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**VENUE RESOLUTION AND FORUM NON CONVENIENS:
FOUR MODELS OF JURISDICTIONAL PROPRIETY* by
Professor Alan Reed****

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ABSTRACT

VENUE RESOLUTION AND FORUM NON CONVENIENS: FOUR MODELS OF JURISDICTIONAL PROPRIETY by Professor Alan Reed

Venue resolution is of fundamental importance in the arena of international commercial litigation. A panoply of factors are engaged when a cross-border tort occurs or transnational contract is breached. Dyspeptic litigants are presented with a disputed 'border skirmish' on appropriate litigational battleground. Dilemmatic choices apply to identification of which country to commence proceedings across respective fora. It is submitted that in this context an important role for *forum non conveniens* needs to be fashioned, and the doctrine may operate as a species of alternative dispute resolution. The discretionary and flexible nature of *forum non conveniens* may operate to temper exorbitant jurisdiction principle prevalent in Anglo-American law. The putative search for a true seat and natural forum for venue resolution promotes systemic natural justice.

There is necessarily a residual place for *forum non conveniens*, as a fail-safe device, where actions are egregiously brought against a home defendant simply to vex and harass her-actions where it is unduly inconvenient to allow them to proceed in the seised forum. The syntax of this supererogatory model of *forum non conveniens* arguably heralds a need to return to the old abuse of process standard-bearer as the apposite reformulated test. There is a need to refocus the *forum non conveniens* inquiry to more closely appropriate the original intent and social conscience of the doctrine. The doctrine is consequently deconstructed in light of paradigms presented by four models: English traditional law principles; Brussels I Regulation and *actor sequitur forum rei* adoption of communitarianism/harmonisation and the lack of review; U.S. ideology post-*Bhopal*; and the template presented by recent Australian reforms. It is propounded that the discriminatory nature of the federal standard adopted in *Piper Aircraft* has capriciously insulated behemoth U.S. multinationals from liability for conduct abroad. Machiavellian games have been played with stalking horse arguments of international comity and anti-chauvinism.

Key precedential authorities in respective fora are critiqued, notably, *Connelly*, *Owusu*, *Piper*, *Voth* and *Lubbe*. Public and private evaluative orderings are examined as part of the presentation and consequential impact of a gallimaufry of exogenetic influences: (i) applicable law and intellectual coherence; (ii) *Fiscus conveniens* and court delays; (iii) evidential and procedural issues and (iv). Minimum standards of justice abroad. It is identified that a reformulation is required to enhance consideration of applicable law public policy implications as part of sybaritic intellectual coherence of substantive law. The article presents an innovative evaluation of the new European framework for choice of law in contract and tort presented by recent adoption of the Rome I and II Regulations.

They are deconstructed, however, in terms of connectivity with public interest and progenitor of harm precepts relevant to venue resolution and *de novo* illustrations are adduced. The conclusions suggest a transmogrification away from a most significant forum approach towards a via media perspective expressing a clear inappropriate forum threshold reflecting the venerable antiquity and sophistication of the doctrine.

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1. INTRODUCTION

“A brisk preliminary skirmish on jurisdiction may well allow each side to gauge the strength of the other’s case and the stomach each has for the fight. After the issue has been decided, the case may well settle and, if it does, settle on better informed terms than would otherwise have been the case. If this is so, the doctrine of *forum non conveniens* also justifies itself as a species of alternative dispute resolution”¹

Forum non conveniens is an important doctrine that allows the court a discretion to decline jurisdiction in cases connected to an alternative legal system that presents a more ‘natural’ forum for venue resolution.² The discretionary nature of the articulated theory allows presumptive choice, where applicable, to resolution of a forum.³ It is impossible to overstate the significance of the formulation in terms of international commercial litigation, and the impact effected on dispute resolution.⁴ It has been cogently stated that, “the battle over where the litigation occurs is typically the hardest fought and most important issue in a transnational case.”⁵ The parties are litigating in order to determine where to litigate.⁶ In such terms the debate is not focused on establishment of jurisdiction, but rather whether it should be exercised and whether a foreign court represents, “a more appropriate and convenient forum for adjudicating the controversy.”⁷ In

¹ ADRIAN BRIGGS, *THE CONFLICT OF LAWS* 95 (2002).

