, as a matter of comity, give effect to the decision of the High Court that overrode that bargain and that choice.

In formulating his decision Thomas J passed over the fact that the contract had been entered into in New South Wales between an Australian company and a Singapore
insurer, that it wholly concerned insurance in Australia and New Zealand and gave 
primacy to upholding the bargain of the parties for English law. He could have given 
weight to the fact that there was no English connection with the matter except that the 
parties had chosen English law to govern any dispute. Australian public policy, a 
matter prescribed by the law of a sovereign nation, specifically to prevent private 
parties making such bargains, could have been allowed to determine the outcome of a 
matter that concerned the insurance coverage of an Australian company, despite the 
lack of extraterritorial effect of that legislation. Thomas J could have respected the 
determination in this respect of Australia’s highest court and not issued an injunction 
to prevent matters proceeding in Australia.

In a more recent decision of the English Commercial Court, Cresswell J in Society of 
Lloyd’s v White,\textsuperscript{150} followed the reasoning of Thomas J in Akai v PIC. He issued an 
interim anti-suit injunction to halt proceedings underway in the Supreme Court of 
Victoria, where Byrne J had already refused a stay of proceedings applying the 
Australian approach, and in particular the Eleftheria principles in relation to strong 
reason, the authoritative English decision on the point.\textsuperscript{151} The English proceedings 
involved major and extensive commercial litigation in the well known Lloyd’s Names 
dispute. The Australian proceedings involved a third party who had made claims under 
Australian trade practices and securities legislation, not available in England, to attack 
the English forum selection clause. Bryne J found that strong cause had been shown 
for not upholding the agreement. The situation was therefore similar to Akai v PIC. 
The Victorian Court of Appeal upheld the decision of Byrne J and the High Court 
refused special leave to appeal. At that point Lloyds sought an anti-suit injunction in 
England.

Cresswell J found that no good reason had been provided for denying an anti-suit 
injunction and dismissed the effect of the Australian legislation as irrelevant. He took 
care to set out his concerns in regard to comity, but found that no infringement had 
taken place because the Australian legislation was regulatory and not ‘a principle of 
universally recognised positive law.’\textsuperscript{152} He took Byrne J to task for not applying

\textsuperscript{150} Queen’s Bench Division (Commercial Court) Unreported, 3 March 2000
\textsuperscript{151} Commonwealth Bank of Australia; Ex parte Lloyds, Unreported, [1999] VSC 262, Byrne J, 
29 July 1999.
\textsuperscript{152} Queen’s Bench (Commercial Court) Unreported, 3 March 2000.
numerous English authorities, however, unlike Thomas J, he did not specifically address the point whether this meant that Byrne J had not applied principles relating to jurisdiction similar to those applied by the English Court. In the light of Byrne J’s specific reference to the Eleftheria principles, this would have been a contentious point, although undoubtedly Cresswell J’s reasons were the same as those of Thomas J – that the effect of the Australian legislation made further consideration irrelevant.

When further proceedings were brought in the Victorian Supreme Court, before Warren J, she considered the effect of the English anti-suit injunction and although she ultimately granted a stay, it is clear from her judgment that she would not have done on that basis alone, if there had not been other compelling factors that persuaded her.

More recently still, the English Court of Appeal in Donohue v Armco affirmed the principles stated in both the Angelic Grace and by Thomas J in Akai v PIC. In Donohoe, in granting an anti-suit injunction to halt New York proceedings, brought in breach of an English exclusive jurisdiction clause, Lord Brooke said that the Angelic Grace was decided, ‘when this court was concerned to turn the tide of judicial non-intervention which tended to give greater primacy to the tender feelings of a foreign Court (where proceedings had been started in defiance of an exclusive jurisdiction clause) than to the bargain made by the parties.’ Stuart-Smith LJ adopted Mr Justice Thomas’s reasoning with respect to comity:

Finally I have taken into account the fact that in refusing to stay these proceedings, the effect may be that there is simultaneous litigation here and in New South Wales with the inevitable and undesirable consequences that follow. Although the Court will always lean against that, it is the consequences of Akai not abiding by a freely negotiated jurisdiction clause; it would not be just that they should be entitled to take advantage of their own breach of contract to achieve this result.

Although he came down on the side of granting the injunction, Sedley LJ was more equivocal. He quoted the remarks of Lord Justice Millett in Credit Suisse Fides Trust

\[154\] Ibid para 50.
\[156\] Ibid 595.
to the effect that, 'it is becoming increasingly widely accepted that comity between the Courts of different countries requires mutual respect for the territorial integrity of each other’s jurisdiction'. Lord Sedley added that, 'this remark serves in the present case only to highlight the dilemma: who should be deferring to whom'?

Others than Lord Sedley have apparently expressed qualms about the direction in which English jurisprudence is moving. In Credit Suisse, for example, Rix J pointed out that the Angelic Grace was a straightforward case and that, because the facts were so strongly in favour of issuing an injunction, the importance of comity was swamped. The remarks about the 'ritual incantation' of caution have had an unduly exaggerated effect in seeming to diminish the importance of comity in later cases. His Honour said,

In my judgment the Court of Appeal was not there saying that the question of comity was of little regard, but rather that in a straightforward case there was little mileage in a 'ritual incantation' of the doctrine of comity as supporting a general principle that the issue should always be left in the first instance to the foreign court whose jurisdiction was invoked in breach of the parties' agreement.

Rix J went on to say that, 'in other circumstances and in the light of new considerations that the question of comity may well require caution is illustrated for instance by what the Court of Appeal said in Philip Alexander Securities & Futures Ltd v Bamberger ('Bamberger'). He also referred to Lord Goff of Chieveley's speech to the House of Lords in Airbus as underlining the continuing importance of comity. It is apparent, however, that Lord Goff was not referring to 'bargain cases': 'I wish to stress however that, in attempting to formulate the principle, I shall not concern myself with those cases in which the choice of forum has been, direct or indirectly, the subject of a contract between the parties.'

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161 Ibid 780-781.
162 Ibid.
163 (Unreported, Court of Appeal, 12 July 1996).
165 Ibid 138.
Bamberger was a case involving agreements to arbitrate in England which were apparently breached by the German parties litigating in Germany. The English plaintiff obtained interim injunctions against each of the six respondents in England. They, however, ignored the injunctions and prosecuted five out of six of the cases to judgment in Germany. The German Courts rejected in each case a submission by the plaintiff that it had no jurisdiction and held that the arbitration agreements were invalid or inappropriate. The English Court of Appeal also held that the arbitration agreements were not enforceable and that therefore there was no breach. They went on to state that,

The practice of the courts in England to grant injunctions to restrain a defendant from prosecuting proceedings in another country may require reconsideration in the light of the facts of this case. The conventional view is that such an injunction operates in personam with the consequence that the English courts do not and never have regarded themselves as interfering with the exercise by the foreign court of its jurisdiction. In cases where the defendant lives or has assets of substance in England that view may have some reality for there is reason to think that the injunction may be enforced so as to prevent proceedings taken in breach of it from reaching the foreign court. But in cases in which the defendant does not live in England and does not have assets here the injunction is unlikely to be enforceable except by the foreign court recognizing and giving effect to the injunction or, where it refuses to do so, by this court refusing to recognise the order of the foreign court made without such recognition. In the present case the German courts regarded the injunctions as an infringement of their sovereignty and refused to permit them to be served in Germany....

In cases concerning the European Union what would best meet the predicament is a Directive defining the extent of the recognition which the orders of the courts of each Member State are entitled to receive from the courts of other Member States.  

In Mediterranean Shipping Co. SA v Atlantic Container Line AB, Clarke LJ, with whom the other members of the Court of Appeal agreed, declined to depart from the principles laid down in the Angelic Grace, but stated that the case was, ‘perhaps the high watermark of statements of principle which support the grant of an injunction to restrain breaches of exclusive jurisdiction or arbitration clauses.’ Clarke LJ noted further that,

In my judgment, when Millett LJ referred to ‘good reason’ he was referring to good reasons not to grant injunctive relief, that is, discretionary relief. No doubt what his Lordship said is an indication that the Court should tend to consider that relief should be granted unless the circumstances are unusual, and should look with care

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166 (Unreported, Court of Appeal, 12 July 1996).
167 (Unreported, Court of Appeal, December 3 1998)
at the reasons given for not granting relief. But that, in my judgment, is as far as it
goes.\textsuperscript{168}

The Court of Appeal declined to interfere with the Judge’s exercise of discretion not to
discharge the injunction. As Underhill and Valentin note, ‘the decision emphasised that
injunctive relief is always discretionary. It shows that, while the \textit{Angelic Grace}
remains good law (subject to any future review by the House of Lords), it should not
be read to have held that such relief is to be granted automatically in any case.\textsuperscript{169}

\section*{6.4 Summation}

The pendulum continues to swing, however. In \textit{Donohoe v Armco}, as noted, a more
recent and again differently constituted English Court of Appeal followed and
reaffirmed the \textit{Angelic Grace}. They also approved the decision of Thomas J in \textit{Akai v
PIC}.

In a recent article Stephen Males has suggested that the possible courses of action open
to a court which is asked to grant an injunction to halt proceedings brought in a foreign
court in breach of an agreement to arbitrate or an exclusive jurisdiction clause are: (1)
to grant an injunction before the foreign court has considered the question; (2) to leave
the matter entirely to the decision of the foreign court; or (3) to defer consideration of
an injunction until after the foreign court has considered the matter.\textsuperscript{170} There is of
course a fourth option: not to interfere but to deny recognition to the resulting
judgment on the ground of public policy. As noted in the extract from the judgment
above, this was suggested by the Court of Appeal in \textit{Bamberger}, although of course
there the question of faith and credit under the Brussels Convention would arise. It was
also a course of action adverted to by Brennan J (as he then was), in \textit{dicta} in the
\textit{Oceanic Sun}.\textsuperscript{171}

Males argues that the third course is inappropriate, except in exceptional situations. It
is the course argued for by the Canadian Supreme Court in \textit{Amchem}, and apparently
\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{168} Ibid.
\item \textsuperscript{169} D. Underhill \& B. Valentin, ‘Restraining foreign proceedings pursued in breach of an
\item \textsuperscript{170} S. Males, \textit{above n 65}, 549.
\item \textsuperscript{171} (1988) 165 CLR 197, 240.
\end{itemize}
\end{footnotesize}
rejected by the High Court in *Cigna* although this is by no means certain. In *Bouygues Offshore S.A. v Caspian Shipping Co (No.2)*, Morison J said, obiter, in words reminiscent of the *Amchem* approach, that had he been free to do so, he would have held that an application for a stay should normally first be made to the foreign court, in both oppression and breach of contract cases; that if anything that point had greater force when the complaint was that the foreign proceedings were oppressive; and that, before deciding that proceedings in a foreign court were oppressive, he would be assisted to receive the foreign court's views on this point. Males says that, 'the value of such assistance seems doubtful. If the foreign court concludes that its proceedings are oppressive, it will presumably terminate them itself. But if it does not, the scope for conflict foreseen by Leggatt LJ, will arise acutely.' The judgments of the Court of Appeal in *Bamberger* and *Societe Cargill* indicate that, at the least, there is disagreement and not a little disquiet in relation to the approach of English courts and that a modified *Amchem*-type approach may gain in favour.

In the *Angelic Grace*, counsel for the charterers argued that, if considerations of comity failed to sway the Court of Appeal from interfering before a determination by the Italian Court, then, in the alternative, that if the Italian Court made the 'wrong' decision (i.e. by not staying the action) that would be the appropriate time for an English court to intervene. Their Lordships rejected this argument. Leggatt LJ said that such a course of action would be patronising to the Italian Court; to accept their decisions if they opted for a stay but to issue an injunction in the event that they did not. The Court of Appeal said in the *Angelic Grace*, it will be 'patronising', 'invidious' and 'the reverse of comity' for the court to grant an injunction, directly conflicting with the decision of the foreign court, on the ground that the foreign court arrived at the wrong decision. Of course, as Males notes, other reasons might then make it too late for the home court later to consider grant of an injunction at all, 'for example if it is obliged to recognise the direction of the foreign court on the jurisdictional question in a Convention judgment.' It must also be pointed out that the anti-suit injunctions in both *Akai v PIC* and *Society of Lloyds v White* were not

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173 S.Males, above n 65, 549 fn30.
175 Ibid.
176 S.Males., above n 65, 549.
initiated until after the Australian Courts had decided against staying the actions in the local jurisdiction – although according to the English Courts they acted so because the Australian courts had not applied similar reasoning to English courts in so doing, basing their reasoning on requirements of Australian protective legislation instead.

In Akai v PIC, the Australian Court, or at least a majority of the High Court, were of the opinion that the policy of certain Commonwealth legislation required them to override the intentions of the parties entered into in breach of the intent of that legislation, and allow the action to go forward in New South Wales. And we have an English judge, bound by no such legislative intent, following the Court of Appeal in the Angelic Grace, and issuing an anti-suit injunction to hold the parties to their bargain of litigating in England, overriding the public policy of a sovereign nation in so doing, and holding that comity did not require him to do otherwise. The situation was repeated in Society of Lloyds v White.

Such cases are further illustration of the need to confine the anti-suit injunction within very strict limits. The requirements of Australian public policy ought to have constituted good or strong reason for allowing those Australian proceedings to continue. The words of Lord Sedley in Donohue v Armco, extracted above, as to who should be deferring to whom, highlight the difficulty these cases present. The continued recourse to anti-suit injunctions to halt concurrent litigation elsewhere, even when that litigation is specifically allowed by public policy and legislation in the foreign country (and where such legislation and public policy is not manifestly contrary to the public policy of the issuing forum177) does breach comity and is a situation that will only be resolved by means of an international convention, or by universal observance of principles such as those drafted by the International Law Association (i.e. the Leuven/London Principles).178

With respect to the situation in Australia, it is unclear from the decisions in Akai and Cigna that the High Court will follow the Angelic Grace, even in ‘clear’ cases of

178 The text of the Principles is included with discussion and explanatory notes in the report of Dr McLachlan to the International Law Association Conference (London 2000). Committee on International Civil and Commercial Litigation, Third Interim Report: Declining and Referring
breach of an agreement. In the context of declining to follow the approach of the Canadian Supreme Court in *Amchem*, and refusing to adopt a general rule that interlocutory anti-suit injunctions are not to be granted without the applicant having moved first for a stay or dismissal of the foreign proceedings, the High Court majority said that such a proposed general rule would not serve any purpose, 'where foreign proceedings clearly constitute conduct entitling the applicant to equitable relief; for example, where the proceedings are a clear breach of contract.'\(^{179}\) The Supreme Court’s view of comity insists that the foreign court be given the chance to ‘do the right thing’ first. *Amchem* was not an arbitration case nor even a matter of a ‘clear bargain’, but this view has certainly found its supporters. However, it would be a mistake to build too much on *dicta* of the High Court majority in a case where, because of their findings on the facts, they did not enter into a serious consideration of the issue. And it is hoped that if the matter does receive the attention of the Court that they will consider the cases decided since the *Angelie Grace* which indicate that this is, indeed, no simple matter.

Garnett has suggested that Australian courts *may* follow the *Angelie Grace*, 'at least in cases where the foreign proceedings have been brought in a country which is not a party to the New York Convention nor had adopted the Model Law and so a stay may be difficult to obtain.'\(^{180}\) There is certainly justification for this given the words of the majority in *Cigna*, referred to above, however, in the light of the more recent decisions of the English Court of Appeal, particularly those in *Societe Cargill and Bamberger*, and also in light of the House of Lords’ decision in *Airbus*, it is submitted that Australian courts will be more cautious in their application of the *Angelie Grace* principles and will certainly confine their application to very clear cases of breach of an agreement to arbitrate within the jurisdiction unless shown good reason why they should not do so.

It would be a mistake, however, to assume that Australian judges are not capable as being as chauvinistic as their English cousins (the decision of Rolfe J at first instance

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*Jurisdiction in International Litigation*. The text of the Principles is included as an annexure to this dissertation.

\(^{179}\) (1997) 189 CLR 345, 396.

in *Cigna* for instance). The only sure way to resolve this issue is by way of international convention that would determine allocation of jurisdiction. The Leuven/London Principles, referred to above, provide a model that confines the use of anti-suit injunctions to only those situations where the law of both fora concerned is manifestly breached. Observance of these principles would have made it impossible for anti-suit injunctions to be issued in most of the cases referred to above. Jurisdiction would have been determined by the Principles and through the agreement of the parties and courts concerned. This is surely a preferable solution to the situation as described above. The potential for adoption of such a solution will be discussed further in the next chapter.
Chapter 7.

Future hopes

The ultimate justification for according some degree of recognition is that if in our highly complex and international world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal processes of life would be disrupted.¹

In 1926 Herbert Barry wrote, 'None of us will see the Millennium, where all strife and war shall cease, and where all laws shall be just and equally enforced.'² We who have seen the Millennium know that Barry was wrong about the strife and war. However, he went on to point out that which was true of both his and our own time; that,

Through the centuries man's concepts of rights of others have broadened and taken more definite form; his narrow view as to reciprocal treatment of those outside one's own city, state or realm has widened. The era when a Hermit Kingdom might be perpetuated is past.... It is consonant with the spirit of our age that the fundamental principle of comity should be given a broader and firmer recognition and that the restrictions should be progressively narrowed and more closely defined.³

It requires no gift of prophesy to see that see that such extension of the rule will not be limited to transactions within our own geographical confines.⁴

He was right in this. On the one hand it is apparent from decisions such as Amchem, Cigna, Aerospatiale and Airbus, that the major courts of most common law jurisdictions have been more inclined to tell parties appearing before them to go to more appropriate courts in other countries, and have been more generally willing to respect comity and to respect the jurisdiction and competence of the courts of other countries; to observe long-standing principles to the effect that courts should be loathe to restrain parties from proceeding in those foreign courts. It is equally apparent, however, especially when one considers the recent decisions of the House of Lords in Connelly v RTZ⁵ and Lubbe v Cape Plc,⁶ and the decisions referred to in the previous chapter that attitudes may just as well be said to be swinging in the opposite direction.

³ Ibid.
⁴ Ibid 395.
The approaches adopted in decisions such as Cigna, Amchem and Airbus, are not universally accepted or applied in all categories of case, as witness the approach of several circuits of the U.S. Court of Appeals, discussed in chapter four, and, for instance, the perspective provided by Markus Lenenbach. A German academic from a civil law background, Professor Lenenbach might have been expected to be firmly opposed to the use of anti-suit injunctions. Instead, he adopts a hawkish approach akin to the US laxer standard:

Civil courts are not diplomats; rather their function is to enforce private rights and expectations. It is likely that a foreign court considers an anti-suit injunction as interference with its authority. The possibility, however, that a foreign legal system will not recognise a court decision is no reason not to issue the injunction. The court must protect the private parties' rights by providing judicial adjudication of these rights when the court's domestic law requires it. Whether this decision will be recognised by a foreign country is outside the control of a court. The court only needs to refuse enforcing private rights on the ground of courtesy to foreign nations' sovereignty when its decision would violate international treaties or public international law. The foreign nation's sovereignty is safeguarded by its own law and by public international law. In making itself the foreign nation's advocate, a court deprives the private party of its rights. Only public international law justifies this deprivation.

And then there is the research by Carter, referred to earlier in this dissertation, which shows that the use of anti-suit injunctions is anything but on the wane, and in cases where it is, arguably, anything but appropriate, such as the decisions by Thomas J in Akai v PIC, Cresswell J in Society of Lloyd's v White, and that of the English Court of Appeal in Bamberger, referred to in the last chapter. This of course raises the question that, if anti-suit injunctions are generally a bad thing, then how are they to be securely done away with? The review of cases conducted in this dissertation appears to leave no conclusion other than that leaving things in the hands of the judiciary will provide no certainty of forum selection in international litigation.