² See generally J. Stanton-Hill, “Towards Global Convenience, Fairness, and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts” (2008) 41 *Vanderbilt Journal of Transnational Law* 1177; and Michael McParland, “Forum Non Conveniens in the U.S: Are the Courtroom Doors Finally Shut?” (2008) *Journal of Personal Injury Law* 58.

³ See generally, Laurel E Miller, “Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions” (1991) 58 *University of Chicago Law Review* 1369; Ronald A Brand, “Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments” (2002) 37 *Texas International Law Journal* 467; Freidrich K. Juenger, “Forum Shopping, Domestic and International” (1989) 63 *Tulane Law Review* 553; and Joel H. Samuels, “When is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis (2010) 85 *Indiana Law Journal* 1059.

⁴ As Park has stated in evocative language, “[L]itigation may take place before courts of questionable independence, with procedural traditions radically different from those to which the litigant is accustomed. Proceedings may unfold not in a variant of the language of Shakespeare, but in the tongues of Molière, Cervantes, Demosthenes or Mohammed”; WILLIAM W. PARK, *INTERNATIONAL FORUM SELECTION* 8-9 (1995).

⁵ David W. Robertson and Paula K. Speck, “Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions” (1990) 68 *Texas Law Review* 937, at 938.

⁶ RICHARD FENTIMAN, *INTERNATIONAL COMMERCIAL LITIGATION*, 486 (2010).

⁷ *Sinochem Int’l Co. v Malaysia Int’l Shipping Corp.*, 127 S. Ct. 1184, 1188 (2007).

this regard there are particularistic attractions for the suit being brought by a plaintiff in the U.S. within their adventitious legal framework, “As a moth is drawn to the light, so is a litigant drawn to the United States.”⁸ Although litigants may have quite natural proclivities for suit therein the likely outcome, specifically if they are foreign plaintiffs bringing suit against a U.S. multinational, is disappointment.⁹ An unfortunate situation prevails, highlighted throughout this article, that behemoth U.S. corporations enjoy inequitable benefit in the litigational battleground presented by a federal standard jurisprudential bulwark:

“Corporations have the dual advantage of profiting from their investments in areas where local citizens are likely to be effectively excluded from the host country’s legal and political systems, while also remaining insulated from actions in home country courts.”¹⁰

At a practical and theoretical level *forum non conveniens* doctrine is often supererogatory in international commercial disputes.¹¹ The discretionary nature of doctrinal principles adduced plays a vital role in tempering aspects of exorbitant jurisdictional principles that apply in Anglo-American extant law.¹² The template provided allows for a sophisticated evaluation of ‘appropriate’

⁸ See Smith Kline & French Labs. Ltd. V Bloch [1983] 1 W.L.R. 730, at 733-4 per Lord Denning; and see generally, Weintraub, “International Litigation and Forum Non Conveniens” (1994) 29 Texas International Law Journal 321.

⁹ See Erin Foley Smith, “Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening U.S. Courts to Victims of Corporate Human Rights Abuses” (2010) 44 Columbia Journal of Law and Social Problems 145; Finity E Jernagan, “Forum Non Conveniens: Whose Convenience and Justice?” (2008) 86 Texas Law Review 1079; and Emil Petrossian, “In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England” (2007) 40 Loyola of Los Angeles Law Review 1257.

¹⁰ Foley Smith, *supra* n. 9, at 159; and see further, Malcolm J Rogge, “Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua and Aguinda” (2001) 36 Texas International Law Journal 299.

¹¹ See, generally, Michael M Karayanni, “The Myth and Reality of a Controversy: Public Factors and the Forum Non Conveniens Doctrine” (2000) 21 Wisconsin International Law Journal 327, at 333 who asserts: “[I]n common law countries, where it was accepted that jurisdiction could be dependent on connections that were not always of a meaningful nature, a need emerged within jurisdictional thoughts to introduce a second stage into the jurisdictional inquiry. The second stage was supposed to guarantee the existence of a meaningful connection with the case and thereby make adjudication in the local forum more reasonable”; and, see, generally, Lonny Sheinkopf Hoffman and Keith A Rowley, “Forum Non Conveniens in Federal Statutory Cases” (200) 49 Emory L.J. 1137; and Ellen L. Hayes, “Forum Non Conveniens in England, Australia and Japan. The Allocation of Jurisdiction in Transnational Litigation” (1992) 26 U. Brit. Colum. L. Rev. 41.