Although the essential purpose of an anti-suit injunction is to restrain the activity of a litigant in the foreign jurisdiction, its actual effect is to interfere with the jurisdiction of the foreign tribunal by withdrawing a case from its review. If the foreign court were...

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8 P.Carter, 'Anti-suit injunctions in private international law' (Europa Institut at Universität des Saarlandes, 1997).
also to issue an injunction, and domestic courts recognised, or enforced them, it is quite conceivable that no party would be able to obtain a remedy: stalemate.9

At least one writer has proposed that to decrease the likelihood of courts granting such remedies, in effect to reveal that the Emperor has no clothes, that such injunctions be ignored altogether.10 And in fact this has happened in a number of instances where European countries have ignored anti-suit injunctions against their citizens. Bamberger is a prime example, a case where German courts regarded the attempted English anti-suit injunctions as an infringement of their sovereignty and refused to enforce them. And in *Re the Enforcement of an English Anti-Suit Injunction*,11 the Dusseldorf Oberlandesgericht (Regional Court of Appeal) also refused service of an English anti-suit injunction on a German resident. The judgment states:

Service of an anti-suit injunction on a German resident must be refused under Article 13 of the 1965 Hague Service Convention. Anti-suit injunctions constitute an infringement of the jurisdiction of Germany, and thus the sovereignty of that state, because the German courts alone decide, in accordance with the procedural laws governing them and in accordance with existing international agreements, whether they are competent to adjudicate on a matter, or whether they must respect the jurisdiction of another domestic or foreign court. The fact that an anti-suit injunction is not directly addressed to the German state or German courts cannot affect this decision. Under German law the courts rely on the co-operation of the parties, so that if the parties fail to co-operate this may bring the action to a standstill. An injunction addressed to a party is therefore likely to influence directly the work of the German courts. Furthermore, judicial proceedings are guaranteed to be duly conducted in accordance with the rule of law only if the parties and their representatives are able, without any restriction, to place before the court all the facts they consider necessary for assessment by the court and to make the applications required by the procedural situation. These rights are safeguarded by the German procedural codes and the Basic Law. The courts must give effect to these rights and instructions from foreign courts to the parties concerning the manner in which the proceedings are to be conducted, and their subject-matter, are likely to impede the German courts in fulfilling this task. In addition, the

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9 See *Laker Airways Ltd v Sabena, Belgian World Airlines* ("Laker") 731 F2d 909, 927 (1984) and D.Baer, ‘Note, injunctions against the prosecution of litigation abroad: towards a transnational approach’ (1984) 37 *Stanford Law Review* 155, 165, ‘[Foreign courts might retaliate by enjoining parties from participating in parallel American actions ...].’ ‘If foreign and domestic courts grant injunctions halting the other’s pending suit, both actions will be paralyzed and neither party will be able to obtain any relief’ (*Gau Shan Co v Bakers Trust Co* 956 F2d 1349, 1355 (6th Cir 1992)).

10 See e.g., R.Raushenbush, ‘Note, antisuit injunctions and international comity’ (1985) 71 *Virginia Law Review* 1039, 1066-7. The author believes that domestic courts should never recognise foreign antisuit injunctions, since they ‘eliminate the concurrent jurisdiction of the domestic forum and frustrate the public policies that authorize a course of action in the domestic courts.’

11 *Case 3VA 11/95, [1997] I.L. Pr 320*
constitutional right of parties to have free access to the German courts is undermined by such injunction.

As noted in the previous chapter, Warren J, in Commonwealth Bank of Australia v White (No.3), also indicated that, were it not for other factors, she likely would have ignored Cresswell J’s anti-suit injunction.

Such understandable reactions by national courts to anti-suit injunctions will, if the defendant does not live in the issuing forum, or have assets there, render the anti-suit injunction ineffective. Leggatt LJ noted as much in Bamberger, and indicated that the English court could then take the further action of refusing to recognise the foreign order or judgment – a course of action that would only be effective in the circumstances noted, and which, in the context of the Brussels and Lugano Conventions, would likely be prohibited in any case.

Such a course of action, i.e., not to recognise a foreign judgment is an alternative strategy in itself. Brennan J (as he then was) indicated as much in Oceanic Sun, in the context of his discussion of forum non conveniens, where he said, ‘If we be confident of the quality of our justice administered in Australian courts, there is no reason why we should defer to other fora, who have it within their power to grant or refuse recognition to and enforcement of the judgments of Australian courts according to their municipal laws.’ This would be an adaptation, in a sense, of the Amchem approach – that comity requires non-interference with the processes of the foreign court, unless they do the ‘wrong’ thing and fail to stay their proceedings, when in the opinion of the home forum, they should have done so.

It could hardly be said, however, that either of these ‘solutions’ is satisfactory, nor do they advance the cause of international comity. If anything they underline the need to limit the use of anti-suit injunctions and find an alternative approach.

There is an alternative model that does not know the anti-suit injunction.

A different approach to the resolution of conflict between jurisdictions has emerged in the civil law jurisdictions of continental Europe – which have adopted the principles of

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*lis alibi pendens* (case depending elsewhere) through the Brussels and Lugano Conventions. Lord Goff of Chieveley described that approach in these terms in *Airbus*:

On the continent of Europe, in the early days of the European Community, the essential need was seen to be to avoid any such clash [of jurisdictions] between member states of the same community. A system, developed by distinguished scholars, was embodied in the Brussels Convention ... under which jurisdiction is allocated on the basis of well-defined rules.

His Lordship went on to say,

This system achieves its purpose, but at a price. The price is rigidity, and rigidity can be productive of injustice. The judges of this country, who loyally enforce this system, not only between United Kingdom jurisdictions and the jurisdictions of other member states, but also as between the three jurisdictions within the United Kingdom itself, have to accept that the practical results are from time to time unwelcome. This is essentially because the primary purpose of the Convention is to ensure that there shall be no clash between the jurisdictions of member states of the Community.

These comments should be compared with his remarks about the common law system which he also considered to be imperfect:

I must stress again that, as between common law jurisdictions, there is no system as such, comparable to that enshrined in the Brussels Convention. The basic principle is that each jurisdiction is independent. There is therefore, as I have said, no embargo on concurrent proceedings in the same matter in more than one jurisdiction. There are simply these two weapons, a stay (or dismissal) of proceedings or an anti-suit injunction. Moreover, each of these has limitations. The former depends on its voluntary adoption by the state in question, and the latter is inhibited by respect for comity. It follows that, although the availability of these two weapons should ensure that practical justice is achieved in most cases, this may not always be possible.

As noted above, under the Brussels Convention model, pursuant to Article 21, the principle of *lis alibi pendens* applies. If an action is brought in a court involving the

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15 Ibid 131-2.
16 Ibid 132.
17 Ibid 133.
19 Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.
same matter between the same parties which is already proceeding in another court, the
second court must defer to the first court. If there is uncertainty about the jurisdiction
of the first court, the second court must stay its proceedings until that uncertainty is
resolved. If the first court’s jurisdiction is clear or later becomes clear, the second court
must dismiss.

According to Professor Lenenbach,

The Convention has a simple but inflexible concept of jurisdiction which provides
the advantage of legal certainty and predictability. If the requirements of a
jurisdictional rule are met, the court must adjudicate the action before it. Expressed
in terms of the forum non conveniens doctrine, every court which has jurisdiction
under any rule of the Convention is the appropriate forum. Especially in
international litigation cases, clear and quick decision regarding jurisdiction is
invaluable. The parties need not fight a long and costly dispute, which may result in
unforeseeable dismissal of the action by a discretionary decision of the court. The
Convention’s clear jurisdiction rules allow parties to predict which court will decide
the dispute, without a long and annoying quarrel concerning preliminary procedural
questions.  

There has been some difficulty with the approach of the Brussels Convention,
however, not just because of its rigidity, but because of the difficulty, caused by
different national procedures, in determining just when a court is ‘seised’.  
The Brussels Convention approach is very attractive because of its simplicity, but this
simplicity is deceptive, and, as Fawcett emphasises in the following passages, there are
numerous vices inherent in its approach (footnotes omitted):  

First, any mechanical lis pendens rule, particularly when enshrined in a code, a
convention, or a statute, is going to have to define the meaning of lis pendens. Thus
Article 21 of the Brussels and Lugano Conventions contains a definition of lis
pendens in terms of the ‘same parties’ and ‘the same cause of action’. This has led
to a considerable body of case law interpreting these terms. …
There have also been difficulties in the situation in which there is complex litigation
involving many parties, some, but not all, of whom may be parties to both actions.

Secondly, if you have a definition in terms of the same parties and cause of action
there is an obvious temptation for a party to evade the lis pendens provision by
adding another party or another cause of action.

20 M.Lenenbach, above n 7, 308.
21 Ibid.
law (1995) 34-35. To like effect are the criticisms summarised in the Report of the Special
Commission (Hague Conference on Private International Law), Preliminary Document 11,
prepared by P.Nygh and F.Pocar (hcch.net/doc/jdgmpl11.doc).
Thirdly, it is necessary to make separate provision for certain cases falling outside the definition of lis pendens. Thus Article 22 of the Brussels and Lugano Conventions deals with 'related actions'.

Fourthly, which court is first seised may be an accident of timing. Moreover, actions may be started contemporaneously.

Fifthly, the first-seised rule, far from acting as a disincentive to parallel proceedings, acts as a positive incentive to this. It leads to an unseemly race by the parties to be the first to commence proceedings.

Sixthly, a party may start proceedings first in order to block proceedings in another State, and then engage in delaying tactics. This consideration has led to exceptions to the priority principle being created in Italy and Germany, in cases under the Italo-German bilateral Convention.

Seventhly, the lack of uniformity over the question when a court is seised of proceedings means that the race to institute proceedings may commence from different starting points. Moreover, it may not be clear when the race starts because of the uncertainty in some States over when a court is seised of proceedings.

Eighthly, what happens if the second seised has exclusive jurisdiction; does it still have to give way to the court first seised? The European Court of Justice has left this question open. However, the English Court of Appeal has held that, if the court second seised has jurisdiction conferred on it by the agreement of the parties under Article 17 of the Brussels Convention, this takes precedence over Article 21.

Lowenfeld, for one, has proposed the adoption of an international convention which would do away with anti-suit injunctions across national frontiers, would strengthen the concept of lis alibi pendens but also provide for general acceptance of forum non conveniens principles; taking the Brussels Convention model further and resolving the problems currently inherent in it. And indeed it is possible that we are now witnessing the realisation of an international regime that would bring some certainty to this difficult and vexing area of law, and achieve a compromise between the approach of the common law and civil law jurisdictions. In May 1993, the Seventeenth Session of the Hague Conference on Private International Law decided 'to include in the agenda for the work of the Conference the question of the recognition and enforcement of judgments in civil and commercial matters', and requested the Conference's Secretary General to convene a Special Committee to 'study ... further the problems in

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drafting a new convention,' 'to make ...further proposals with respect to work which
might be undertaken,' and to 'suggest ... the timing of such work'.

Substantial work has been done over the past nine years and a Preliminary Draft
Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters
(which appears to owe much to the Leuven/London Principles proposed by the
International Law Association), was adopted by the Special Commission on October
30, 1999, and is to be further considered at meetings in 2001 and 2002. Amendments
to the draft Convention have been put forward after further work during Part One of
the 19th Diplomatic Session, held during June 2001. According to item 32 of the
Conclusions drawn up by the Permanent Bureau,

...it seemed that a consensus might emerge in favour of allowing a limited
possibility for application of the theory of forum non conveniens in specific cases to
be determined and on the condition that a mechanism of co-ordination be instituted
in the convention. The essence of this mechanism would be that, where the court of
a Contracting State considers that the court of another Contracting State is better
placed than it to judge the case pending before it, under circumstances which
might be set out in the convention, it would stay proceedings before it until that
other court has declared itself to have jurisdiction. If this second court refuses to
exercise jurisdiction, the first court would then have to decide the case on the
merits.

The clear results of the deliberations which resulted from this are articulated in Article
21 of the draft Convention which adopts an approach to the resolution of the problem

Seventeenth Session 1993).
25 The text of the Principles is included with discussion and explanatory notes in the report of
Dr McLachlan to the International Law Association Conference (London 2000). Committee on
International Civil and Commercial Litigation, Third Interim Report: Declining and Referring
Jurisdiction in International Litigation. (Hereafter ‘the McLachlan Report’). The text of the
Principles are included as an annexure to this dissertation.
26 The Draft Convention is provided as an annexure to this dissertation. The latest information
from the web-site of the Hague Conference on Private International Law
(http://www.hcch.net/e/workprog/jdgm.html) indicate: Part Two of the Nineteenth
Diplomatic Session will be held in the course of 2002. For a summary of the work done prior to
the Nineteenth Session see P.Nygh and F.Pocar, above n 22. (hcch.net/doc/jdgmpd11.doc)
27 The Interim text which contains the suggested amendments is included as an annexure to
this dissertation.
28 Note on the question of forum non conveniens in the perspective of a double convention on
judicial jurisdiction and the enforcement of decisions (the ‘Note e... Forum non conveniens’).
Preliminary document No.3 for the attention of the Special Commission of June 1997 on the
question of jurisdiction and recognition and enforcement of foreign judgments in civil and
commercial matters. The Hague, Netherlands: Permanent Bureau of the Conference on PIL.
of concurrent proceedings that combines both *lis alibi pendens* and *forum non conveniens*. The article (with amendments suggested during Part One of the Nineteenth Diplomatic Session) reads as follows:

**Article 21**  
Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction under Articles [white list] [or under a rule of national law which is consistent with these articles] and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 [11] or 12.

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised —

   a) when the document instituting the proceedings or an equivalent document is lodged with the court; or

   b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

   [As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised —

   a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised; and

(Introductory paragraph) (http://www.state.gov/www/global/legal_affairs/forum.html) [on file with author].
b) the court first seised shall suspend the proceedings at the request of a party
if the court second seised is expected to render a decision capable of being
recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party,
determines that the court second seised is clearly more appropriate to resolve the dispute,
under the conditions specified in Article 22.

Pursuant to the article, the court second seised must suspend proceedings in favour of
that first seised, unless the latter court has exclusive jurisdiction under Articles 4 or 12
of the draft Convention. The second seised court must decline jurisdiction as soon as a
judgment that complies with the requirements of the Convention is rendered by the
first court, unless, as noted, it is an article 4 or 12 case.

It must be pointed out that, not surprisingly, the adoption of this approach, to combine
elements from two vastly different legal systems, was by no means a simple task. Nor
is it settled yet. A discussion paper released by the Australian Attorney-General’s
Department in relation to the draft Convention, noted that, in relation to including a
provision permitting a court to decline to hear a matter on *forum non conveniens*
grounds, that,

Article 24 of the draft Convention is a controversial provision in the Special
Commission discussions. Many countries, including Australia have argued that
such a provision is necessary even if the Special Commission is successful in
developing a double Convention: jurisdictional rules in any Convention are never
absolutely perfect and many situations can be envisaged where the provision is
necessary to ensure an appropriate forum. However civil law countries are
unfamiliar with the concept of *forum non conveniens* and there is no uniformity
among common law countries. In some countries there is a constitutional right to
have a court try a case if that court has jurisdiction. Some national delegations are
concerned about whether a discretion of a court to decline jurisdiction is compatible
with the objective of the draft Convention in providing foreseeability for litigants.
Others suggest that article 24 might be abused by defendants seeking to delay
proceedings.

And, further, that,

Those delegations opposed to *forum non conveniens* want to restrain the States
which know of it from using the doctrine even amongst themselves. Among those

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29 Australia. Attorney-General’s Department. *International jurisdiction and the recognition and
30 Ibid para 5.37 [footnotes omitted]. Note that the paper refers to Article 24, which is, after
renumbering, now Article 21.
delegations supporting the inclusion of article 24, some will only allow it in exceptional cases as between Contracting States where the forum considers another State’s courts to be clearly more appropriate and that court is willing to assume jurisdiction (transfer of jurisdiction). Some delegations want to extend this to third States. Yet others want their courts to have the right to decline jurisdiction completely.31

And in the Department’s second issues paper, published some months later, it was stated that, ‘the subject of forum non conveniens and lis alibi pendens have been the most controversial in the development of the Convention’,32 quoting from submissions received as examples of the conflicting views:

Supporting *lis alibi pendens* -

[I]f one of the purposes of the Convention is to prevent forum shopping and if the Convention sets out clear rules for the assignment of jurisdiction to particular courts, then if those rules are complied with there should be no further right to change the forum on the basis of *forum non conveniens*.33

Supporting *forum non conveniens* (the majority) –

[T]he flexibility offered by the doctrine of *forum non conveniens* is valuable, particularly in cases with contacts to multiple jurisdictions. Under this principle, if applied even handedly, the court has the power to weigh and balance the various factors in determining where a matter should best be tried in the interests of all the parties and both jurisdictions. By contrast under [the lis alibi pendens provisions in the Brussels/Lugano Conventions] jurisdiction will often be based on only a single connecting factor such as the place of the defendant’s domicile, which seems unduly restrictive.34

The forum in which proceedings are first filed may not be competent to address all of the causes of action and relief necessary to do justice between the parties. Further, matters of gross inconvenience and oppression (in both a legal and an economic sense) can arise by the simple application of a first filed rule. While the closer proximity of members of the European Union may diminish this as a problem in the context of the Brussels Convention, it has real potential impact on a broader global scale. It is one thing for a French party to be compelled to litigate in Belgium. It is quite another for an Australian company to be hauled to Europe or the United States, or vice versa. While the lis alibi pendens provision .... has a comity attraction....it must at least be coupled by a requirement that the court first seized, if requested, consider a stay upon the application of agreed principles of *forum non conveniens*, and that its consideration of, and decision on such an application, must be fully reasoned and transparent. Such a tie between lis alibi

31 Ibid para 5.39.
33 Submission from the Law Society of New South Wales.
34 Submission from Mr R. Garnett, Faculty of Law, Monash University.
pendens and *forum non conveniens* is a minimum necessary to accommodate common law concerns about oppression and injustice and to enable the common law countries to give up such blunt, insensitive but sometimes necessary instruments as anti suit injunctions and their various permutations.\(^{35}\)

In opting for the inclusion of *forum non conveniens* principles in the draft Convention, the Commission was concerned that simple adherence to *litis alibi pendens* would prove unworkable when translated to the world stage. ‘Can one, on the worldwide scale, as do the Brussels and Lugano Conventions, leave it to the national systems to define the concept of “the court first seised”?\(^{36}\) And, they asked,

> Is it reasonable, on this worldwide scale, to attribute in all circumstances, and without any reservations an automatic prize to the party who acts the most quickly – and this may be a question of several days or weeks only – to be sure of being the first to bring proceedings before a court? Should the parties be thus encouraged to avoid seeking a friendly settlement of the issues?’\(^{37}\)

The adoption of *forum non conveniens* as found in the Convention apparently owes much to an analysis by Professor P. Lagarde.\(^{38}\) He proposed a ‘clause creating an exception to the rules of judicial jurisdiction’. According to this clause,

> [A] tribunal which has jurisdiction might exceptionally declare itself not to have jurisdiction if it were established, on one hand, that this court was not very appropriate to handle the litigation because of its distance from the defendant and the difficulty for this court to gain access to evidence and the elements of the lawsuit and, on the other hand, that another court which is more appropriate and closer, offering the plaintiff equivalent guarantees as to its impartiality and as to procedural justice, might recognise itself as having jurisdiction if it were seised by the plaintiff. Finally, such a clause creating an exception would be however excluded where the court is one which is regularly chosen by the parties to the litigation.\(^{39}\)

The Commission was obviously concerned that, for such a clause to be effective, courts would need to refer to objective factors, in order to provide certainty to parties.