¹² See, generally, Jeffrey E Baldwin, “International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens” (2007) 40 Cornell International Law Journal 749; and, Christopher A. Whytock, “The Evolving Forum Shopping System” (2011) 96 Cornell Law Review 481.

jurisdiction beyond the blunt instrument of adjudicatory connection to a forum. The appraisal conducted within the balanced equation is approached by trial courts in a neutral and objective fashion, and dismissal of suits via this mechanism, where litigation is brought simply to ‘vex or harass’ a dyspeptic party provides an important tactical weapon against pejorative reverse forum shopping and regrettable venue engagement.¹³ There is a systemic promotion of procedural justice in this regard with the putative search for the ‘natural’ venue to resolve a contract or tort dispute. An efficiency may arise in terms of outcome determination as resolution of the venue often promotes a compromise settlement or negotiations, avoiding trials and lengthy engagement centred around contestation of the substantive merits.¹⁴

Forum non conveniens may promote efficiency, reduced cost and promote convenience, as adduced, by avoiding trial procedure and by identification of the ‘best’ place to litigate in terms of adjectival evidence and focal epicentre of the dispute.¹⁵ The presumption is that the most appropriate forum standardisation enhances fairness and efficiency by localisation of the dispute within the purview of the natural forum. It is often the ultimate litigation introspection as the party who loses the venue battle retreats and forecloses to avoid the risk of litigation in an unwelcome alternative forum.¹⁶ The discretionary element purveyed within the framework allows for resolution of hard cases in a contemporary and nuanced

¹³ See Robertson, “Conflict of Laws and Forum Non Conveniens Determinations in Maritime Personal Injury and Death Cases in United States Courts”, in *New Directions in Maritime Law* 51 at 51-2 (Sharpe and Spicer eds. 1985). Robertson states: “Just as plaintiffs and their lawyers seek the best forum and the best law by bringing suit in the United States and seeking recovery under American law, so do defendants and their lawyers seek the best forum and the best law by resisting American jurisdiction and the application of American law, by seeking dismissal of the United States action on the basis of the discretionary doctrine of forum non conveniens, and occasionally by moving a tribunal outside the United States to enjoin plaintiff from litigating in the chosen forum”; *ibid.*, at 52; and see, also, Albright, “In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens” (1992) 71 *Tex. L. Rev.* 351; Reynolds, “The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts “ (1992) 70 *Tex. L. Rev.* 1663; and Duval-Major, “One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiffs (1992) 77 *Cornell L.R.* 650.

¹⁴ Fentiman, *supra* n. 6., at 480-484; and, see, generally, SYMEON C. SYMEONIDES, *AMERICAN PRIVATE INTERNATIONAL LAW* (2008); GARY B. BORN AND PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (2007); and JONATHAN HILL AND ADELINE CHONG, *INTERNATIONAL COMMERCIAL DISPUTES*, (Hart Publishing, 4th edn.), (2010).

¹⁵ Fentiman, *supra* n.6., at 482-484.

¹⁶ *Ibid.*, and see, generally, C.M.V. CLARKSON AND JONATHAN HILL, *THE CONFLICT OF LAWS*, (Oxford Press, 4th edn), (2011); and DAVID McCLEAN AND KISCH BEEVERS, *THE CONFLICT OF LAWS*, (Sweet and Maxwell, 7th edn.), (2009).

fashion, and this prompted Lord Goff to assert that *forum non conveniens*, “can be regarded as one of the most civilised of legal principles.”¹⁷ Others, of course, are more hostile and vituperative in their treatment of the analysis.¹⁸