> This will eliminate the floating applications of the theory. As one finds them sometimes in the United States where the theory is sometimes utilized more as an element of assessment in the balancing of the interest of the parties than as a condition under which justice will be declined.\(^{40}\) … In addition, it will be noted

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\(^{35}\) Submission from Mr K Steele and Mr J Kirk, Freethill Holliardale and Page Solicitors, Sydney.

\(^{36}\) *Note on Forum non conveniens*, above n 28, section II.

\(^{37}\) Ibid.

\(^{38}\) P. Lagarde, ‘Le principe de proximité dans le droit international privé contemporain’ *Cours général de droit international privé, Recueil des Cours* (1986) I, 151.

\(^{39}\) Ibid.

\(^{40}\) *Note on Forum non conveniens*, above n 28, section VI.
that, according to the clause proposed, jurisdiction should be declined only if the existence of a foreign court which has jurisdiction is guaranteed. Thus the hypothesis is eliminated which is also found in the American case law of declining jurisdiction where this would lead to a denial of justice.41

Clearly concerned about American standards (i.e., the ‘lax standard’ cases referred to in chapter four), the Commission specifically adverted to English case law as its preferred standard: ‘It is in particular the recent case law of the House of Lords (Spiliada case 1986) which “objectivised” the theory of forum non conveniens’.42 They did refer to the Australian test, defined in Annex A, a Note on Australian forum non conveniens practice, as follows:

Basically, that test requires the court only to satisfy itself that the forum chosen by the plaintiff is not “clearly inappropriate” i.e. imposes a burden on the defendant that is substantially out of proportion to any benefit to be gained by the plaintiff in that forum. The fact that the forum chosen by the plaintiff is not the “natural forum” e.g. because the cause of action arose elsewhere or the defendant resides elsewhere is not sufficient to decline jurisdiction. Nor is the fact that there is another forum which is more appropriate for the trial of the action.... Although the High Court in Voth v. Manildra Flour Mills Pty Ltd. did decline jurisdiction by applying the above test, other courts applying the Voth principle have been extremely reluctant to decline jurisdiction.43

By providing that the second court seised must suspend rather than decline jurisdiction, if another court is already seised, the proposed Convention provides an opportunity for the party in the second court to proceed if the plaintiff in the first court is dilatory, or if a judgment is not rendered within a ‘reasonable time’.44 And, recognising the difficulties which parties to the Brussels Convention have experienced with the definition of seisin, the Draft Convention provides one.45 The Convention also prevents a plaintiff seeking a negative declaration from gaining the advantage of being first in

41 Ibid.
42 Ibid.
43 Ibid Annex A, Australian Practice - Note from the Australian Delegation in Relation to Forum non conveniens.
45 Ibid art 21, para 5. For the purpose of this Article, a court shall be deemed to be seised – a) when the document instituting the proceedings or an equivalent document is lodged with the court, or b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.
court, by providing that the provisions of article 21 do not apply when a party seeking substantive relief has taken action in the court second seised. The proceedings in the first court will be suspended in such a case.\textsuperscript{46}

During debates in the Special Commission in 1996, there was consideration to giving simple priority to the first court seised, but it was recognised that this might result in a race to litigation.\textsuperscript{47} Likewise the suggestion of allowing both proceedings to continue, awaiting the rendering of the first judgment and pleading it as res judicata in the still-pending proceeding. It was thought that this might ‘favour the rush to judgment at the detriment, perhaps of a calm dispensation of justice’.\textsuperscript{48}

Seeking to overcome the difficulties of rigid application that have been recognised as the major disadvantage of the otherwise certainty-giving Brussels Convention, and recognising also that a large number of potential adherents to the proposed Convention are common law jurisdictions which have adopted principles of forum non conveniens, the draft Convention incorporates those principles, to an extent. Article 21, paragraph 7, provides for the court first seised to surrender its jurisdiction in favour of that second seised if it is ‘clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.’

Article 22 is entitled ‘Exceptional Circumstances for declining Jurisdiction’. Paragraph 1 holds that the first court seised may suspend its proceedings on application by a party if ‘it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute.’ Adopting recognised principles of forum non conveniens, paragraph 2 provides that the court shall take into account, in particular,

a) any inconvenience to the parties in view of their habitual residence;
b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;

\textsuperscript{[As appropriate, universal time is applicable.]} 
\textsuperscript{46} I\textsuperscript{bid} art 21, para 6.

234
c) applicable limitation or prescription periods;  
d) the possibility of obtaining recognition and enforcement of any decision on the merits.

And paragraph 3 is to the effect that, in deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

The draft Convention attempts a compromise that seeks to allow for incorporation of both the certainty provided by the Brussels Convention \textit{lis alibi pendens} approach (defined to resolve the seisin problem) and the flexibility of \textit{forum non conveniens}. It is a compromise however that will not be wholly satisfactory to the advocates of \textit{forum non conveniens} because it requires both that the forum of the court first seised be clearly inappropriate and that the alternative forum be clearly more appropriate. There will be instances where such a situation cannot be satisfied. Nygh and Pocar, in their commentary on the Preliminary Draft Convention, provide the example of a plaintiff bringing a suit against a corporate defendant at its principal place of business in respect of injuries the plaintiff received while employed by that corporation in another country, where the plaintiff was resident and was hired. 'It may be that the second country is the “clearly more appropriate” forum, but, if the major decisions, including those affecting safety of employees throughout its operations, were made at the principal place of business, it cannot be said that this place is a “clearly inappropriate” forum'.

There will likely be a period of difficulty and uncertainty should the Convention be adopted with the articles as currently drafted. This is particularly the case because of the lack of familiarity with the \textit{forum non conveniens} principles on the part of courts of civil law jurisdictions. Fawcett says that,

\begin{quote}
Many States lack the case law decisions on private international law which are necessary to add flesh to the bare bones of a doctrine of \textit{forum non conveniens}, and reduce the uncertainty when exercising the discretion. Sweden and Finland have few cases on private international law. The same is true of Switzerland and Austria. More generally, in common law jurisdictions, where much of the law on international jurisdictions is based on case law, it is probably easier to introduce a
\end{quote}

\citepara{Ibid para 149.}
\citepara{Nygh and Pocar, above n 22, 90.}
doctrine of *forum non conveniens* than in civil law States where jurisdiction is laid
down by code, statute, or treaty.50

Article 38 provides, in paragraph 1, that the interpretation of the Convention should
have regard to the need to promote uniformity and paragraph 2, that courts of
Contracting States should take account of the case law of other Contracting States
when applying and interpreting the Convention. And article 39 provides that
Contracting States should send copies of significant decisions taken in applying the
Convention to the Permanent Bureau (para 1), and that a Special Commission will be
convened at regular intervals to review the operation of the Convention. The advantage
of proceeding under the articles as drafted is that there would, eventually, be built up a
universal body of case law on the interpretation and application of the principles of
*forum non conveniens* under the Convention.

A suggested enhancement to the resolution of the forum issue must be highlighted:

...another method might be suggested, favouring dialogue between the two or more
courts addressed. This dialogue should enable the judges in these courts, or their
deputies, to consider together which court is best placed to adjudicate. Of course,
the parties will have been asked to give their views on the question, so that the
decision takes these into account. This decision should be taken within a relatively
brief time, so as not to drag out the proceedings unduly. Of course, we are aware
that this method is more cumbersome and awkward to operate then the simpler,
automatic *a priori* method of the 'court first seised'.51

This is an admirable suggestion and quite attractive. It is a central feature of the
Leuven/London Principles developed by the International Law Association. Principle
5.2 provides:

*The originating court may communicate directly with the alternative court in any
application for referral in order to obtain information relevant to its determination
under Principle 4 [i.e., whether to decline jurisdiction], where such communication
is permitted by the respective states. States are encouraged to permit their to courts
to make, and respond to, such communications.

Any such communication shall be either on the application of one of the parties or
on its own motion. Where the court acts on its own motion it shall give reasonable
notice to the parties of its intention to do so, and hear the parties on the information
to be sought.

The originating court shall either communicate in writing or otherwise on the
record. It shall communicate in a language acceptable to the alternative court.*

50 J.Fawcett, above n 22, 23.
51 C.Kessedjian, above n 47, para 150.
The Committee considered that these provisions, 'represent the most innovative part of the Committee's work, since they embody the working out of the practicalities of a procedure for referral of cases between countries in pursuance of the decision to decline jurisdiction. The research and experience of the Committee has shown that these practical matters may offer the key to an improved system for the allocation of international jurisdiction.'\textsuperscript{52} This approach has the advantage that decisions would be made jointly by the respective courts involved, avoiding any potential for confusion and overcoming problems of comity.

There are a number of matters that will have to be resolved should the Draft Convention be adopted as currently drafted. These questions were identified in the Commission's \textit{Note on the Question of 'Forum non conveniens'} as follows:\textsuperscript{53}

-- should there be taken into account among the objective factors justifying the application of the clause not only private interests (which ones?), but also considerations of public interest (costs of the proceedings for the public treasury, difficulty for the judge to apply a foreign law)?

-- should there be established, in the convention, and if so how, a procedure for determining whether the other court (1) is in fact more appropriate to handle the case, (2) offers equivalent guarantees to the plaintiff (to the parties), (3) confirms its own jurisdiction and, then, (4) has been in fact seised and has recognized that it has jurisdiction?

-- may the first court condition its dismissal on the defendant agreeing not to raise certain objections before the second court (e.g. jurisdiction)?

-- should there be limits, in the convention, on the possibility to appeal from a decision on forum non conveniens in order to reduce the length and the costs of the proceedings?

The Commission Note also raises the problem of the court of a non-contracting State being the one which is supposed to be better placed to decide the case and the possibility that a plaintiff may be blocked from remedies otherwise available. The Note concludes,

[I]f there is a basis for jurisdiction recognised by an international convention in favour of the court of a Contracting State, the plaintiff should not be deprived of the benefit of recognition by operation of law and the enforcement of the judgment in

\textsuperscript{52} The McLachlan Report, above n 25, para 72.
\textsuperscript{53} Above n 27, section VI.
all the other Contracting States by being sent away to proceed in a non-Contracting State before a court whose judgment will certainly not have the same effect.\(^{54}\)

On the issue of anti-suit injunctions, the Note observes that while the possibility of conflicting decisions ought to be avoided, 'the problem will then be dealt with in the convention itself by an exception for lis pendens or for related action.'\(^{55}\) And,

...the use of injunctions for the purpose of prohibiting a party from bringing an action before a court considered to have jurisdiction under the convention would be contrary to the spirit of an international treaty. This question was not discussed at the first Special Commission meeting and the problem undoubtedly deserves to be addressed and clarified during the coming discussions.\(^{56}\)

The situation has been discussed in the more recent report by Nygh and Pocar which indicates that the use of anti-suit injunctions would be antithetical to the Convention, with respect to matters to which the articles apply: "...an anti-suit injunction is concerned with jurisdiction, and not with the maintenance of the status quo of the subject matter of the litigation'.\(^{57}\) This statement is extracted from a paragraph in the report which deals with what remedies do not serve the two principal purposes included in the definition of 'provisional and protective measures'. If further support is needed for the view that anti-suit injunction are to be excluded from the regime of the Convention, it is found in a report on provisional and protective measures prepared by the then Deputy Secretary General of the Hague Conference on Private International Law, Dr Kessedjian.\(^{58}\) In defining what is and what is not such a measure, she states:

'On the one hand, it could be said that this [the anti-suit injunction] is a protective measure, in the sense that it enables the party awarded it to preserve his rights in his chosen forum. But in fact, this measure applies in cases of contested jurisdictional competence, and does not relate to the merits of a case, so that in our opinion it cannot be regarded as falling within the definition given above.'\(^{59}\) Dr Kessedjian referred to

\(^{54}\) Ibid section VII.
\(^{55}\) Ibid section VIII.
\(^{56}\) Ibid.
\(^{57}\) P.Nygh and F.Pocar, above n 22, a.
\(^{59}\) Ibid para 2. 'These measures, in their protective aspect, are normally ordered in emergency cases in order to maintain the status quo, to ensure that certain rights are safeguarded, so that the parties can have a chance to agree their claims on the merits.'
the lack of a uniform approach in the United States but noted that the Restatement (Third) Foreign Relations Law, holds that anti-suit injunctions are 'exceptional remedies inconsistent with normal relations between states, and that challenges to the application of a States' law to a transnational controversy should ordinarily be raised before the courts of that State. Dr Kessesdjian concluded, '[T]hose reasons militate in favour of excluding anti-suit injunctions from the category of protective measures.' It is further apparent from a review of the interim revised text of the draft Convention, prepared after the June 2001 discussions of the Diplomatic Session, that there is at present no consensus on either whether there should be any provision in the Convention at all for provisional and protective measures, or, if so, what its scope should be.

Nygh and Pocar were also members of the International Law Association Committee which drafted the Leuven/London Principles. The relevant provisions of those Principles state as follows:

**Injunctions in Relation to Foreign Proceedings**

*7.1 Where the respective states are parties to an international convention providing common rules for the exercise of original jurisdiction, no court of either state shall be entitled to restrain by injunction any party from proceeding in the court of the other state. It shall be for the court in which the proceedings on the merits are instituted to determine its own jurisdiction and any application pursuant to these Principles.*

*7.2 Where there is no such applicable international convention, a court to which a request for such an injunction is made shall not grant an injunction where it is satisfied that these Principles will be applied by the court in which proceedings have been instituted.*

*7.3 This Principle is without prejudice to the power of a court to grant redress where an exclusive jurisdiction clause has been manifestly breached according to the law applicable in the courts of both states.*

The McLachlan Report notes that the place of anti-suit injunctions within the Principles was 'one of the most controversial and difficult parts of the Committee's task'. And that,

The Committee did not consider that such injunctions should be at the centre of the scheme which they were developing. On the contrary, it was felt that an effective

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60 Ibid para 9.
61 Ibid.
62 The McLachlan Report, above n 25, para 78.
system of declining jurisdiction should reduce, and for the most part eliminate, the need for injunctions in relating to foreign proceedings as between states applying the Principles. The procedural innovations instituted by the Committee, in particular the requirement that determinations of declining jurisdiction issues be made at the outset of the proceedings, should remove many of the perceived procedural impediments to the efficient operation of a system of allocation of jurisdiction in which an alternative court could with confidence await the decision of an originating court.\textsuperscript{63}

The Committee did not, as will be noted, entirely exclude the use of anti-suit injunctions, retaining them for cases of manifest breach of an exclusive jurisdiction clause. They regarded this clause as a ‘wholly exceptional measure available to be exercised additionally by the court designated in the jurisdiction clause’, and they incorporated two safeguards: the requirement that the agreement be manifestly breached and that the applicant establish that such breach was according to the law applicable in the courts of both states. ‘The purpose of this requirement is in order to avoid any forum shopping over the determination of the validity of the jurisdiction clause. Thus, in these wholly exceptional cases, another court will only be able to intervene where, on any view, the action has been commenced in breach of the clause.’\textsuperscript{64}

While the Leuven/London Principles and the draft Convention have both taken a similar stance on anti-suit injunctions by assuming that their approaches to lis pendens effectively exclude them, the Principles spell this out while the Convention leaves it to implication. The Convention provides no exception for breach of exclusive jurisdiction clauses. It could be argued that the ‘safeguards’ provided in the Leuven/London Principles render the Principle largely redundant in any case; if the breach is contrary to the laws of both fora, and the courts of both fora observe the Principles, and trust each other to do so, an essential feature, then the one incorrectly seised should stay in favour of the other or engage in communication to determine which court should proceed. It ought really only come into play when the trust element is clearly and justifiably lacking.

It is important to note here that the Convention does not apply to ‘arbitration and proceedings relating thereto’ (Article 1(2)(g)). It appears therefore that the Convention

\textsuperscript{63} Ibid.

\textsuperscript{64}
would not apply to a matter where a party had commenced litigation in breach of an agreement to arbitrate. The Leuven/London Principles, on the other hand, contain no such restriction and it is contended that they are the better for it. Adherence to Principle 7.1 for instance ought to preclude issuance of an anti-suit injunction in an Angelic Grace-type case where the countries concerned are party to the New York Convention. If Principle 7.1 had applied in respect of the facts of the Angelic Grace, it would have been left to the Italian Court to determine its jurisdiction. Likewise, the English Commercial Court in White and Akai would have been precluded from issuing anti-suit injunctions, because the exclusive jurisdiction clauses had not been 'manifestly breached' contrary to the law in both England and Australia, to apply the language of Principle 7.3.

At the beginning of this dissertation, I quoted from the speech of Lord Salmon to the House of Lords in MacShannon v Rockware Glass, where he said, 'The common law of England almost invariably marches in step with commonsense. If one examines the authorities and, at first sight, comes to the conclusion that they lead to a result which is contrary to commonsense, it is advisable to re-examine them; for this will usually show that one's first impression was wrong.' In questioning whether the decision of the High Court majority in Cigna was the correct one, and not contrary to commonsense, it has been made sufficiently clear in the preceding chapters that the outcome in Cigna, granting a stay of the New South Wales proceedings and refusing the anti-suit injunction to forestall the New Jersey proceedings was indeed correct. Lord Salmon's words, and despite one's initial reaction to the outcome based on what seemed the commonsense approach of Rolfe J and Brennan CJ, are indeed correct.

I base this conclusion on the foregoing review of English, United States and Canadian authorities, and the dominant adverse approach of the superior courts of the major common law jurisdictions to anti-suit injunctions and in favour of stay of the local jurisdiction where appropriate whether on forum non conveniens principles or grounds of abuse of the court's processes in the inherent or equitable jurisdictions. And on the surer grounds that any move by courts to bring certainty to the grounds on which they

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64 Ibid para 82.
66 Ibid 817.
will appropriately stay matters in favour of proceedings in a more appropriate jurisdiction, and restrain the employment of anti-suit injunctions is a good thing.

Although attitudes to stay of matters in the local jurisdiction are by no means as certain as one would have hoped, the superior courts of England, Canada, three out of six Circuits of the US Court of Appeals to have considered the matter, and now Australia have seen fit to restrict the use of anti-suit injunctions. It is this approach which should be preferred in order to avoid conflicts both at the judicial and political level.

As has been seen, however, there is no certainty in the application of these principles and common law courts still grant anti-suit injunctions in inappropriate cases, and the number of those cases is anything but on the wane. Principles developed by common law courts, and subject to change and interpretation by those same courts, can be of limited effectiveness. It is indeed time to bury the anti-suit injunction except, as has been discussed, in the case of a manifest breach, under the law of both jurisdictions involved, because the recurrent, at times resurgent, chauvinism of individual courts and judges cannot be trusted to restrain it. The only sure means to do so is by means of an international agreement on jurisdiction. The proposed Hague Convention is, ultimately, the logical conclusion of efforts towards resolving the vexed issues associated with international jurisdictional disputes and the recognition of judgments and which would see the use of anti-suit injunctions precluded. Those negotiations are proceeding slowly, however, and amid much contention, and are likely to see further compromise.  

That they are proceeding at all is cause for continued hope.

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CHAPTER I - SCOPE OF THE CONVENTION

Article 1 Substantive scope

1. The Convention applies to civil and commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2. The Convention does not apply to:

   a) the status and legal capacity of natural persons;
   b) maintenance obligations;
   c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;
   d) wills and succession;
   e) insolvency, composition or analogous proceedings;
   f) social security;
   g) arbitration and proceedings related thereto;
   h) admiralty or maritime matters.