This article seeks to deconstruct four alternative models of venue resolution and the synergous relationship with *forum non conveniens*. Anglo-American traditional common law principles are examined in the context of *Spiliada Maritime*¹⁹ and the federal standard articulated in *Gulf Oil*²⁰/*Piper Aircraft*²¹ which both set out a two-prong test for amenability determination. The search is for the most appropriate forum with clear discretion vested in the trial judge to reflect upon a gallimaufry of exogenetic factors in evaluation of the availability of another ‘amenable’ forum, most suitable in terms of convenience and the ends of justice.²² In addressing the range of impacted public and private interest concerns it is suggested that a rebalance is needed in terms of the intellectual coherence of substantive approach. Public policy interests of the potentially engaged fora need to be promoted in terms of the sybaritic relationship that should exist with applicable choice of law concerns.²³ Choice of law should be subject to enhanced consideration as part of the venue resolution equation, and in this regard parallels are drawn to the nature of ‘interests’ within U.S. governmental interest analysis techniques,²⁴ and new Europeanisation of choice of

¹⁷ *Airbus Indus. G.I.E. v Patel* [1999] 1 A.C. 119, 141 (H.L. 1998) (appeal taken from Eng.).

¹⁸ See, generally, Hal S. Scott, “What to do about Foreign Discriminatory Forum Non Conveniens Legislation” (2009) 49 Harvard ILJ 95; and Jennifer L. Woulfe, “Where Forum Non Conveniens and Pre-emptive Jurisdiction Collide: An Analytical Look at Latin-American Pre-emptive Jurisdiction Laws in the United States” (2010) 30 Saint Louis University Public Law Review 171. See Stewart, “Forum Non Conveniens: A Doctrine In Search of a Role” (1986) 74 Cal. L. Rev. 1259, at 1262-4 (arguing that the policies addressed by *forum non conveniens* are best considered in the jurisdictional contexts and there is no valid continuing role for forum non conveniens, only a repetitive one).

¹⁹ *Spiliada Maritime Corporation v Cansulex, Ltd.* [1987] A.C. 460.

²⁰ *Gulf Oil Corp. v Gilbert*, 330 U.S. 501 (1947).

²¹ *Piper Aircraft v Reyno*, 454 U.S. 235 (1981).

²² See, generally, Karayanni, *supra* n. 11.

²³ See, generally, Spencer, “Jurisdiction to Adjudicate: A Revised Analysis” (2006) 73 University of Chicago L.R. 617; Litman, “Considerations Of Choice of Law in the Doctrine of Forum Non Conveniens” (1986) 74 California L.R. 565; Jernagan, *supra* n. 9; and, Anthony Gray, “Forum Non Conveniens in Australia: A Comparative Analysis” (2009) 38 Common Law World Review 207.

²⁴ Spencer, *supra* n. 23, at 659 asserts: “For a state to be able to dictate, through its laws, the substantive outcome of a suit suggests that the state has an interest in the matter sufficient to permit its laws to govern rather than those of another state. On what basis then can a jurisdictional doctrine dictate that this same state is not empowered to adjudicate the very dispute to which its law applies?” and see, also, Adrian Briggs, “In Praise and Defence of Renvoi” (1998) 47 International and Comparative Law Quarterly 877, at 878 contending:

law in the Rome I and II Regulations.²⁵ A new way forward is adduced to beneficially promulgate overlapping critique of private international law principles.

Anglo-American traditional principles on most appropriate forum are contrasted with the deontological bright-line mechanistic tests applied to jurisdiction and venue resolution for civil and commercial matters throughout European Contracting States in the Brussels I Regulation.²⁶ What is presented is an internal regulatory framework that is anathema to flexible and discretionary *forum non conveniens*, but adopts certainty, party expectations and fixed presumptions as a mandate for convenience and ease of exposition.²⁷ The lack of flexibility has produced, on occasion, certain outcomes which could have been legitimately avoided by means of a more nuanced and appropriate response

“even today we still look at choice of law and on jurisdiction as if each was self-contained and neither was coloured by the other, ‘choice of law [is] a stepping stone to determining jurisdiction, not the other way around’”; *ibid.*, at 883.