3. A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any other person acting for the State is a party thereto.

4. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 2 Territorial scope

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident
in that State. However, even if all the parties are habitually resident in that State -

a) Article 4 shall apply if they have agreed that a court or courts of another Contracting State have jurisdiction to determine the dispute;

b) Article 12, regarding exclusive jurisdiction, shall apply;

c) Articles 21 and 22 shall apply where the court is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State.

2. The provisions of Chapter III apply to the recognition and enforcement in a Contracting State of a judgment rendered in another Contracting State.

CHAPTER II - JURISDICTION

Article 3 Defendant's forum

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident.

2. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State -

a) where it has its statutory seat,

b) under whose law it was incorporated or formed,

c) where it has its central administration, or

d) where it has its principal place of business.

Article 4 Choice of court

1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into or confirmed -

a) in writing;

b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

c) in accordance with a usage which is regularly observed by the parties;

d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.
3. Agreements conferring jurisdiction and similar clauses in trust instruments shall be without effect if they conflict with the provisions of Article 7, 8 or 12.

**Article 5 Appearance by the defendant**

1. Subject to Article 12, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.

2. The defendant has the right to contest jurisdiction no later than at the time of the first defence on the merits.

**Article 6 Contracts**

A plaintiff may bring an action in contract in the courts of a State in which -

- *(a)* in matters relating to the supply of goods, the goods were supplied in whole or in part;
- *(b)* in matters relating to the provision of services, the services were provided in whole or in part;
- *(c)* in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

**Article 7 Contracts concluded by consumers**

1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if

   - *(a)* the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
   
   - *(b)* the consumer has taken the steps necessary for the conclusion of the contract in that State.

2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.

3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court -

   - *(a)* if such agreement is entered into after the dispute has arisen, or
   
   - *(b)* to the extent only that it allows the consumer to bring proceedings in another court.

**Article 8 Individual contracts of employment**

1. In matters relating to individual contracts of employment -
a) an employee may bring an action against the employer,

i) in the courts of the State in which the employee habitually carries out his work or in the courts of the last State in which he did so, or

ii) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the business that engaged the employee is or was situated;

b) a claim against an employee may be brought by the employer only,

i) in the courts of the State where the employee is habitually resident, or

ii) in the courts of the State in which the employee habitually carries out his work.

2. The parties to a contract within the meaning of paragraph 1 may, by agreement which conforms with the requirements of Article 4, make a choice of court -

a) if such agreement is entered into after the dispute has arisen, or

b) to the extent only that it allows the employee to bring proceedings in courts other than those indicated in this Article or in Article 3 of the Convention.

Article 9 Branches (and regular commercial activity)

A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or establishment [or to that regular commercial activity].

Article 10 Torts or delicts

1. A plaintiff may bring an action in tort or delict in the courts of the State -

a) in which the act or omission that caused injury occurred, or

b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.

2. Paragraph 1 b) shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolisation, or conspiracy to inflict economic loss.

3. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.

4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.

Article 11 Trusts
1. In proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, the courts of a Contracting State designated in the trust instrument for this purpose shall have exclusive jurisdiction. Where the trust instrument designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. In the absence of such designation, proceedings may be brought before the courts of a State -

   a) in which is situated the principal place of administration of the trust;

   b) whose law is applicable to the trust;

   c) with which the trust has the closest connection for the purpose of the proceedings.

**Article 12 Exclusive jurisdiction**

1. In proceedings which have as their object rights _in rem_ in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a different State.

2. In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State whose law governs the legal person have exclusive jurisdiction.

3. In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction.

4. In proceedings which have as their object the registration, validity, [or] nullity[, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.

5. In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a Contracting State.

6. The previous paragraphs shall not apply when the matters referred to therein arise as incidental questions.

**Article 13 Provisional and protective measures**

1. A court having jurisdiction under Articles 3 to 12 to determine the merits of the case has jurisdiction to order any provisional or protective measures.

2. The courts of a State in which property is located have jurisdiction to order any provisional or protective measures in respect of that property.

3. A court of a Contracting State not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that -

   a) their enforcement is limited to the territory of that State, and
b) their purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by
the requesting party.

**Article 14  Multiple defendants**

1. A plaintiff bringing an action against a defendant in a court of the State in which that defendant is habitually resident
   may also proceed in that court against other defendants not habitually resident in that State if -
   
   a) the claims against the defendant habitually resident in that State and the other defendants are so closely
      connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments, and
   
   b) as to each defendant not habitually resident in that State, there is a substantial connection between that
      State and the dispute involving that defendant.

2. Paragraph 1 shall not apply to a codefendant invoking an exclusive choice of court clause agreed with the plaintiff and
   conforming with Article 4.

**Article 15  Counter-claims**

A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to
determine a counter-claim arising out of the transaction or occurrence on which the original claim is based.

**Article 16  Third party claims**

1. A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction
to determine a claim by a defendant against a third party for indemnity or contribution in respect of the claim against that
defendant to the extent that such an action is permitted by national law, provided that there is a substantial connection
between that State and the dispute involving that third party.

2. Paragraph 1 shall not apply to a third party invoking an exclusive choice of court clause agreed with the defendant and
   conforming with Article 4.

**Article 17  Jurisdiction based on national law**

Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of
jurisdiction under national law, provided that this is not prohibited under Article 18.

**Article 18  Prohibited grounds of jurisdiction**

1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for
   under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the
   dispute.

2. In particular, jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more
   of the following -
   
   a) the presence or the seizure in that State of property belonging to the defendant, except where the dispute
is directly related to that property;

b) the nationality of the plaintiff;

c) the nationality of the defendant;

d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State;

e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities;

f) the service of a writ upon the defendant in that State;

g) the unilateral designation of the forum by the plaintiff;

h) proceedings in that State for declaration of enforceability or registration or for the enforcement of a judgment, except where the dispute is directly related to such proceedings;

i) the temporary residence or presence of the defendant in that State;

j) the signing in that State of the contract from which the dispute arises.

3. Nothing in this Article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action [seeking relief] [claiming damages] in respect of conduct which constitutes -

[Variant One:

[a) genocide, a crime against humanity or a war crime[, as defined in the Statute of the International Criminal Court]; or]

[b) a serious crime against a natural person under international law; or]

[c) a grave violation against a natural person of non-derogable fundamental rights established under international law, such as torture, slavery, forced labour and disappeared persons].

[Sub-paragraphs [b] and [c] above apply only if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.]

Variant Two:

a serious crime under international law, provided that this State has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for civil compensatory damages for death or serious bodily injury arising from that crime.]

Article 19 Authority of the court seised

Where the defendant does not enter an appearance, the court shall verify whether Article 18 prohibits it from exercising jurisdiction if -

a) national law so requires; or

b) the plaintiff so requests; or
[c) the defendant so requests, even after judgment is entered in accordance with procedures established under national law; or]

[d) the document which instituted the proceedings or an equivalent document was served on the defendant in another Contracting State.

or

[d) it appears from the documents filed by the plaintiff that the defendant's address is in another Contracting State.]

Article 20

1. The court shall stay the proceedings so long as it is not established that the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, or that all necessary steps have been taken to that effect.

2. Paragraph 1 shall not affect the use of international instruments concerning the service abroad of judicial and extrajudicial documents in civil or commercial matters, in accordance with the law of the forum.

3. Paragraph 1 shall not apply, in case of urgency, to any provisional or protective measures.

Article 21  Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12.

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised -

   a) when the document instituting the proceedings or an equivalent document is lodged with the court, or

   b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

[As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised -
a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised, and

b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

Article 22 Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular -

a) any inconvenience to the parties in view of their habitual residence;

b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;

c) applicable limitation or prescription periods;

d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.

5. When the court has suspended its proceedings under paragraph 1,

a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or

b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

CHAPTER III - RECOGNITION AND ENFORCEMENT

Article 23 Definition of "judgment"

For the purposes of this Chapter, "judgment" means -

a) any decision given by a court, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided that it relates to a decision which
may be recognised or enforced under the Convention;

b) decisions ordering provisional or protective measures in accordance with Article 13, paragraph 1.

Article 24  Judgments excluded from Chapter III

This Chapter shall not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 17.

Article 25  Judgments to be recognised or enforced

1. A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter.

2. In order to be recognised, a judgment referred to in paragraph 1 must have the effect of res judicata in the State of origin.

3. In order to be enforceable, a judgment referred to in paragraph 1 must be enforceable in the State of origin.

4. However, recognition or enforcement may be postponed if the judgment is the subject of review in the State of origin or if the time limit for seeking a review has not expired.

Article 26  Judgments not to be recognised or enforced

A judgment based on a ground of jurisdiction which conflicts with Articles 4, 5, 7, 8 or 12, or whose application is prohibited by virtue of Article 18, shall not be recognised or enforced.

Article 27  Verification of jurisdiction

1. The court addressed shall verify the jurisdiction of the court of origin.

2. In verifying the jurisdiction of the court of origin, the court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

3. Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.

Article 28  Grounds for refusal of recognition or enforcement

1. Recognition or enforcement of a judgment may be refused if-

   a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seised in accordance with Article 21;
b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognised or enforced in the State addressed;

c) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court;

d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence;

e) the judgment was obtained by fraud in connection with a matter of procedure;

f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

2. Without prejudice to such review as is necessary for the purpose of application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.

Article 29 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce -

a) a complete and certified copy of the judgment;

b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;

c) all documents required to establish that the judgment is res judicata in the State of origin or, as the case may be, is enforceable in that State;

d) if the court addressed so requires, a translation of the documents referred to above, made by a person qualified to do so.

1. The production or similar formality may be required.

In the event that the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require the production of any other necessary documents.

Article 30 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the State addressed so far as the Convention does not provide otherwise. The court addressed shall act expeditiously.

Article 31 Costs of proceedings
No security, bond or deposit, however described, to guarantee the payment of costs or expenses shall be required by reason only that the applicant is a national of, or has its habitual residence in, another Contracting State.

Article 32 Legal aid

Natural persons habitually resident in a Contracting State shall be entitled, in proceedings for recognition or enforcement, to legal aid under the same conditions as apply to persons habitually resident in the requested State.

Article 33 Damages

1. In so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.

2. a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition may be limited to a lesser amount.

b) In no event shall the court addressed recognise the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.

3. In applying paragraph 1 or 2, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 34 Severability

If the judgment contains elements which are severable, one or more of them may be separately recognised, declared enforceable, registered for enforcement, or enforced.

Article 35 Authentic instruments

1. Each Contracting State may declare that it will enforce, subject to reciprocity, authentic instruments formally drawn up or registered and enforceable in another Contracting State.

2. The authentic instrument must have been authenticated by a public authority or a delegate of a public authority and the authentication must relate to both the signature and the content of the document.

[3. The provisions concerning recognition and enforcement provided for in this Chapter shall apply as appropriate.]

Article 36 Settlements

Settlements to which a court has given its authority shall be recognised, declared enforceable or registered for enforcement in the State addressed under the same conditions as judgments falling within the Convention, so far as those conditions apply to settlements.
CHAPTER IV - GENERAL PROVISIONS

Article 37  Relationship with other conventions

[See annex]

Article 38  Uniform interpretation

1. In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application.

2. The courts of each Contracting State shall, when applying and interpreting the Convention, take due account of the case law of other Contracting States.

[Article 39

1. Each Contracting State shall, at the request of the Secretary General of the Hague Conference on Private International Law, send to the Permanent Bureau at regular intervals copies of any significant decisions taken in applying the Convention and, as appropriate, other relevant information.

2. The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission to review the operation of the Convention.

3. The Commission may make recommendations on the application or interpretation of the Convention and may propose modifications or revisions of the Convention or the addition of protocols.]

[Article 40

1. Upon a joint request of the parties to a dispute in which the interpretation of the Convention is at issue, or of a court of a Contracting State, the Permanent Bureau of the Hague Conference on Private International Law shall assist in the establishment of a committee of experts to make recommendations to such parties or such court.

[2. The Secretary General of the Hague Conference on Private International Law shall, as soon as possible, convene a Special Commission to draw up an optional protocol setting out rules governing the composition and procedures of the committee of experts.]

Article 41  Federal clause

ANNEX [back to article 38]

Article 37  Relationship with other conventions
Proposal 1

1. The Convention does not affect any international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

2. However, the Convention prevails over such instruments to the extent that they provide for fora not authorized under the provisions of Article 18 of the Convention.

3. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned and to instruments adopted by a community of States.

Proposal 2

1. a) In this Article, the Brussels Convention [as amended], Regulation [...] of the European Union, and the Lugano Convention [as amended] shall be collectively referred to as "the European instruments".

b) A State party to either of the above Conventions or a Member State of the European Union to which the above Regulation applies shall be collectively referred to as "European instrument States".

2. Subject to the following provisions [of this Article], a European instrument State shall apply the European instruments, and not the Convention, whenever the European instruments are applicable according to their terms.

3. Except where the provisions of the European instruments on -

   a) exclusive jurisdiction;
   b) prorogation of jurisdiction;
   c) lis pendens and related actions;
   d) protective jurisdiction for consumers or employees;

are applicable, a European instrument State shall apply Articles 3, 5 to 11, 14 to 16 and 18 of the Convention whenever the defendant is not domiciled in a European instrument State.

4. Even if the defendant is domiciled in a European instrument State, a court of such a State shall apply -

   a) Article 4 of the Convention whenever the court chosen is not in a European instrument State;
   b) Article 12 of the Convention whenever the court with exclusive jurisdiction under that provision is not in a European instrument State; and
   c) Articles 21 and 22 of this Convention whenever the court in whose favour the proceedings are stayed or jurisdiction is declined is not a court of a European instrument State.

Note: Another provision will be needed for other conventions and instruments.
5. Judgments of courts of a Contracting State to this Convention based on jurisdiction granted under the terms of a
different international convention ("other Convention") shall be recognised and enforced in courts of Contracting States to
this Convention which are also Contracting States to the other Convention. This provision shall not apply if, by
reservation under Article ..., a Contracting State chooses -

a) not to be governed by this provision, or

b) not to be governed by this provision as to certain designated other conventions.

[back to article 38]

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1 The Special Commission has considered whether the provisions of the preliminary draft Convention meet the needs of e-commerce.
This matter will be further examined by a group of specialists in this field who will meet early in the year 2000. [back to article 1]
Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001

Interim Text

Prepared by the Permanent Bureau and the Co-reporters

For the sake of clarity this summary follows the order of the articles as set out in the preliminary draft Convention of October 1999. It is understood that the structure and form of the Convention awaits final discussion.

CHAPTER * – SUBSTANTIVE SCOPE

Article 1 Substantive scope

1. The Convention applies to civil and commercial matters. It shall not extend in particular to revenue, customs or other administrative matters.

2. The Convention does not apply to –
   a) the status and legal capacity of natural persons;
   b) maintenance obligations;
   c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;
   d) wills and succession;
   e) insolvency, composition or analogous proceedings;
   f) social security;

* Note: proposals have only been included if endorsed by Member State delegations.

1 It has been proposed to add the words ‘before courts of Contracting States’ at the end of the first sentence. This proposal has not been discussed. Note the statement in Preliminary Document No 11 (the Nygh/Pocar Report) at p. 31 that there was a consensus in the Special Commission that the application of the Convention should be confined to proceedings before courts. There was no suggestion in the Diplomatic Conference that this consensus should be departed from with the possible exception of authentic instruments (see Art. 35 below). It should be noted, however, that there were proposals to include decisions of certain administrative organs in the scope of Article 12. See footnote 88 below.

2 It was agreed to add the word ‘other’ in order to indicate that revenue and customs matters are also of an administrative nature.

3 A desire was expressed for further clarification of the meaning and scope of ‘administrative matters’. An attempt to provide further clarification was made, but this did not achieve consensus. That clarification would also have merged paragraph 3 with paragraph 1.
(g) arbitration and proceedings related thereto;
(h) admiralty or maritime matters;
(i) anti-trust or competition claims;
(j) nuclear liability;
(k) Alternative A
[provisional and protective measures other than interim payment orders;]
Alternative B
[provisional or protective measures [other than those mentioned in Articles 13 and 23A];]
(l) rights in rem in immovable property;
(m) validity, nullity, or dissolution of a legal person and decisions relating thereto.

[3. This Convention shall not apply to arbitration and proceedings related thereto, nor shall it require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to an arbitration agreement.]
4. A dispute is not excluded from the scope of the Convention by the mere fact that a
government, a governmental agency or any person acting for the State is a party thereto.

5. Nothing in this Convention affects the privileges and immunities of sovereign States or of
entities of sovereign States, or of international organisations.

**Article 2 Territorial scope**

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the
parties are habitually resident in that State. However, even if all the parties are habitually
resident in that State -

   a) Article 4 shall apply if they have agreed that a court or courts of another
   Contracting State have jurisdiction to determine the dispute [provided that dispute
   is of an international character];

   b) Article 12, regarding exclusive jurisdiction shall apply;

   c) Articles 21 and 22 shall apply where the court is required to determine whether to
decide jurisdiction or suspend its proceedings on the grounds that the dispute
ought to be determined in the courts of another Contracting State.

2. The provisions of Chapter III apply to the recognition and enforcement in a Contracting
State of a judgment rendered in another Contracting State.

**CHAPTER ** - JURISDICTION

**Article 3 Defendant's forum**

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of [a]
[the] State [in which] [where] that defendant is [habitually] resident.

2. For the purposes of the Convention, a natural person shall be considered to be resident -

   a) if that person is resident in only one State, in that State;

   b) if that person is resident in more than one State,

      i) in the State in which that person has his or her principal residence; or

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14 Another proposal for the amendment of paragraph 1 of this Article has been reproduced as part of Proposal 4 in
Annex I.

15 Concern has been expressed that sub-paragraph a) as it stands, will have the effect of making the Convention
applicable to purely domestic situations involving not only parties who were habitually resident within the same
State but also involving a legal relationship and a subject matter entirely confined to that State: see the Report of
the co-reporters Prel Doc 11 at p. 41, note 40. The words in brackets were proposed to require an international
connection. This proposal was opposed, and it was pointed out that it was difficult to define when a dispute was of
an international nature and that this might lead to divergent interpretations. The view was also expressed that this
issue should be determined only by the selected court. Other suggestions made were: that paragraph a) be
deleted with the result that the Convention, including Article 4, would not apply if all the parties to the choice of
forum agreement were habitually resident in the same State, or extending Article 22 in order to allow the selected
court in such a situation to decline jurisdiction.

16 There is agreement on the defendant's forum as a forum of general jurisdiction.
ii) if that person does not have a principal residence in any one State, in each State in which that person is resident.]^{17}

3. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be [habitually] resident in the State –

a) where it has its statutory seat;

b) under whose law it was incorporated or formed;

c) where it has its central administration; or

d) where it has its principal place of business.\^{18}

**Article 4 Choice of court**

1. If the parties have agreed that [a court or] the courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, [that court or those] the courts of that Contracting State \^{21} shall have jurisdiction, provided the court has subject matter jurisdiction\^{22} and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates [a court or] the courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the [court or]\^{23} courts chosen have themselves declined jurisdiction. Whether such an agreement is invalid for lack of consent (for example, due to fraud or duress) or incapacity shall depend on national law including its rules of private international law.\^{24}

2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into –

a) in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;
b) orally and confirmed in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;

c) in accordance with a usage which is regularly observed by the parties;

d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.  

3. Where a defendant expressly accepts jurisdiction before a court of a Contracting State, and that acceptance is [in writing or evidenced in writing], that court shall have jurisdiction.  

[4. The substantive validity of an agreement conferring jurisdiction shall be determined in accordance with the applicable law as designated by the choice of law rules of the forum.]  

5. [The parties cannot be deprived of the right to enter into agreements conferring jurisdiction.]  