²⁵ See Clay H. Kaminsky, “The Rome II Regulation: A Comparative Perspective on Federalizing Choice of Law” (2010) 85 Tulane Law Review 55; M. Chapman, “The Rome II Regulation and a European Law Enforcement Area: Harmony and Discord in the Assessment of Damages” (2010) Journal of Personal Injury Law 1; Symeon C. Symeonides, Rome II and Tort Conflicts: A Missed Opportunity” (2008) 56 American Journal of Comparative Law 177; Trevor C. Hartley, “Choice of Law for Non-Contractual Liability: Selected Problems Under the Rome II Regulation” (2008) International and Comparative Law Quarterly; Alan Reed, “The Rome I Regulation and Reapprochement of Anglo-American Choice of Law in Contract: A Heralded Triumph of Pragmatism Over Theory” (2012) 23 Florida Journal of International Law 357; and ANDREW DICKINSON, THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS, (Oxford University Press), (2008).

²⁶ See European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels, Sept. 27, 1968, 1968 J.O. ((27) 1, updated Jan. 26, 1998 (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1996 Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden) [hereinafter Brussels Convention]. On May 1, 1999, the Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts became effective for the European Union Member States, and competence for co-ordination of internal rules on jurisdiction and recognition of judgments now lies with the Community institutions. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts, Oct. 2, 1997, 1997 O.J. (C340) 1 [hereinafter Treaty of Amsterdam]. A further step in the promulgation of the European schematic template was the substitution of the Brussels Convention by the Brussels I Regulation, which became effective on 1 March 2002; Regulation (E.C.) No. 44/2001, OJ 2001 L.12/1. See, generally, Clarkson and Hill, *supra* n. 16., at 59-102.

²⁷ The wide ‘appropriate forum’ discretion does not apply to the Brussels I Regulation. It was anathema to all but two of the Contracting States (the United Kingdom and Ireland: ‘the idea that a national court has discretion in the exercise of jurisdiction either territorially or as regards the subject-matter of a dispute does not generally exist in Continental legal systems’; see the Schlosser Report (1979) OJ C59/71, at 97.

addressing concerns of genuine connectivity of a forum to a dispute.²⁸ The fourth element that is extirpated in this particular rationale is the distinctive approach laid down by the High Court of Australia in *Voth*.²⁹ This arguably presents an encomium solution to international commercial litigation, by presenting an abuse of process standardisation whereby proceedings will only be stayed in the *lex fori* on a clearly inappropriate forum standardisation.³⁰

The discussions that follow are set out in a discrete and bespoke fashion. In section 2 there is consideration of the English common law developments in *forum non conveniens* that led to extant law set out by the House of Lords in *Spiliada*.³¹ This position is directly contrasted in section 3 that focuses on the Brussels I Regulation and the rigidity presented by the general rule of *actor sequitur forum rei*,³² and compartmentalised civil procedure harmonisation provisions. The rejection of *forum non conveniens* in the significant Court of Justice decision in *Owusu v Jackson*³³ is evaluated, and a number of potentially

²⁸ See *Owusu v Jackson and others* (Case – 281/02) [2005] 2 W.L.R. 942; [2005] Q.B. 801, ECJ *Erich Gasser GmHH v MISAT Srl.* (Case C – 116/02) [2005] Q.B.1; and *Turner v Grovit* (Case C – 159/02) [2005] 1 A.C. 101.

²⁹ (1990) 171 CLR 538. The majority judgment was that of Mason C.J., Deane, Dawson and Gaudron JJ. See, generally, Anthony Gray, “Forum Non Conveniens in Australia: A Comparative Analysis” (2009) 38 Common Law World Review 207.

³⁰ See Richard Garnett, “Stay of Proceedings in Australia: A Clearly Inappropriate Test” (1999) 23 Melbourne University Law Review 30; Reid Mortenson, “Duty Free Forum Shopping: Disputing Venue in the Pacific” (2001) 32 Victoria University of Wellington Law Review 673; MARY KEYES, *JURISDICTION IN INTERNATIONAL LITIGATION* (Federation Press: Sydney, 2005); and Peter Prince, “Bhopal, Bougainville and Tedi: Why Australia’s Forum Non Conveniens Approach is Better” (1998) 47 International and Comparative Law Quarterly 573.

³¹ *Spiliada Maritime Corporation v Cansulex, Ltd.* [1987] A.C. 460.

³² The general rule of *actor sequitur forum rei* draws its rationale from the presupposition that the defendant, as the party being pursued by the claimant, should be able to fight on ‘home ground’ where she can most easily conduct her defence; see Lando, “The Task of the Court of Justice and the System of the Brussels Convention” in Court of Justice of the European Communities (ed.), *CIVIL JURISDICTION AND JUDGMENTS IN EUROPE* (Butterworths, 1992) at 26-27. See, generally, PETER STONE, *THE CONFLICT OF LAWS* 129 (I.H. Dennis et al eds., 1995): “[T]he rationale for this preference for defendants over plaintiffs, a preference which has deep historical roots, goes beyond mere convenience in the conduct of litigation. Rather, it is linked with such general rules as that which places on the plaintiff the burden of proving his claim, and reflects a primordial legal assumption that complaints are presumptively unjustified, and that it is better, where the truth cannot be ascertained with reasonable certainty, that the Courts should not intervene; that failure to rectify injustice is more tolerable than positive action imposing it. In the present context, this gives rise to a general rule that the plaintiff must establish his case to the satisfaction of the court in whose goodwill towards him the defendant would presumably have most confidence.”

³³ *Owusu*, *supra* n. 28.

harmful consequences for U.S. corporations and individuals trading in Europe are identified in terms of potentially inappropriate venue resolution.³⁴

The article shifts in section 4 to address the federal standard adopted in *Piper Aircraft*³⁵ to *forum non conveniens*. An egregious position has been reached whereby discriminatory treatment applies unduly against alien plaintiffs. The consequences of this Dantean descent has been to unduly insulate U.S. multinationals from liability for harm abroad, but where key decisions are taken at home.³⁶ There is a vital policy interest at stake in not allowing U.S. multinationals to escape responsibility via Machiavellian venue resolution manipulation, “defendants who argue that it would be inconvenient for them to litigate in a court located only blocks away from their headquarters often encounter sceptical reactions: It is, as Alice said, ‘curioser and curioser’.³⁷ As Boyd has cogently stated, “[T]he doctrine appears to be not a convenience doctrine at all, but rather an outcome determination which could mask more nefarious motives such as xenophobia, a desire to protect multinational corporations for injuries in foreign countries, or fears of dealing with different issues of foreign law.”³⁸ The key decisions in terms of reverse forum shopping are extirpated and then set in context of the real issues deployed when arguments are presented in terms of international comity and anti-chauvinism.³⁹

Section 5 of the article moves the debate into the sphere of Anglo-American balancing factors that trial courts evaluate as guidance in venue resolution.⁴⁰ A gallimaufry of ethereal and uncertain specific interest factors have

³⁴ See *infra* at p. XX.

³⁵ *Piper Aircraft v Reyno* 454 U.S. 235 (1981).

³⁶ See Samuels *supra* n. 3; Foley-Smith, *supra* n. 9; and Jernagan, *supra* n. 9.

³⁷ See *Lony v E.I. Dup Pont de Nemours & Co.*, 935 F. 2d 605, 608 (3rd Cir. 1991), noting that Du Pont, which is headquartered in Wilmington, Delaware, and is the largest employer in that state seeks to move the action against it to a forum more than 3,000 miles away; and see, generally, Born and Rutledge, *supra* n. 14.

³⁸ See Kathryn Lee Boyd, “The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation,” (1998) 39 *Virginia Journal of International Law* 41, 46.

³⁹ See *infra* at p. XX, See generally, John Fellas “Strategy in International Litigation” (2008) 14 *5 LJAJ. Intl. 8 Comp. L.* 317, 231 (asserting that it is a matter of basic common sense that a plaintiff will aim to select the most favourable forum, forum shopping does not deserve negative treatment.

⁴⁰ See Karayanni, *supra* n. 11, Petrossian, *supra* n. 9; and see, generally, Elizabeth T. Lear, “National Interests, Foreign Injuries and Federal Forum Non Conveniens” (2007) 41. *U.C. Davis L. Rev.* 559; E.E. Daschbach, “Where There’s a Will, There’s a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiff’s Actions against U.S. Multinationals” (2007) 13. *L. & Bus. Rev. Am.* 11; and J.