Article 5 Defendant's right to contest jurisdiction  

[The defendant shall have the right to contest jurisdiction under Articles [white list] [at least until] [no later than at] the time of the first defence on the merits.]  

Article 6 Contracts  

[Alternative A]  

1. [Subject to the provisions of Articles 7 and 8,] a plaintiff may bring an action in contract in the courts of the State -

   a) in which the defendant has conducted frequent [and] significant activity; [or]  

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25 This paragraph as redrafted was accepted by agreement. The redraft removes the words 'or confirmed' from the chapeau to sub-paragraph b) where it is more appropriate.

26 This paragraph is intended to deal with the situation where a defendant consents to appear and defend in a jurisdiction other than the chosen one. There was agreement as regards the purpose of this provision, but the view was expressed that the reference to 'writing' should be aligned with paragraph 2.

27 This is an alternative proposal to that discussed in note 24, above. There was no consensus on this proposal.

28 This proposal seeks to make it clear that national law may not prohibit the entry into choice of forum clauses by express prohibition or the use of public policy, except in the cases which may be provided for in the Convention, such as consumer transactions or employment contracts; see the views expressed by the co-reporters in Preliminary Document No 11, at p. 42. This proposal did not receive consensus.

29 This is the text as it appeared in the preliminary draft Convention of October 1999. The relationship between the choice of forum provisions and consumer transactions and employment contracts still has to be resolved.

30 See also Article 27A below.

31 It has been proposed to delete the words 'no later than at' and substitute the words 'at least until' the time of. The purpose of this proposal is to make clear it was a minimum condition. It did not receive consensus.

32 It has been proposed that this provision be deleted in its entirety as an intrusion into the proper role of national law. No consensus was reached on this issue.

33 There was no consensus on the basis for jurisdiction in contractual matters. In the material that follows, two basic options are put forward: one alternative refers to activity (with several sub-options) and the other alternative focuses on the place of performance.

34 This refers to the provisions on consumer transactions and employment contracts on which no decisions have been taken as yet.

35 This leaves open the question of whether the requirements of frequency and significance should be cumulative or alternative.
b) into which the defendant has directed frequent [and] significant activity;\(^{36}\)

provided that the claim is based on a contract directly related to that activity [and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State].\(^{37}\)

[Variant 1\(^{38}\)]

2. For the purposes of the preceding paragraph, 'activity' means one or more of the following -

a) [regular and substantial] promotion of the commercial or professional ventures of the defendant for the conclusion of contracts of this kind;

b) the defendant's regular or extended presence for the purpose of negotiating contracts of this kind, provided that the contract in question was performed at least in part in that State. [Performance in this sub-paragraph refers [only] to non-monetary performance, except in case of loans or of contracts for the purchase and sale of currency];\(^{39}\)

c) the performance of a contract by supplying goods or services, as a whole or to a significant part.\(^{39}\)

[Variant 2\(^{40}\)]

2. For the purpose of the preceding paragraph, 'activity' includes, inter alia, the promotion, negotiation, and performance of a contract.

[3. The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid entering into or performing an obligation in that State.]\(^{41}\)]

[Alternative B\(^{42}\)]

A plaintiff may bring an action in contract in the courts of a State in which -

a) in matters relating to the supply of goods, the goods were supplied in whole or in part;

b) in matters relating to the provision of services, the services were provided in whole or in part;

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\(^{36}\) This leaves open the question of whether the activity of the defendant should take place within the State of the forum or could be directed from outside that State into the State of the forum.

\(^{37}\) If the words within brackets are accepted, this would be a condition to be satisfied in addition to that of frequent and/or significant activity.

\(^{38}\) In this variant the scope of 'activity' would be confined to the activities of promotion, negotiation and performance which are further defined in the following sub-paragraphs.

\(^{39}\) The words in brackets, if accepted, would exclude the payment of the purchase price or fee for services rendered from the scope of 'performance'.

\(^{40}\) Under this variant the activities of promotion, negotiation and performance would be within the scope of 'activity' but would not define its parameters.

\(^{41}\) This proposal that would have to be considered whether Variant 1 or 2 was adopted, seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State.

\(^{42}\) This alternative option consists of the text as it appeared in the preliminary draft Convention of October 1999.
c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

[Article 7 Contracts concluded by consumers 43]

1. This Article applies to contracts between a natural person acting primarily for personal, family or household purposes, the consumer, and another party acting for the purposes of its trade or profession, unless the other party demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract primarily for personal, family or household purposes, and would not have entered into the contract if it had known otherwise. 44

2. Subject to paragraphs [5-7], a consumer may bring [proceedings][an action in contract] 45 in the courts of the State in which the consumer is habitually resident if the claim relates to a contract which arises out of activities, including promotion or negotiation of contracts, which the other party conducted in that State, or directed to that State, unless 46 [that party establishes that] 47 -

a) the consumer took the steps necessary for the conclusion of the contract in another State; [and]

b) the goods or services were supplied to the consumer while the consumer was present in the other State. 48

[3. For the purposes of paragraph 2, activity shall not be regarded as being directed to a State if the other party demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in the State.] 49

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43 This Article consists of the first four common paragraphs with three different alternative solutions (including two variants of the second alternative) to meet the desire of some delegations to allow a choice of forum clause in consumer contracts in cases where the relevant law permits this, the agreement complies with requirements of Article 4, paragraphs (1) and (2), and provided the agreement is valid as to substance under the applicable law. A fourth alternative solution has also been suggested: to exclude business to consumer contracts from the scope of the Convention. For that reason the whole of the Article is placed in square brackets. There is no consensus in respect of any of them either that one or more should be omitted or that any one of them should be preferred.

44 The purpose of this provision within brackets is to give some protection to the business party, especially in a long distance transaction such as in electronic commerce, where the business party cannot easily ascertain with whom it is dealing or the truthfulness of that person's representations. There was opposition to the insertion of this provision on the ground that it would be very difficult for a consumer to rebut an allegation that the business was unaware that the buyer was a consumer.

45 Not all proceedings brought by consumers are actions in contract. They may be actions for a common law tort or delict, or a civil claim on a ground provided for by a statute enacted for the protection of consumers. Some delegations wanted to confine paragraph 2 to actions in contract. There was no consensus on this point.

46 This is the so-called 'small shop' exception that seeks to protect a business party who has dealt with a foreign consumer, such as a tourist, entirely in its State of habitual residence. The question was raised whether there was a need to make such a provision that could only be of relevance to small transactions that are unlikely to become the subject of proceedings under the Convention.

47 This provision would place the burden of establishing that the two conditions in sub-paragraphs (a) and (b) were fulfilled on the business party. The fear was expressed that the burden would be too high for many small businesses. If this issue was not resolved one way or the other, the question of on whom the burden lies, will remain uncertain and would lead to divergent interpretations. There was no consensus on this point.

48 There was no consensus on whether this condition should be added to that set out in sub-paragraph (a).

49 This proposal seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State. There is no consensus on this provision.
4. Subject to paragraphs [5-7], the other party to the contract may bring proceedings against a consumer under this Convention only in the courts of the State in which the consumer is habitually resident.59

[Alternative A 51

5. Article 4 applies to a jurisdiction agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen.52

6. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen, the consumer may bring proceedings against the other party in the courts of the State designated in that agreement.53

7. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen, Article 4 applies to the agreement to the extent that it is binding on both parties under the law of the State in which the consumer is habitually resident at the time the agreement is entered into.54

Add at the beginning of Article 25 the words:

'Subject to Article 25 bis'

Insert [Article 25 bis]55

1. A Contracting State may make a declaration that it will not recognise or enforce a judgment under this Chapter, or a declaration specifying the conditions under which it will recognise or enforce a judgment under this Chapter, where -

   a) the judgment was rendered by the court of origin under Article 7(2) [or Article 8(2)]56, and

   b) the parties had entered into an agreement which conforms with the requirements of Article 4 designating a court other than the court of origin.57

59 This is proposed as the general rule to which Alternatives A to C are exceptions.
51 This Alternative is a revised version of the solution that was presented to the informal discussions held in Edinburgh in April 2001: see Prel Doc 15, Annex III-A. It provides that a choice of forum clause in a consumer contract will be effective if valid under the law of the habitual residence of the consumer and the Contracting State in which recognition and enforcement is sought has made the declaration provided for in the proposed Article 25 bis. For the sake of convenience that proposed Article is reproduced here as part of Alternative A. Several delegations objected to this proposal on the ground of its complexity, but there was no agreement that it should be omitted from the list of alternatives.
52 This is the provision that appeared as Article 7(3)(a) in the preliminary draft Convention of October 1999. It is not controversial.
53 This repeats the provision that appeared as Article 7(3)(b) in the preliminary draft Convention of October 1999. It is not controversial in so far as it allows the consumer to bring proceedings in the chosen forum in addition to other fora, including the forum under Article 7(2). The controversial issue is whether the proceedings brought by the consumer could be confined to the chosen forum.
54 This provision contains a choice of law provision referring to the law of the consumer's habitual residence the issues of whether the choice of forum clause is lawful as regards each party and whether it is substantially valid (including issues of public policy and reasonableness): see Report of the co-reporters, Prel. Doc. No 11 at p. 42.
55 If accepted, this Article should be placed among the articles dealing with recognition and enforcement.
56 The reference to Article 8(2) will be relevant if this solution is extended to individual contracts of employment.
57 Under this provision a State may declare that it will only recognise or enforce judgments under the Convention that are consistent with a choice of court clause. A State making the declaration would not be bound to recognise or enforce a judgment given in accordance with Article 7(2) if this jurisdiction was incompatible with the choice of court clause. On the other hand, a State not making the declaration would be bound to recognise or enforce a judgment rendered in accordance with Article 7(2) in other Contracting States, including a State that had made the declaration. But a non-declaring State would not be bound to recognise or enforce a judgment rendered by the chosen court, including one of a State that had made the declaration. A concern was expressed at this lack of reciprocity and fear of possible complexities that might be introduced if the declaration also specified conditions.
[2. A declaration under this Article may not deny recognition and enforcement of a judgment given under Article 7(2) [or Article 8(2)] if the Contracting State making the declaration would exercise jurisdiction under the relevant Article in a corresponding case.]58

3. Recognition or enforcement of a judgment may be refused by a Contracting State that has made a declaration contemplated by paragraph 1 in accordance with the terms of that declaration.]

[Alternative B]59

[Variant 1]60

5. This provision may be departed from by a jurisdiction agreement provided that it conforms with the requirements of Article 4.

6. A Contracting State may declare that –

a) it will only respect a jurisdiction agreement if it is entered into after the dispute has arisen or to the extent that it allows the consumer to bring proceedings in a court other than a court indicated in this Article or in Article 3; and

b) it will not recognise and enforce a judgment where jurisdiction has been taken in accordance with a jurisdiction agreement that does not fulfil the requirements in sub-paragraph a).]

[Variant 2]61

5. Article 4 applies to an agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen; or to the extent that the agreement permits the consumer to bring proceedings in a court other than the consumer’s habitual residence.

6. A Contracting State may declare that in the circumstances specified in that declaration –

a) it will respect a jurisdiction agreement entered into before the dispute has arisen;

b) it will recognise and enforce a judgment in proceedings brought by the other party given by a court under a jurisdiction agreement entered into before the dispute has arisen;

58 This provision is intended to prevent States that make a declaration under Article 25 bis (1) from denying recognition or enforcement of a judgment when that State does not treat such choice of court provisions as binding on its own consumers.

59 There are two variants in this Alternative. The basic rule is that stated in paragraph 4 above which limits the business party to the forum of the consumer’s habitual residence. Both Variants allow a departure from this rule, but differ in whether departure is allowed unless a declaration is made to the contrary (Variant 1) or whether a departure is not allowed unless a State makes a declaration to the opposite effect (Variant 2).

60 Variant 1 allows the parties to depart from the basic rule by an agreement that complies with the requirements of Article 4, but this choice of forum will not be regarded as excluding the forum provided for in paragraph 2 nor will a judgment rendered by the chosen forum (unless the consumer commenced the proceedings there or it coincides with the habitual residence of the consumer) be recognised or enforced in a State that makes a declaration to that effect. That State thereby ‘opts-in’ into the system of restricted jurisdiction over proceedings brought by the business party against the consumer.

61 Under Variant 2 pre-dispute choice of forum clauses are not binding on consumers except in States that have made a declaration that they will respect such an agreement and that they will recognise and enforce judgments given in pursuance of such agreements. Such States will not recognise and enforce judgments given in breach of choice of forum clauses. Whatever system of declaration is adopted, problems of reciprocity remain.
c) it will not recognise and enforce a judgment given by a court in which proceedings could not be brought consistently with a jurisdiction agreement entered into before the dispute has arisen.]

[Alternative C\(^5\)]

5. Article 4 applies to a jurisdiction agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen.

6. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen -

a) the consumer may bring proceedings against the other party under the Convention in the courts of the State designated in that agreement;

b) the consumer may not bring proceedings against the other party under this Convention in any other court, unless the agreement permits the proceedings to be brought in that court;

c) the other party may bring proceedings against the consumer under this Convention only if the agreement permits the proceedings to be brought in the courts of the State in which the consumer is habitually resident.]

Article 8 Individual contracts of employment

This matter was not discussed by Commission II. The Commission agreed that the Working Documents put forward in relation to this subject as well as the draft prepared at the informal discussions in Edinburgh in April 2001 should be reproduced in Annex II to facilitate further discussion. The proposals in Annex II should be viewed in the light of the Alternatives proposed in relation to Article 7 above.

Article 9 Branches (and regular commercial activity)\(^6\)

1. A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or other establishment [or to that regular commercial activity].

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\(^5\) This Alternative limits the 'white list' jurisdiction that may be invoked by each of the parties in cases where a choice of forum agreement has been concluded between the parties. In essence there will only be 'white list' jurisdiction if the consumer brings proceedings in the chosen forum. Conversely, there will only be 'white list' jurisdiction in the chosen forum in relation to an action brought by the business party if the chosen forum coincides with the habitual residence of the consumer. If the consumer brings proceedings in the forum provided for under paragraph 2 or in any other 'white list' forum contrary to a choice of forum clause, that forum will be deprived of its 'white list' status. It will then depend on the national law of the forum to determine whether the consumer will be permitted to rely on that jurisdiction and it will also depend on the national law of the State addressed to determine whether a judgment rendered in a State other than that of the chosen forum will be recognised or enforced, even if, in the absence of a choice of forum clause, the court in the State of origin would have exercised a 'white list' jurisdiction, such as a jurisdiction under paragraph 2.

\(^6\) The matter placed between the brackets has not been discussed pending general discussion of the 'activity jurisdiction' elsewhere. There appears to be general agreement, subject to further clarification (see note 64 below), on the remainder of the paragraph.
[2. For purposes of applying paragraph 1, a legal entity shall not be considered a 'branch, agency or other establishment' by the mere fact that the legal entity is a subsidiary of the defendant.]64

Article 10  Torts [or delicts] 65

1. A plaintiff may bring an action in tort [or delict] in the courts of the State -
   a) in which the act or omission that caused injury occurred, or
   b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State.66

[2. A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity into that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.]67

[3. The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid acting in or directing activity into that State.]68

[4. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.]69

[5. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.]70

64 It was proposed to delete the term 'nécessairement' in the French text. It was also proposed to replace the term 'simple' by the term 'seul' in the French text. There does not appear to be any objection with the interpretation given by the Co-Reporters in Preliminary Document No 11 at p. 56 that a subsidiary, even one that is wholly owned by a parent, will not by that fact alone be regarded as falling within the definition of 'a branch, agency or other establishment'. However, some delegations expressed a fear that the formal incorporation of those comments into the body of the text might be misinterpreted. There is no consensus on this provision.

65 The deletion of the words 'or delicts' in the title and in the first paragraph has been proposed. The concern was raised that the term includes both civil and criminal offences in some legal systems and may extend the reach of Article 10 or result in other unintended consequences in those systems. There is no consensus on this proposal.

66 This is the text of the preliminary draft Convention of October 1999. No specific proposals were made to modify this text. However, it was noted that the paragraph would have to remain under consideration in light of e-commerce and intellectual property issues, its relation to activity jurisdiction proposals, and constitutional issues in one State. There was agreement that the material appearing as paragraph 2 in the preliminary draft Convention of October 1999 should be deleted.

67 This proposal seeks to insert an activity based jurisdiction similar to that proposed in relation to Article 6 Contracts, Alternative A, paragraph 1. There is no consensus on this proposal.

68 This proposal seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State. There is no consensus on this proposal.

69 The deletion of this paragraph that appeared as Article 10, paragraph 3 of the preliminary draft Convention of October 1999 has been proposed. There is no consensus on its deletion.

70 The deletion of this paragraph that appeared as Article 10, paragraph 4 of the preliminary draft Convention of October 1999 has been proposed. There is no consensus on its deletion.
Article 11  Trusts

1. In proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, the courts of a Contracting State designated in the trust instrument for this purpose shall have jurisdiction, and that jurisdiction shall be exclusive unless the instrument provides otherwise. \(^{71}\) Where the trust instrument designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction. [The validity of such a designation shall be governed by the law \(^{72}\) applicable to the validity of the trust.] \(^{73}\)

2. In the absence of such \(\text{valid}\) designation, proceedings may be brought before the courts of a State -
   
   a) in which is situated the principal place of administration of the trust; or
   
   b) whose law is applicable to the trust; or
   
   c) with which the trust has the closest connection for the purpose of the proceedings, taking into account in particular the principal place where the trust is administered, the place of residence or business of the trustee, the situation of the assets of the trust, and the objects of the trust and the places where they are to be fulfilled; or
   
   d) in which the settlor (if living) and all living beneficiaries are habitually resident, if all such persons are habitually resident in the same State. \(^{75}\)

[3. This Article shall only apply to disputes among the trustee, settlor and beneficiaries of the trust.] \(^{76}\)

Article 12  Exclusive jurisdiction

[1. In proceedings which have as their object rights \textit{in rem} in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property \(\text{concluded for a maximum period of six months}\) \(^{77}\), the tenant is habitually resident in a different State.]

[2. In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State whose law governs the legal person have exclusive jurisdiction.] \(^{79}\)

\(^{71}\) There was agreement on the insertion of the last sub-sentence in order to bring the provision in conformity with the similar provision found in Article 4, paragraph 1.

\(^{72}\) It was noted that the phrase \textquoteleft national law\textquoteright should replace the word \textquoteleft law\textquoteright if the Convention consistently uses \textquoteleft national law\textquoteright in such cases.

\(^{73}\) The words within brackets were proposed to ensure that the question of the existence and validity of the choice of forum clause would be determined by the law applicable under the choice of law rules of the court seised and not necessarily by any law nominated as the applicable law by the settlor. No consensus was reached on this provision.

\(^{74}\) See note 73 above.

\(^{75}\) Subject to the use of the word \textquoteleft valid\textquoteright in the chapeau, this paragraph was approved by consensus.

\(^{76}\) This paragraph did not achieve consensus. It has been proposed that this matter should be left to national law: see the comment of the co-reporters in Preliminary Document No 11, at p. 62 that the disputes covered by this Article are disputes that are internal to the trust.

\(^{77}\) It has been proposed to limit the exclusion of tenancies of immovable property from the exclusive jurisdiction of the State of situation to a lease for a single period not exceeding 6 months. There was no consensus on this proposal.

\(^{78}\) It has been proposed to exclude rights \textit{in rem} in immovable property and tenancies of movable property from the scope of the Convention. There was no consensus on this proposal.

\(^{79}\) It has been proposed to exclude the validity, nullity, or dissolution of a legal person and decisions related thereto from the scope of the Convention. There was no consensus on this proposal.
3. In proceedings concerning the validity of entries in public registers other than those dealing with intellectual property rights, the courts of the Contracting State in which the register is kept shall have exclusive jurisdiction.

In the event of a dispute concerning the validity of entries in public registers other than those dealing with intellectual property rights, the courts of the Contracting State in which the register is kept shall have exclusive jurisdiction.

Alternative A

4. In proceedings in which the relief sought is a judgment on the grant, registration, validity, abandonment, revocation or infringement of a patent or a mark, the courts of the Contracting State of grant or registration shall have exclusive jurisdiction.

5. In proceedings in which the relief sought is a judgment on the validity, abandonment, or infringement of an unregistered mark (or design), the courts of the Contracting State in which rights in the mark (or design) arose shall have exclusive jurisdiction.

Alternative B

5A. In relation to proceedings which have as their object the infringement of patents, trademarks, designs or other similar rights, the courts of the Contracting State referred to in the preceding paragraph (or in the provisions of Articles [3 to 16]) have jurisdiction.

Alternatives A and B

6. Paragraphs 4 and 5 shall not apply where one of the above matters arises as an incidental question in proceedings before a court not having exclusive jurisdiction under those paragraphs. However, the ruling in that matter shall have no binding effect in subsequent proceedings, even if they are between the same parties. A matter arises as an incidental question if the court is not requested to give a judgment on that matter, even if a ruling on it is necessary in arriving at a decision.

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60 Three proposals have been made with respect to the treatment of intellectual property in the Convention. The first two appear within general brackets and are each bracketed also (Alternatives A and B). That indicates that there is no consensus on the inclusion of intellectual property within the scope of the Convention or in respect of each of the proposals themselves. For the third proposal, see note 88 below.

61 The main difference between Alternatives A and B is whether proceedings for the infringement of patents and marks and such other rights as may be covered by this provision should fall within the exclusive jurisdiction or not. In addition, for a number of the delegations that favour an exclusive jurisdiction also for infringement under this provision, a satisfactory final or disconnection clause with respect to existing and future instruments regulating jurisdiction, recognition and enforcement for specific areas such as intellectual property is a precondition for including infringement in this Article on exclusive jurisdiction.

62 It was pointed out that, when deciding which proceedings (e.g. infringement proceedings based on provisions of an Unfair Competition Act or of a Patent or Trademark Act, or proceedings concerning certain common law torts such as passing off) were to be covered by 'infringement', the solution should be consistent with the possible exclusion of 'antitrust or competition claims' from the scope of the Convention.

63 This paragraph also covers situations where an application for the grant or registration of a patent or mark has been filed.

64 This Alternative does not dispute the proposition in Alternative A that there should be exclusive jurisdiction in respect of proceedings that have as their object the registration, validity, nullity or revocation of patents, trade marks, designs or other similar rights. To that extent paragraphs 4 and 5 would remain if paragraph 5A was accepted. Alternative B refers only to proposed paragraph 5A. Paragraphs 6, 7 and 8 are common to both Alternatives.

65 This provision will have to be excluded from the exceptions stated in Article 17.

66 The purpose of this paragraph is to maintain non-exclusive jurisdiction where a matter otherwise falling within the scope of paragraphs 4 and 5 arises as an incidental question in proceedings which do not have as their object one or more of the matters described in that paragraph. The intention is that any decision made between the parties on such an incidental question will not have a preclusive effect in another State, in other cases when produced by one of the parties. There is no consensus on this paragraph.
7. [In this Article, other registered industrial property rights [(but not copyright or
neighbouring rights, even when registration or deposit is possible)] shall be treated in the
same way as patents and marks]

8. For the purpose of this Article, 'court' shall include a Patent Office or similar agency.)

Article 13 Provisional and protective measures

[Alternative A]

1. A court seised and having jurisdiction under Articles [in the white list] to determine the
merits of the case has jurisdiction to order provisional and protective measures.

2. A court of a Contracting State [may] has jurisdiction to, even where it does not have
jurisdiction to determine the merits of a claim, order a provisional and protective measure in
respect of property in that State or the enforcement of which is limited to the territory of that
State, to protect on an interim basis a claim on the merits which is pending or to be brought by
the requesting party in a Contracting State which has jurisdiction to determine that claim under
Articles [in the white list].

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87 There is no consensus on the words included within the brackets. Other suggestions are to exclude copyright
from the scope of the Convention either in whole or only copyright infringement on-line. Furthermore, the
following text was proposed as an alternative: "In proceedings concerning the infringement of a copyright or any
neighbouring right, the courts of the Contracting State under whose laws the copyright or the neighbouring right is
claimed to be infringed shall have exclusive jurisdiction". This proposal seeks to include copyright within the
exclusive jurisdiction of the courts of the Contracting State under whose law a copyright is claimed to have been
infringed. This is an alternative to the exclusion of proceedings for the infringement of copyright proposed in
paragraph 7 above.

88 This paragraph might be necessary to ensure that decisions of these organs are covered by the chapter on
recognition: see the definition of 'judgment' in Article 23.

89 This Article would be deleted if Alternative A of Article 1(2)(k) was adopted. It would also be deleted if the
Alternative B of Article 1(2)(k) was adopted without the reference to Articles 13 and 23A. Some delegations have
also suggested that provisional and protective measures should be dealt with in a separate Chapter in the
Convention. This would certainly be necessary if no provision were made for the recognition and enforcement of
provisional and protective measures.

90 For another proposal in relation to Article 13, see Article 1(2)(k) which proposes that provisional and protective
measures be excluded from the scope of the Convention with certain qualifications.

91 It has been suggested that it would be sufficient if a court is seised after a provisional and protective measure is
made. This would require the addition of the words 'or about to be seised' or similar.

92 The description 'provisional and protective' is intended to be cumulative, that is to say, the measures must meet
with both criteria.

93 A form of words has also been suggested that would make it clear that Contracting States are obliged to provide
this jurisdiction, although it was also stressed that this would not interfere with the discretion of the courts of such
States either to make or to refuse to make such orders.

94 It was noted that some States, especially those in the Commonwealth other than the United Kingdom, did not
provide for jurisdiction to make provisional and protective orders unless the court was seised of jurisdiction to
determine the merits of the case. This could operate to the detriment of foreign plaintiffs who sought to 'freeze'
assets within the jurisdiction in aid of litigation pending elsewhere. The provision is intended to provide such
States with jurisdiction to make such orders based on the existence of property in the forum and limited to the
territory of the forum. There was no consensus on this provision.
3. Nothing in this Convention shall prevent a court in a Contracting State from ordering a provisional and protective measure for the purpose of protecting on an interim basis a claim on the merits which is pending or to brought by the requesting party in another State.\footnote{This provision is intended to overcome any restrictions imposed on the exercise of jurisdiction by the courts of Contracting States by the list of prohibited jurisdictions (at present found in Article 18). The provision would also allow the exercise of jurisdiction to make provisional and protective orders under national law without the restrictions imposed by the list of prohibited jurisdictions. It is proposed to remove the reference to Article 13 in Article 17 in order to allow the exercise of such jurisdiction under national law. Some delegations took the view that this paragraph was the only provision on provisional and protective measures that should be included in the Convention.}

4. In paragraph 3\footnote{It has been proposed that this definition apply also to paragraphs 1 and 2.} a reference to a provisional and protective measure means

\begin{itemize}
    \item[a)] a measure to maintain the status quo pending determination of the issues at trial; or
    \item[b)] a measure providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied; or
    \item[c)] a measure to restrain conduct by a defendant to prevent current or imminent future harm.\footnote{This proposal is linked with the second alternative in Article 1(2)(k) which in itself contains the options either to exclude provisional or protective measures entirely from the scope of the Convention or to permit a limited jurisdiction to make such orders. Alternative B provides for such a limited jurisdiction, if so desired.}
\end{itemize}

\[\text{[Alternative B\footnote{There was agreement that there should be provision for a jurisdiction based on a counter-claim and that this jurisdiction should be one that is entitled to recognition and enforcement under Article 25(1). There was some debate on whether this was already obvious or should be further clarified: see the remarks of the co-reporters in Preliminary Document No 11, at p. 95. The language not within brackets was also approved by consensus.}]}\]

A court which is or is about to be seised of a claim and which has jurisdiction under Articles [3 to 15] to determine the merits thereof may order provisional and protective measures, intended to preserve the subject-matter of the claim.\footnote{It was agreed that the proposal to add this qualification should remain within brackets pending resolution of the status of Article 12.}

\begin{description}
  \item[Article 14 Multiple defendants]
  It was agreed to delete this Article.

  \item[Article 15 Counter-claims\footnote{There was agreement that there should be provision for a jurisdiction based on a counter-claim and that this jurisdiction should be one that is entitled to recognition and enforcement under Article 25(1). There was some debate on whether this was already obvious or should be further clarified: see the remarks of the co-reporters in Preliminary Document No 11, at p. 95. The language not within brackets was also approved by consensus.}]\footnote{It was agreed that the proposal to add this qualification should remain within brackets pending resolution of the status of Article 12.}
\end{description}
of the transaction or occurrence on which the original claim is based [unless the court would be unable to adjudicate such a counter-claim against a local plaintiff under national law].

**Article 16  Third party claims**

It was agreed to delete this Article.

**Article 17  Jurisdiction based on national law**

[Subject to Articles 4, 7, 8, 11(1), 12 and 13*], the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18.

**[Article 18  Prohibited grounds of jurisdiction]**

1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and [either] the dispute [or the defendant]*] the defendant.

2. [In particular,] [Where the defendant is habitually resident in a Contracting State,] jurisdiction shall not be exercised by the courts of a Contracting State on the basis [solely of one or more] of the following --

   (a) the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property;]

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100 It was proposed to add the language within brackets to provide for the situation where the counterclaim is outside the subject matter jurisdiction of the court. There was general agreement that a counter-claim could only confer jurisdiction over the person of the defendant and not subject matter jurisdiction (including excess of any monetary limits) which it did not possess under national law. There was some discussion as to whether this was already obvious, or whether the issue which also arises in relation to forum selection clauses, should be dealt with in a general provision, and whether the language proposed within the brackets was adequate for the intended purpose. In relation to the last issue, the following alternative words have been proposed: “[…], unless the court seised does not have subject matter jurisdiction to adjudicate the counter-claim”.

101 Subject to the determination of the material in brackets, this Article was approved by agreement.

102 It has been proposed that the reference to Article 13 be deleted. This will allow the making of provisional and/or protective orders under national law.

103 The question of the existence or exclusivity of Articles 7, 8, 12 and 13 still remain to be resolved.

104 There was no consensus on this provision.

105 It has been proposed to add the words ‘either’ and ‘or the defendant’ in order to meet the difficulties in national legal systems where the main emphasis for jurisdictional competence lies on the link between the forum and the defendant, rather than the subject matter of the dispute. There is no consensus on this point.

106 The deletion of the whole of paragraph 1 has been proposed in order to emphasise the basic concept of the Convention that there be a limited number of required bases of jurisdictions that are generally accepted, a limited number of jurisdictional bases so universally disapproved as exorbitant that they should be listed as prohibited jurisdictions, and that any other jurisdiction not listed in either category should remain open for the exercise of jurisdiction under national law (the ‘grey zone’). There was no consensus on the deletion of paragraph 1.

107 If paragraph 1 is to be deleted, the words in brackets should also be deleted.

108 If paragraph 1 is to be deleted, the words in brackets should be placed in what is now paragraph 2.

109 It has been proposed to delete the words within the brackets. No consensus exists on this point.

110 It has been proposed to delete sub-paragraph a) entirely. There is no consensus on this issue.
b) the nationality of the plaintiff;
c) the nationality of the defendant;
d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State;
  [e) the carrying on of commercial or other activities by the defendant in that State, whether or not through a branch, agency or any other establishment of the defendant,]_{111} except where the dispute is directly related to those activities;
f) the service of a writ upon the defendant in that State;
g) the unilateral designation of the forum by the plaintiff;_{113}
h) [proceedings in that State for declaration of enforceability or registration or for the enforcement of a judgment, except where the dispute is directly related to such proceedings]_{114} [initiation of proceedings in that State by the party against whom jurisdiction is claimed, for the purpose of recognising or enforcing a judgment from another State];_{115}
  [i) the temporary residence or presence of the defendant in that State;]_{116}
j) the signing in that State of the contract from which the dispute arises;_{117}
k) the location of a subsidiary or other related entity of the defendant in that State;_{118}
l) the existence of a related criminal action in that State]._{119}

[3. Nothing in this article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action claiming damages in respect of conduct which constitutes -

[a) genocide, a crime against humanity or a war crime];_{120} or]_{121}

_{111} The addition of the words within the brackets is proposed to make it clear that the presence of a branch, agency or other establishment within the forum should not be a basis for the exercise of general jurisdiction under national law: see the view expressed by the co-reporters in Preliminary Document No 11 at p. 57 that 'such a general jurisdiction is inconsistent with the Convention' (the preliminary draft Convention of October 1999). No consensus was reached on this proposal.
_{112} It has been proposed to delete sub-paragraph e) entirely. There is no consensus on this issue.
_{113} It has been proposed to delete sub-paragraph g) entirely. There is no consensus on this point.
_{114} This was the text as it appeared in the preliminary draft Convention of October 1999.
_{115} The language within the bracket's was proposed as an alternative to the October 1999 text by way of clarification only. However, it was objected that the omission of the words 'except where the dispute is directly limited to such proceedings' had a substantial effect and would deprive the judgment debtor of the opportunity to raise objections directly related to the enforcement, such as part payment of the debt.
_{116} It has been proposed to delete this sub-paragraph entirely. There is no consensus on this point.
_{117} It has been proposed to delete this sub-paragraph entirely. There is no consensus on this point.
_{118} The addition of this item to the list of prohibited jurisdiction has been proposed. There is no consensus on this point.
_{119} The addition of this item to the list of prohibited jurisdictions has been proposed. There is no consensus on this point: see the comments of the co-reporters in Preliminary Document No 11, at p. 31, footnote 14 and accompanying text.
_{120} It was proposed to include a reference to the definitions contained in the Statute of the International Criminal Court. However, it was pointed out that this Statute had not as yet entered into force.
_{121} There was agreement that the material in sub-paragraph a) be placed in separate brackets, because sub-paragraphs a) and b) raised different issues.
b) a serious crime under international law, provided that this State has exercised its
criminal jurisdiction over that crime in accordance with an international treaty to
which it is a Party and that claim is for civil compensatory damages for death or
serious bodily injuries arising from that crime.\textsuperscript{122}

Sub-paragraph \textit{b)} only applies if the party seeking relief is exposed to a risk of a denial of
justice\textsuperscript{123} because proceedings in another State are not possible or cannot reasonably be
required.\textsuperscript{124}

\textit{Article 19} Authority of the court seised

1. Where the defendant does not enter an appearance, the court shall verify whether
Article 18 prohibits it from exercising jurisdiction if -

\begin{itemize}
  \item \textit{a)} national law so requires; or
  \item \textit{b)} the plaintiff so requests; or
  \item \textit{c)} the defendant so requests, even after judgment is entered in accordance with
  procedures established under national law; or
  \item \textit{d)} the document which instituted the proceedings or an equivalent document was
  served on the defendant in another Contracting State
\end{itemize}

or

\begin{itemize}
  \item [it appears from the documents filed by the plaintiff that the defendant's address is
  in another Contracting State].\textsuperscript{125}
\end{itemize}

\textsuperscript{122} The original proposal had translated the French '\textit{exercer} as 'established'. Some favourable comments on the
proposal were withdrawn when it was pointed out that the intention was not to say 'established' in English but to
restrict the article to situations where criminal jurisdiction is 'exercised'.

\textsuperscript{123} It was pointed out that the concept of 'denial of justice' was unknown under certain legal systems.

\textsuperscript{124} There was no consensus on the proposed paragraph 3. It is included in the text within square brackets to
facilitate future discussion.

\textsuperscript{125} There was no consensus on this proposal.

\textsuperscript{126} It was agreed to place the text of Article 19, paragraph 1, as it appeared in the preliminary draft Convention of
October 1999 (including any bracketed material) in the present document.

\textsuperscript{127} It was agreed to place the text of Article 20, as it appeared in the preliminary draft Convention of October 1999
(including any bracketed material) in the present document.
**Article 21**  
Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and where such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction under Articles [white list][128] [or under a rule of national law which is consistent with these articles][129] and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 [, II][130] or 12.

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised -
   
   a) when the document instituting the proceedings or an equivalent document is lodged with the court; or
   
   b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

   [As appropriate, universal time is applicable.]  

6. If the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised -
   
   a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised; and
   
   b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

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128 It was agreed to add the words within brackets in order to make it clear that the *lis pendens* rule only applies when the court first seised exercises jurisdiction under the Convention: see the Report of the co-reporters, Preliminary Document 11, at p. 15.

129 This proposal sought to make it clear that the *lis pendens* rule will not only apply where the court first seised is exercising 'white list' jurisdiction as such, but also in the case where that court exercises a jurisdiction under national law in a situation that is consistent with 'white list' jurisdiction, such as proceedings against a defendant who is habitually resident in that State: see Report of co-reporters, Preliminary Document 11, at p. 86. There was no consensus on this point.

130 There was no consensus on the insertion of a reference to Article 11 (trusts).
Article 22   Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular -
   a) any inconvenience to the parties in view of their habitual residence;
   b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
   c) applicable limitation or prescription periods;
   d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, or if it is in a non-Contracting State, unless the defendant establishes that [the plaintiff's ability to enforce the judgment will not be materially prejudiced if such an order is not made][sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced].

5. When the court has suspended its proceedings under paragraph 1,
   a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court; or
   b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

6. This Article shall not apply where the court has jurisdiction only under Article 17 [which is not consistent with Articles [white list]]. In such a case, national law shall govern the question of declining jurisdiction.

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131 It was agreed to insert the words "or if it is in a non-Contracting State" in order to fill a gap in the provision, see the Report of the co-reporters, Preliminary Document 11, at pp. 92-93.

132 The words in the preceding brackets were proposed in substitution of the existing text which were thought to set too high a standard for the defendant to be able to meet on the one hand and still not give the plaintiff the security needed on the other: see the Report of the co-reporters, Preliminary Document 11 at p. 93. There was no consensus on this point.

133 This is the text of the preliminary draft Convention of October 1999.

134 This proposal sought to ensure that the preservation of national rules of forum non conveniens will not apply both where the court seised is exercising 'white list' jurisdiction as such, and also in the case where that court exercises a jurisdiction under national law in a situation that is consistent with 'white list' jurisdiction, such as proceedings against a defendant who is habitually resident in that State. There was no consensus on this point.

135 This paragraph makes it clear that Article 22 does not apply where the court is only exercising jurisdiction under national law. In that case, the court can apply its own rules of forum non conveniens or similar (if any). This resolves the question raised by the co-reporters in Preliminary Document 11, at p. 89. It was agreed to insert this paragraph.
7. The court seised and having jurisdiction under Articles 3 to 15 shall not apply the doctrine of forum non conveniens or any similar rule for declining jurisdiction.}\textsuperscript{136}

CHAPTER \textbf{***} - RECOGNITION AND ENFORCEMENT

\textbf{Article 23} Definition of 'judgment'

For the purposes of this Chapter, 'judgment' means any decision given by a court, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided that it relates to a decision which may be recognised or enforced under the Convention.\textsuperscript{137}

[\textbf{Article 23A} Recognition and enforcement of provisional and protective measures] \textsuperscript{138}

\textbf{[Alternative A]}

1. A decision ordering a provisional and protective\textsuperscript{139} measure, which has been taken by a court seised\textsuperscript{140} with the claim on the merits, shall be recognised and enforced in Contracting States in accordance with Articles \{25, 27-34\}.\textsuperscript{138}

2. In this article a reference to a provisional or protective measure means -

a) a measure to maintain the status quo pending determination of the issues at trial; or

b) a measure providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied; or

c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.\textsuperscript{139}

\textsuperscript{136} This paragraph was proposed to ensure that national rules of forum non conveniens or similar rules would not be used in relation to 'white list' jurisdiction as a means of declining jurisdiction. There was no consensus on this point.

\textsuperscript{137} For those delegations that support the complete exclusion of provisional and protective measures from the Convention, no reference to such measures will be necessary in this Article. It has been proposed to include in the Convention provisions both for jurisdiction to take provisional and protective measures and for their recognition and enforcement. As for jurisdiction, it was pointed out that the definition of 'judgment' in Article 23 could be read to include provisional and protective measures. As for recognition and enforcement, proposals are made in Article 23A below.

\textsuperscript{138} The two alternatives which do not appear to differ much in substance, provide for the recognition and enforcement of provisional and protective orders made by a court that is seised (or about to be seised) of the substantive dispute. Such a provision is opposed naturally by those delegations that favour exclusion of such measures from the scope of the Convention. But several delegations that favoured the inclusion of a provision relating to such measures in the jurisdictional or procedural part of the Convention, opposed making provision for the recognition and enforcement of provisional and protective orders. Note also that there may be a need to address: the extent to which similar relief is known in the State of the court addressed; and, procedures to safeguard the interests of third parties or of the defendant (e.g. an undertaking to pay damages).

\textsuperscript{139} The two descriptions 'provisional' and 'protective' are intended to be cumulative.

\textsuperscript{140} It was suggested that it would be sufficient if a court is seised after a provisional and protective measure is made as long as it is already seised by the time of recognition and enforcement of the provisional and protective measure is sought abroad.
Orders for provisional and protective measures issued in accordance with Article 13 shall be recognised and enforced in the other Contracting States in accordance with Articles [25, 27-34].]

Article 24  Judgments excluded from Chapter III

This Chapter shall not apply to judgments based solely on a ground of jurisdiction provided for by national law in accordance with Article 17, and which is not consistent with any basis of jurisdiction provided for in Articles [white list].

Article 25  Judgments to be recognised or enforced

1. A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter.

2. [In order to be recognised, a judgment referred to in paragraph 1 must have the effect of res judicata in the State of origin.] or

   [A judgment referred to in paragraph 1 shall be recognised from the time, and for as long as, it produces its effects in the State of origin.]

3. [In order to be enforceable, a judgment referred to in paragraph 1 must be enforceable in the State of origin.] or

   [A judgment referred to in the preceding paragraphs shall be enforceable from the time, and for as long as, it is enforceable in the State of origin.]

4. However, recognition or enforcement may be postponed [or refused] if the judgment is the subject of review in the State of origin or if the time limit for seeking a review has not expired.

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141 This refers back to the proposal made as Alternative B in Article 13, above. The order must have been made by a court which is seised or about to be seised of a claim and which has white list jurisdiction to determine the merits thereof.

142 The addition of the second part of the sentence was accepted by consensus. The additional words make it clear that Chapter III will apply to any judgment based on one or more grounds of jurisdiction, so long as any one of those grounds is consistent with a required basis for jurisdiction under the Convention. For recognition purposes, the application of Article 24 is confined to judgments that can only be based on jurisdiction provided for by national law.

143 This is the text of paragraph 2 as it appeared in the preliminary draft Convention of October 1999. It was suggested to avoid the use of technical terms such as 'res judicata' or 'autorité de la chose jugée' which may not have a uniform meaning in all legal systems.

144 This text was proposed as an alternative text to paragraph 2 by the Informal Working Group on Article 25. It has been agreed to insert it in the text to facilitate future discussion.

145 This is the text of paragraph 3 as it appeared in the preliminary draft Convention of October 1999.

146 This text was proposed as an alternative text to paragraph 3 by the Informal Working Group on Article 25. It has been agreed to insert it in the text for future discussion.

147 The addition of the words in brackets is proposed in order to ensure that Contracting States are not obliged to recognise or enforce judgments under the circumstances described in this paragraph. The decision whether to postpone or refuse recognition should be left to national law. The proposal has not as yet been discussed.

Page 22 of 38
Article 26  Judgments not to be recognised or enforced 148

A judgment based on a ground of jurisdiction which conflicts with Article 4, 5, 7, 8 or 12, or whose application is prohibited by virtue of Article 18, shall not be recognised or enforced. 149

Article 27  Verification of jurisdiction 150

1. The court addressed shall verify the jurisdiction of the court of origin.

2. In verifying the jurisdiction of the court of origin, the court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

3. Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.

Article 27A  Appearance without protest

1. If, in the proceedings before the court of origin, -

   a) the plaintiff claimed that the court had jurisdiction on one of the grounds specified in Articles [white list]; and

   b) the plaintiff did not claim that the court had jurisdiction on any other ground under national law; and

   c) the court did not determine that it had jurisdiction under any other ground under national law; and

   d) the defendant proceeded on the merits without contesting jurisdiction, 151

the defendant shall, in the court addressed, be precluded from contesting the jurisdiction of the court of origin.

2. This Article shall not apply if the courts of a Contracting State other than the State of the court of origin had exclusive jurisdiction under Article 12. 152

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148 Agreement was reached on this Article subject to further identification of the Articles to which it will apply.

149 Agreement was reached on this paragraph subject to further identification of the Articles to which it will apply.

150 This Article was agreed to.

151 The view was expressed that the time limit presently specified in Article 5, above, should be incorporated in sub-paragraph d). There was no consensus on this point.

152 Apart from the matter noted in note 151, above, there was consensus on this proposed new article. Its purpose is to overcome the difficulty referred to by the co-reporters in relation to the text of Article 5 as it appeared in the preliminary draft Convention of October 1999 (see Preliminary Document No 11, at p. 46) that under the text as it then stood appearance without protest to jurisdiction exercised pursuant to national law (the 'grey zone') would convert that jurisdiction into required jurisdiction. There was a consensus that this would be an undesirable effect of the previous provision. The effect of the new provision would remove appearance by the defendant from the list of required jurisdictions (the 'white list'), but appearance of the defendant without protest will, if the conditions set out in paragraph 1 are fulfilled, preclude the defendant from contesting the jurisdiction of the court of origin upon the verification of the jurisdiction of that court by the court addressed.
Article 28  Grounds for refusal of recognition or enforcement

1. Recognition or enforcement of a judgment may be refused [only]\(^{153}\) if -

   a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seised in accordance with Article 21;\(^{154}\)

   b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognised or enforced in the State addressed;\(^{155}\)

   [c) the (judgment results from) proceedings (in the State of origin were)\(^{156}\) incompatible with fundamental principles of procedure of the State addressed, [including the right of each party to be heard by an impartial and independent court];\(^{157}\)

   d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, or was not notified in accordance with [an applicable international convention] [the domestic rules of law of the State where such notification took place],\(^{158}\) unless the defendant entered an appearance and presented his case without contesting the matter of notification in the court of origin, provided that the law of that court permits objection to the matter of notification and the defendant did not object.\(^{159}\)

   e) the judgment was obtained by fraud in connection with a matter of procedure;\(^{160}\)

   f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.\(^{161}\)

2. Without prejudice to such review as is necessary for the purpose of application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.\(^{162}\)

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\(^{153}\) The insertion of the word 'only' has been proposed to make clear that the following list is an exclusive list of grounds for refusal or enforcement, see Preliminary Document No 11, at p. 102. No consensus was reached on the inclusion of this word in the text.

\(^{154}\) This sub-paragraph was agreed to.

\(^{155}\) This sub-paragraph was agreed to.

\(^{156}\) The deletion of the words 'judgment results from' and the insertion of the words 'in the State of origin were'\(^{156}\) has been proposed. This is intended to clarify the provision. Further discussion depends on the decision of the issue raised in footnote 157.

\(^{157}\) The deletion of this sub-paragraph has been proposed because it would encourage attacks on the impartiality and independence of the court by the losing party in an attempt to delay enforcement. It would also be contrary to the need for mutual trust and confidence among the courts of Contracting States. It may be that, subject to revision, the first part of the sub-paragraph could be acceptable. No consensus was reached on the continued inclusion of the sub-paragraph in its present form.

\(^{158}\) No difficulties were raised about the \(^{158}\)riorization of the sub-paragraph not in brackets. The material within the brackets was put forward as containing two options. The option contained within the first set of brackets would permit the requested court to deny recognition in cases where the applicable international convention was violated, such as the Hague Convention of 1955 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The second option would permit the requested court to deny recognition where service was not effected in accordance with the requirements of the law of the State where notification took place. In most cases, but not all, this would coincide with the State addressed. There was no consensus on the acceptance of either option.

\(^{159}\) The addition of the words after the last comma was agreed to, subject to drafting.

\(^{160}\) Agreement was reached on this sub-paragraph.

\(^{161}\) Agreement was reached on this sub-paragraph.

\(^{162}\) Agreement was reached on this paragraph.
Article 29  Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –

a) a complete and certified copy of the judgment;

b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;

c) all documents required to establish that the judgment is res judicata in the State of origin or, as the case may be, is enforceable in that State;

d) if the court addressed so requires, a translation of the documents referred to above, made by a person [legally] qualified to do so.

2. An application for recognition or enforcement may be accompanied by the form annexed to this Convention and, if the court addressed so requires, a translation of the form made by a person [legally] qualified to do so.

3. No legalisation or other formality may be required.

4. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require the production of any other necessary documents.

Article 30  Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the State addressed so far as the Convention does not provide otherwise. [The law of the State addressed must provide for the possibility to appeal against the declaration of enforceability or registration for enforcement.] The court addressed shall act [' in accordance with the most rapid procedure available under local law] [expeditiously].

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163 This Article was approved by consensus as it appeared in the preliminary draft Convention of October 1999. It was noted that drafting changes would have to be made if the proposed amendments to Article 25 were accepted.

164 It was proposed to add the words 'legally'. There was no consensus.

165 A draft of such a form is attached in Annex III as a basis for further discussion.

166 It was proposed to add the words 'legally'. There was no consensus.

167 It was agreed that the nature of the form and whether it should be mandatory, available upon request, or discretionary on the part of the rendering court, required further discussion.

168 This proposal was put forward in order to ensure that there be at least one possibility of an appeal against a decision either to grant or to refuse exequatur or registration. This proposal was opposed on the ground that the provision of a method of challenging or reviewing such a decision should be left to national law. The matter remains unresolved.

169 The language within the brackets was proposed to replace the word ‘expeditiously’ in the existing text. Its intention was to give expression in the text of the Convention to the comment of the Reporters in Preliminary Document No 11 at p. 110 that Article 30 ‘obliges Contracting States to use ... the most rapid procedure they possess in their national law’. Concerns were expressed that the proposal would constitute too great an intrusion into national law and that certain rapid procedures that are provided for, for example, in the context of regional arrangements, are not necessarily appropriate in a world wide convention. In a further clarification the Reporters pointed out that such a provision would not oblige a State to use a procedure made available specifically for the purposes of a treaty or arrangement to which that State was a party, but referred to its non-treaty law (droit commun). No consensus was reached on this provision.
Article 31 Costs of proceedings

1. No security, bond or deposit, however described, to guarantee the payment of costs or expenses [for the procedure of Article 30] shall be required by reason only that the applicant is a national of, or has its habitual residence in, another Contracting State.

[2. An order for payment of costs and expenses of proceedings, made in one of the Contracting States against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 shall, on the application of the person entitled to the benefit of the order, be rendered enforceable without charge in any other Contracting State.]

Article 32 Legal aid

[Natural persons habitually resident in a Contracting State shall be entitled, in proceedings for recognition and enforcement, to legal aid under the same conditions as apply to persons habitually resident in the requested State.]

Article 33 Damages

1. A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the State addressed could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.

2. a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.

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170 This addition was proposed with the intention of clarifying the scope of the Article without changing the substance. The necessity for this provision was questioned and fears were expressed about unintended consequences. Reference was also made to Article 16 of the Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. Consensus was reached on the substance of this paragraph.

171 The proposal for this paragraph is based on Article 15 of the Hague Convention of 1980 on International Access to Justice and Article 18 of the Hague Convention of 1954 on Civil Procedure. Its purpose is to secure enforcement of an order made by the requested court for the payment of the costs and expenses incurred by the judgment debtor in a case where the requested court has rejected enforcement of the judgment on a ground such as the fraud of the judgment creditor upon the court of origin. There was no consensus on this point.

172 It was proposed that this provision be deleted from the Convention because it raised constitutional concerns. Some delegations did not consider the provision essential and it was therefore deleted. But for yet other delegations it was of great importance. It was suggested that the issue could be resolved through an 'opt-in' provision. There was no consensus on these proposals.

173 The text of paragraph 1 has been approved by consensus and replaces the text of the preliminary draft Convention of October 1999. The working group that produced this text also recommended consideration of reversing the order of paragraphs 1 and 2.

174 The Reporters explained that the statement at p. 114 of Preliminary Document No 11 to the effect that as a general principle 'grossly excessive' was likely to mean 'grossly excessive by the standards of the court of origin', did not mean that the question of whether the damages were grossly excessive should be judged only by the standards of the court of origin. This would depend on the circumstances of each case, especially on whether the judgment creditor was a resident of the State of origin or of the requested State. In the latter case, obviously the standards of the requested State would assume greater importance.
b) In no event shall the court addressed recognise or enforce\(^{175}\) the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.\(^{176}\)

3. In applying paragraph 1 or 2, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

**Article 34 Severability**

[Alternative A]

If the judgment contains elements which are severable, one or more of them may be separately recognised, declared enforceable, registered for enforcement, or enforced.\(^{177}\)

[Alternative B]

Partial recognition or enforcement

Partial recognition or enforcement of a judgment shall be granted where:

- a) partial recognition or enforcement is applied for; or
- b) only part of the judgment is capable of being recognised or enforced under this Convention; or
- c) the judgment has been satisfied in part.\(^{178}\)

**Article 35 Authentic Instruments**

[Alternative A]

1. Each Contracting State may declare that it will enforce, subject to reciprocity, authentic instruments formally drawn up or registered and enforceable in another Contracting State.\(^{179}\)

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\(^{175}\) The addition of the reference to enforcement here and in other parts of the Article was proposed in order to make clear that the Article applies to both recognition and enforcement, see the comments of the Reporters in Preliminary Document No 11, at p. 113. The proposal was accepted by consensus.

\(^{176}\) It was inquired whether statutory damages (where a statute has determined the amount to be awarded in case of breach), liquidated damages (where a contract has determined the amount to be paid in case of breach) and fixed interest on damages awards would fall within the scope of Article 33 and, if so, whether their character would be compensatory or non-compensatory. The co-reporters indicated that Article 33 would be applicable in such cases and that the classification of such damages as compensatory or punitive would be determined by the requested court. That court would take into account whether the statutory provision in question of the originating forum, or the contractual provision as interpreted according to its governing law, merely sought to estimate what was required to compensate the plaintiff or sought to impose a penalty.

\(^{177}\) This is the text as it appeared in the preliminary draft Convention of October 1999. It was noted by the co-reporters in Preliminary Document No 11, at p. 115 that this text made no express provision for partial enforcement. Such a provision would allow the court addressed to sever the portion of the judgment which had already been paid or otherwise satisfied.

\(^{178}\) This is an alternative text which has been included in this document to facilitate future discussion.

\(^{179}\) This is the text as it appeared in the preliminary draft Convention of October 1999. According to that text States wishing to take advantage of Article 35 should specifically elect to adopt it on the basis of reciprocity with other States making a similar declaration.
[Alternative B]

1. Authentic instruments formally drawn up or registered and enforceable in a Contracting State shall, upon request, be declared enforceable in another Contracting State. [180]

2. The authentic instrument must have been authenticated by a public authority or a delegate of a public authority and the authentication must relate to both the signature and the content of the document. [181]

3. The provisions concerning recognition and enforcement provided for in this Chapter shall apply as appropriate. [183]

[Article X] [184]

Any Contracting State may, at the time of ratification, acceptance, approval of, or accession to, this Convention, or at any time thereafter, make a declaration that it will not apply Article 35, or that it will apply that Article subject to reciprocity. [185]

Article 36 Settlements [187]

Settlements to which a court has given its authority shall be recognised, declared enforceable, registered for enforcement, or enforced in the State addressed under the same conditions as judgments falling within the Convention, so far as those conditions apply to settlements.

CHAPTER **** - GENERAL PROVISIONS

Article 37 Relationship with other Conventions

It was agreed that the proposals made in the Annex to the preliminary draft Convention as well as the Working Documents produced for the purposes of the present Session be reproduced in Annex 1 of this Summary.

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[180] Further discussion will be necessary to clarify what is meant by the words 'upon request' or whether the method and form of making the request (in writing, to a court or other instance) should be left to national law.

[181] According to this alternative text, Article 35 will apply to all Contracting States in the absence of a declaration as envisaged in the proposed Article X below. No consensus was reached on the version of paragraph 1 to be preferred.

[182] This was the text as it appeared in the preliminary draft Convention of October 1999.

[183] It was decided that this paragraph should remain within square brackets.

[184] This provision is part of Alternative 2 to paragraph 1, above. If accepted, it will probably be placed among the General Provisions of the Convention. If accepted, it will give Contracting States the following options:

- not to apply Article 35 under any circumstances;
- to apply Article 35 on condition of reciprocity; or
- to apply Article 35 without requiring reciprocity, that is, where a Contracting State is prepared to give effect to authentic instruments, although it does not provide for that institution under its domestic law.

[185] It remains to be decided whether reciprocity should be required in this proposal.

[186] There is no consensus as regards this provision.

[187] This Article was approved by consensus.
Articles 38 to 40 inclusive Uniform interpretation

This matter has not yet been discussed.

Article 41 Federal clause

This matter has not yet been discussed.

[Article 42 Ratification of and accession to the Convention 188]

[Alternative A]

1. This Convention shall become effective between any two Contracting States on the date of entry into force provided that the two States have each deposited a declaration confirming the entry into force between the two States of treaty relations under this Convention.

2. At the time of deposit of its instrument of ratification or accession, or at any time thereafter, each State shall deposit with the depository a copy of its declarations concerning all Contracting States with which the State will enter into treaty relations under the Convention. A Contracting State may withdraw or modify a declaration at any time.

3. The depository shall circulate all declarations received to all Contracting States and to Member States of the Hague Conference.

4. The Hague Conference on Private International Law shall regularly publish information reporting on the declarations that have been deposited pursuant to this Article.

[Alternative B]

1. The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Nineteenth Session. 189

2. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

3. Any other State may accede to the Convention.

4. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

5. The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

6. The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

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188 It was agreed that the two following proposals be included in this document in order to facilitate future discussion of this subject. There was no decision on whether there should be a provision dealing with bilateralisation and, if so, what form such a provision should take and how far bilateralisation should extend.

189 It was requested that consideration be given to a method whereby the European Community could become a party to the Convention.
Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

7. The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.  

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198 This proposal follows the language of Articles 37 and 38 of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction.
Article 37  Relationship with other Conventions

Proposal 1

1. The Convention does not affect any international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

2. However, the Convention prevails over such instruments to the extent that they provide for fora not authorised under the provisions of Article 18 of the Convention.

3. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned and to instruments adopted by a community of States.

Proposal 2

1. a) In this Article, the Brussels Convention [as amended], Regulation [...] of the European Union, and the Lugano Convention [as amended] shall be collectively referred to as "the European instruments".

   b) A State Party to either of the above Conventions or a Member State of the European Union to which the above Regulation applies shall be collectively referred to as "European instrument States".

2. Subject to the following provisions [of this Article], a European instrument State shall apply the European instruments, and not the Convention, whenever the European instruments are applicable according to their terms.

3. Except where the provisions of the European instruments on -
   a) exclusive jurisdiction;
   b) prorogation of jurisdiction;
   c) lis pendens and related actions;
   d) protective jurisdiction for consumers or employees;

are applicable, a European instrument State shall apply Articles 3, 5 to 11, 14 to 16 and 18 of the Convention whenever the defendant is not domiciled in a European instrument State.

4. Even if the defendant is domiciled in a European instrument State, a court of such a State shall apply -
   a) Article 4 of the Convention whenever the court chosen is not in a European instrument State;
   b) Article 12 of the Convention whenever the court with exclusive jurisdiction under that provision is not in a European instrument State; and
   c) Articles 21 and 22 of this Convention whenever the court in whose favour the proceedings are stayed or jurisdiction is declined is not a court of a European instrument State.

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191 Proposals 1-3 were annexed to the preliminary draft Convention of October 1999. Proposal 4 was introduced and discussed at the June 2001 Session.
Proposal 3

Judgments of courts of a Contracting State to this Convention based on jurisdiction granted under the terms of a different international convention ("other Convention") shall be recognised and enforced in courts of Contracting States to this Convention which are also Contracting States to the other Convention. This provision shall not apply if, by reservation under Article ..., a Contracting State chooses -

a) not to be governed by this provision, or

b) not to be governed by this provision as to certain designated other conventions.

Proposal 4

Article 2 Territorial scope

Insert the words shown in brackets in the chapeau of paragraph 1, as follows:

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State [or in the territory of a regional economic integration organisation that is a Contracting Party under Article [ ]]. However, even if all the parties are habitually resident in that [Contracting] State [or Party] -

[...]

Article 37A Relationship with Conventions in particular matters

This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

Article 37A Relationship with Conventions in particular matters

This Convention shall not affect the application of any other convention to which the Contracting States are or will be parties and which, in relation to particular matters, governs jurisdiction or the recognition or enforcement of judgments, provided that the application of such other convention shall not affect the rights and obligations under this Convention of any State Party that is not a Party to such other convention.

Article X Allocation of jurisdiction under this Convention

Nothing in this Convention shall affect any rule of a Contracting State regarding the internal allocation of jurisdiction among the courts of that State.

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192 It was pointed out to facilitate future discussions that Article 37A and Article X could in principle also be extended to cover regional economic integration organisations.
Proposal 1

Article 8 Individual contracts of employment

1. An employee may bring a claim in matters relating to individual contracts of employment against the employer
   
   a) in the courts of the State where the employer has its habitual residence;

   b) in the courts of the State in which the employee habitually carries out or carried out his work, [unless it was not reasonably foreseeable by the employer that the employee would habitually carry out his work in that State]; or

   c) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the establishment that engaged the employee is or was situated or in the courts of the State in which the employee carried out the work which has given rise to the dispute.

2. An employer may bring a claim in matters relating to individual contracts of employment against the employee only in the courts of the State in which the employee is habitually resident or in which the employee habitually carries out his work.

3. However, proceedings may be brought before the courts referred to in an agreement which conforms with the requirements of Article 4, paragraphs 1 and 2 -

   a) if the agreement is entered into after the dispute has arisen;

   b) to the extent that the agreement allows the employee to choose whether to bring proceedings in the courts referred to in the agreement or in the courts of the State referred to in paragraph 1; or

   c) to the extent that the agreement is binding on both parties under the law of the State in which the employee carried out the work which has given rise to the dispute and provided that it meets the requirements specified in the declaration made by such State as contemplated in Article X.

Proposal 2

Article 8 Individual contracts of employment

1. In matters relating to individual contracts of employment, an employee may bring a claim against the employer,

   a) in the courts of the State in which the employee habitually carries out or carried out his work, [unless it was not reasonably foreseeable by the employer that the employee would habitually carry out his work in that State]; or

   b) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the establishment that engaged the employee is or was situated.

2. An employer may bring a claim against the employee under this Convention only -

   a) in the courts of the State:

      i) in which the employee is habitually resident; or

      ii) in which the employee habitually carries out his work; or
b) if the employee and the employer have entered into an agreement to which paragraph 4 b) or c) applies, in the court designated in that agreement.

3. Article 4 applies to an agreement between an employee and an employer only:
   a) to the extent that it allows the employee to bring proceedings in the courts of a State other than the State referred to in paragraph 2; or
   b) if the agreement is entered into after the dispute has arisen; or
   c) to the extent that the agreement is binding on the employee under the law of the State in which the employee is resident at the time the agreement is entered into.

Proposal 3

Article X Reservation in respect of consumer contracts and employment contracts

1. A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Article 7 or 8 of this Convention.

2. A Contracting State which makes a declaration in accordance with the preceding paragraph may also declare that it will not be bound by Chapter III of this Convention in respect of judgments rendered under Article 7 or 8.

3. A Contracting State which makes a declaration in accordance with the preceding paragraphs is not to be considered a Contracting State of this Convention in respect of matters to which the declaration applies.

Note: This proposal is an alternative to Article 25 bis in the Edinburgh Draft Annex III A and Article 8, paragraph 4 c). It could also work well with the present wording of Articles 7 and 8 in the 1999 draft Convention. However, some modifications of the rules of jurisdiction will have to be modified in the Edinburgh Draft.

The purpose of this reservation is to make it possible for States that do not accept special rules about consumers or employees, to opt out from the Convention in this respect.

Under the first paragraph a State can opt out from the jurisdictional rules but not the rules on recognition and enforcement under Chapter III. Consequently, such a State is bound to recognise and enforce judgments rendered under Article 7 or 8. However, the State is not obliged to apply Articles 7 and 8 in relation to jurisdiction.

Under the second paragraph, a Contracting State has the possibility to opt out completely in respect of consumer contracts and/or employment contracts. A State can only make a declaration under this paragraph if it has also made a declaration under paragraph 1. A State that has decided to make declarations under paragraphs 1 and 2 will be regarded as having opted out completely in respect of consumer contracts and employment contracts under the Convention. Therefore such a State cannot apply Articles 7 and 8, and judgments rendered in other Contracting States under Articles 7 and 8 will not be recognised under the Convention in the State that has taken this reservation.

Paragraph 3 makes it clear that a State making reservations under paragraphs 1 and 2 is to be considered a non-Contracting State in respect of matters covered by the reservation.
Proposal 4 "Edinburgh Solution"

Article 8  Individual contracts of employment

1. This Article applies in matters relating to individual contracts of employment.

2. An employee may bring a claim against the employer
   a) in the courts of the State in which the employee habitually carries out or carried out
      his work, [unless it was not reasonably foreseeable by the employer that the
      employee would habitually carry out his work in that State; or
   b) if the employee does not or did not habitually carry out his work in any one State,
      in the courts of the State in which the establishment that engaged the employee is
      or was situated.

3. An employer may bring a claim against the employee under this Convention only –
   a) in the courts of the State:
      i) in which the employee is habitually resident; or
      ii) in which the employee habitually carries out his work; or
   b) if the employee and the employer have entered into an agreement to which
      paragraph 4 b) or c) applies, in the court designated in that agreement.

4. Article 4 applies to an agreement between an employee and an employer only:
   a) to the extent that it allows the employee to bring proceedings in the courts of a
      State other than the State referred to in paragraph 2; or
   b) if the agreement is entered into after the dispute has arisen; or
   c) to the extent that the agreement is binding on the employee under the law of the
      State in which the employee is resident at the time the agreement is entered into.

Article 25  Judgments to be recognised or enforced

"Subject to Article 25 bis ..."

[Article 25 bis

1. A Contracting State may make a declaration that it will not recognise or enforce a
   judgment under this Chapter, or a declaration specifying the conditions under which it will
   recognise or enforce a judgment under this Chapter, where:
   a) the judgment was rendered by the court of origin under Article 7(2) or Article 8(2); and
   b) the parties had entered into an agreement which conforms with the requirements of
      Article 4 designating a court other than the court of origin.

2. [A declaration under this Article may not deny recognition and enforcement of a judgment
   given under Article 7(2) or Article 8(2) if the Contracting State making the declaration would
   exercise jurisdiction under the relevant Article in a corresponding case.]  

3. Recognition or enforcement of a judgment may be refused by a Contracting State that
   has made a declaration contemplated by paragraph 1 in accordance with the terms of that
   declaration.]
FORM A

CONFIRMATION OF JUDGMENT

(Sample form confirming the issuance of a judgment by the Court of Origin for the purposes of recognition and enforcement under the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the "Convention"))

THE COURT OF ORIGIN

ADDRESS OF THE COURT OF ORIGIN

CONTACT PERSON AT THE COURT OF ORIGIN

TEL/FAX/EMAIL OF THE COURT OF ORIGIN

PLAINTIFF

Case / Docket Number:

v.

DEFENDANT

THE COURT OF ORIGIN hereby confirms that it rendered a judgment in the above captioned matter on (DATE) in (CITY, STATE, COUNTRY), which is a Contracting State to the Convention. Attached to this form is a complete and certified copy of the judgment rendered by (THE COURT OF ORIGIN).

1. Select one or more of the following options:

   A. This Court based its jurisdiction over the defendant(s) on the following article(s) of the Convention, as implemented under the law governing the proceedings of this Court:

   B. This Court based its jurisdiction over the defendant(s) on the following ground of jurisdiction provided for by national law:

   C. This Court did not identify in the judgment a ground for jurisdiction over the defendant(s):

      YES _______ NO _______

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193 Article 29(1)(a).
194 Article 27 (1) – The court addressed shall verify the jurisdiction of the court of origin.
2. This Court based its jurisdiction over the defendant(s) on the following findings of fact (If the findings of fact are stated in the judgment or accompanying decision, indicate the relevant passages of the judgment and the decision):\textsuperscript{195}

3. This Court awarded the following payment of money (Please indicate any relevant categories of damages):\textsuperscript{196}

4. This Court awarded interest as follows (Please specify the rate of interest, the portion(s) of the award to which interest applies, and the date from which interest is computed):

5. This Court included within the judgment the following court costs and expenses (including attorneys fees) related to the proceedings (Please specify the amounts of any such awards, including where applicable, any amount(s) intended to cover costs and expenses relating to the proceedings within a monetary award):\textsuperscript{197}

6. This Court awarded, in whole or in part, the following non-monetary remedy (Please describe the nature of the remedy):

7. This judgment was rendered by default:

\textbf{YES}_____ \textbf{NO}_____

(\textit{If this judgment was rendered by default, please attach the original or a certified copy of the document verifying notice to the defendant of the proceedings.})\textsuperscript{198}

8. This judgment (or some part thereof) is currently the subject of review in (COUNTRY OF THE COURT OF ORIGIN):\textsuperscript{200}

\textbf{YES}_____ \textbf{NO}_____

9. This judgment (or some part thereof) is presently enforceable in (COUNTRY OF THE COURT OF ORIGIN):\textsuperscript{201}

\textbf{YES}_____ \textbf{NO}_____

\textsuperscript{195} Article 27(2) – The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction.

\textsuperscript{196} Refer to Article 33.

\textsuperscript{197} Article 33 (3).

\textsuperscript{198} Article 27(2) – If the judgment was by default, then the Court being addressed by this form is not bound by the findings of fact on which the court of origin based its jurisdiction.

\textsuperscript{199} Article 29(1)(b).

\textsuperscript{200} Article 25(4).

\textsuperscript{201} Article 25(3).
RESOLUTION

Resolution No. 1/2000

INTERNATIONAL CIVIL AND COMMERCIAL LITIGATION

The 69th Conference of the International Law Association, held in London, United Kingdom, 25th–29th July 2000:

HAVING CONSIDERED the Report of the Committee on International Civil and Commercial Litigation on Declining and Referring Jurisdiction in International Litigation;

ADOPTS the Leuven/London Principles on Declining and Referring Jurisdiction annexed to this resolution:

COMMENDS the Principles to the attention of:

(a) national courts and law reform agencies, with a view to facilitating the progressive development of the law on this subject, and

(b) organisations concerned with international legal co-operation (in particular the Hague Conference), with a view to considering measures at the international level for mutual co-operation in the referral of jurisdiction in civil and commercial matters;

REQUESTS the Secretary General of the Association to transmit this resolution and the Committee's Report to the Hague Conference on Private International Law for its consideration;

INVITES the Committee to complete its work, in particular on the subject of jurisdiction over corporations.

LEUVEN/LONDON PRINCIPLES ON DECLINING AND REFERRING JURISDICTION IN CIVIL AND COMMERCIAL MATTERS

RECOGNISING that all systems of civil and commercial jurisdiction afford the parties some choice of forum in many cases

DESIRING to promote the proper allocation of cases between courts; to discourage improper forum shopping; and to reduce the unnecessary incidence of concurrent jurisdiction and the risk of irreconcilable judgments
ENCOURAGING the adoption of a system of resolving questions of jurisdiction and forum which promotes international civil justice

MINDFUL of the fundamental right of all persons to access to a fair hearing before an impartial tribunal without undue delay and without discrimination on grounds of nationality

CONSIDERING that, irrespective of whether there exists an international convention governing civil and commercial jurisdiction between relevant states, circumstances may arise in which it will be desirable for a national court to decline jurisdiction in favour of the court of another state, and that the above objectives may be assisted by elucidation of the principles upon which a court shall decline jurisdiction

BELIEVING that, when a court declines jurisdiction, the fairest and most efficient means of resolving the matter shall be to refer it to an alternative available forum

URGING enhanced co-operation between courts for the more efficient referral of cases

HEREBY DECIDES TO ADOPT the following Principles:

**Scope and Purpose**

1.1 These Principles determine the extent to which a court otherwise having original jurisdiction shall decline to exercise such jurisdiction, whether by suspension or termination, and refer the matter to a court of competent jurisdiction in another state in the exceptional circumstances set out below.

1.2 These Principles do not determine the rules of original jurisdiction in civil and commercial matters. Such rules are a matter of national law subject to international law, including any applicable international conventions.

**Preliminary Matters**

2.1 It shall be for a party to make and substantiate an application to an originating court. The originating court shall not act of its own motion.

2.2 An application shall be made at the outset of the proceedings. It shall be finally determined by the originating court on summary proceedings by separate order at the earliest opportunity and in any event before the defendant is required to plead on the merits.
2.3 If either party wishes to pursue such rights of appeal as are allowed under national law from such an order, it must do so expeditiously.

**Jurisdiction Clauses**

3.1 If the parties have chosen the originating court as the exclusive forum for resolution of the matter, then that court shall exercise jurisdiction and shall not decline it under Principle 4.

3.2 If the parties have chosen an alternative court as the exclusive forum for the resolution of the matter, then the originating court shall either terminate its proceedings on the ground that it has no jurisdiction over the matter or as the case may be decline jurisdiction.

3.3 If the parties' choice of forum is not exclusive, the court may hear an applicant pursuant to Principle 4.

**Declining Jurisdiction**

4. The originating court shall decline jurisdiction in the following exceptional circumstances:

**Lis Pendens**

4.1 Where proceedings involving the same parties and the same subject-matter are brought in the courts of more than one state, any court other than the court first seized shall suspend its proceedings until such time as the jurisdiction of the court first seized is established, and not declined under this Principle, and thereafter it shall terminate its proceedings. The court first seized shall apply Principle 4.3. Should that court refer the matter to a court subsequently seized in accordance with Principle 4.3, the latter court will not be obliged to terminate its proceedings.

**Related Actions**

4.2 Where related actions are pending in the courts of more than one state either court may suspend or terminate its proceedings and refer the matter to the alternative court in accordance with the procedures in Principle 5, provided that the actions can be consolidated in the alternative court.

**Other Grounds for Referral**

4.3 An originating court shall decline jurisdiction and refer the matter to an alternative court where it is satisfied that the alternative court is the man-
Ifestly more appropriate forum for the determination of the merits of the matter, taking into account the interests of all the parties, without discrimination on grounds of nationality. In making this decision, the court shall have regard in particular to the following factors:

(a) the location and language of the parties, witnesses and evidence;

(b) the balance of advantages of each party afforded by the law, procedure and practice of the respective jurisdictions;

(c) the law applicable to the merits;

(d) in cases under Principle 4.1, the desirability of avoiding multiplicity of proceedings or conflicting judgments having regard to the manner of resort to the respective court’s jurisdiction and the substantive progress of the respective actions;

(e) the enforceability of any resulting judgment;

(f) the efficient operation of the judicial system of the respective jurisdictions;

(g) any terms of referral under Principle 5.3.

Referral

Procedure in the Originating Court

5.1 On the hearing of an application under Principle 4.3, and subject to any terms of referral under Principle 5.3, the applicant shall satisfy the originating court that the alternative court:

(a) has and will exercise jurisdiction over the matter; and

(b) is likely to render its judgment on the merits within a reasonable time.

5.2 The originating court may communicate directly with the alternative court on any application for referral in order to obtain information relevant to its determination under Principle 4, where such communication is permitted by the respective states. States are encouraged to permit their courts to make, and respond to, such communications.

Any such communication shall be either on the application of one of the parties or on its own motion. Where the court acts on its own motion it
shall give reasonable notice to the parties of its intention to do so, and hear the parties on the information to be sought.

The originating court shall either communicate in writing or otherwise on the record. It shall communicate in a language acceptable to the alternative court.

5.3 The parties and the originating court are encouraged to consider appropriate terms of referral. These may deal in particular with:

(a) the applicant's submission to the jurisdiction of the alternative court;

(b) the terms on which the applicant may assert a defence of limitation or prescription of action in the alternative court.

5.4 Save where international convention provides otherwise, the originating court, if satisfied of the matters in paragraph 5.1, shall on an order to decline jurisdiction either suspend further proceedings at least until the jurisdiction of the alternative court has been established, or, where national law provides, terminate its proceedings.

Procedure in the Alternative Court

5.5 The alternative court shall decide any question as to its own jurisdiction at the outset of the proceedings before it and in any event before the defendant is required to plead on the merits.

5.6 The applicant shall transmit the order for referral, together with the originating court's reasons for judgment, if any, to the alternative court which shall be entitled to take it, and the terms of referral, into account whether in deciding its own jurisdiction or as otherwise relevant to the issues before it.

5.7 The applicant shall promptly inform the originating court when the alternative court has assumed jurisdiction over the matter and shall co-operate in the making of any further order which the originating court may wish to make, including an order to terminate its proceedings.

5.8 In the event that the alternative court were not for any reason to assume jurisdiction, then the originating court may lift any suspension of its own proceedings and shall be entitled to resume jurisdiction over the merits.
Consequences of Referral

6. Without prejudice to any other grounds upon which the courts of the state originally applied to may be entitled to decline to recognise or enforce any resulting judgment of the alternative court, once the originating court has, pursuant to Principle 3 or 4, declined jurisdiction in favour of the alternative court, the courts of its state shall not be entitled to review the jurisdiction of the alternative court on an application for the recognition or enforcement of a judgment of that court.

Injunctions in relation to Foreign Proceedings

7.1 Where the respective states are parties to an international convention providing common rules for the exercise of original jurisdiction, no court of either state shall be entitled to restrain by injunction any party from proceeding in the court of the other state.

It shall be for the court in which the proceedings on the merits are instituted to determine its own jurisdiction and any application pursuant to these Principles.

7.2 Where there is no such applicable international convention, a court to which a request for such an injunction is made shall not grant an injunction where it is satisfied that these Principles will be applied by the court in which proceedings have been instituted.

7.3 This Principle is without prejudice to the power of a court to grant redress where an exclusive jurisdiction clause has been manifestly breached according to the law applicable in the courts of both states.