been employed in an *ad hoc*, solipsistic, and intuitive fashion by trial judges as empress of the process, consequently allowing a defendant to obtain a stay of proceedings. The evaluation is broken down into four distinct influences: (i) applicable law and intellectual coherence; (ii) *fiscus conveniens* and court delays; (iii) evidential and procedural issues; and (iv) minimum standards of justice abroad. An important restructuring is propounded to refocus on connectivity between venue selection and coalescence with applicable choice of law as a public interest factor.⁴¹ It is suggested that one should not be blinkered to a rule-selectivity only considering the place where injury occurred, but address more fundamentally a ‘progenitor of harm’ perspective, addressing evaluation of where causally the harm-inducing conduct transpired or elements of contractual breach were set in motion.⁴² Connectivity needs to be addressed in terms of identification of the ‘natural’ overall forum with enhanced public interest considerations of the impacted forum state. Intellectual coherence requires segregation of applicable law to facilitate appropriate factorisation of relevant social factors engaged.⁴³ This sophisticated joinder with *forum non conveniens* principles allows mutual engagement of ‘interests’, ‘policies’ and *depécage* of issues, and should facilitate coalescence of joint public interests.⁴⁴

The new intellectual framework is examined in section 5 in light of the new European landscape, and reformation in applicable tort and contract choice of law issues provided by adoption of the Rome I and II Regulations. The enquiry is extended to embrace the wide-ranging factors that have guided in an unmediated sense Anglo-American venue resolution. Detailed consideration is provided of the disparate impact of impecuniosity and cost factors, a potpourri of private interest factors and influences of modern technological developments to presentation of physical evidence, the stalking horse lip-service paid to ineffectual

Fawcett, “Trial in England or Abroad: The Underlying Policy Considerations” (1989) 9 Oxford J. Legal Stud. 205.

⁴¹ See, generally, Jonathan Harris, “Choice of Law in Tort – Blending in with the Landscape of the Conflict of Laws” (1998) 61 Modern Law Review 33; Russell Weintraub, “An Approach to Choice of Law that Focuses on Consequences” (1993) 56 Alberta Law Review 701; Adrian Briggs, “In Praise and Defence of Renvoi” (1998) 47 International and Comparative Law Quarterly 877; and Lonny Hoffmann and Keith Rowley, *supra* n. 11.

⁴² See, generally, Jernagan, *supra* n. 9; and Gray, *supra* n. 29.

⁴³ See, generally, Harry Litman, *supra* n. 23.

⁴⁴ See, generally, Luther McDougall III, “Judicial Jurisdiction: From a Contacts to an Interest Analysis” (1982) 35 Vanderbilt Law Review 1; Spencer Waller, “A Unified Theory of Transnational Procedure” (1993) 26 Cornell International Law Journal 101.

docket congestion arguments, and true import of advanced arguments on consolidation of related proceedings, substantive merits evaluation, trial court delays, and ultimate enforceability of final judgements.⁴⁵ The coverage shifts from convenience to ends of justice consideration in terms of the requirement that a court's exercise of adjudicatory discretion does not mandate a denial of justice. Amenability is deciphered in terms of whether an alternative forum is practically and realistically available to a litigant.⁴⁶ This raises the spectre of concerns addressing effectiveness of remedy, political or social persecution abroad, systemic corruption or bias in the foreign legal system and lack of a stable alternative forum to resolve the dispute.⁴⁷ The *forum non conveniens* doctrine has been judicially created and judicial muscularity applied in Anglo-American law to craft individual justice in individual cases, and to apply flexible and elegantly crafted solutions. The implicated consequence of this discretion has, on occasions, proved to be implicated uncertainty, unfortunate delay, and enhanced costs.⁴⁸

An alternative template for *forum non conveniens* is presented in section 6, examining the Australian High Court approach set out in *Oceanic Sun*⁴⁹ and developed in *Voth*.⁵⁰ It is debated whether this provides an optimal solution, as the fourth model critiqued, between the inherent flexibility and discretion embedded within the Anglo-American variations of most suitable forum and the deontological and mechanical ritualism of the Brussels I Regulation in presenting an internal European regulatory framework hostile to the concept of *forum non conveniens*. The Australian perspective adopts a *via media* between the *Scylla* of

⁴⁵ Karayanni, *supra* n. 11, at 376 proposes a more simplified evaluative standardisation: "The proper categorization of factors relevant for the forum non conveniens doctrine lies in spheres much simpler than those suggested by the public-private dichotomy. These spheres relate to dominant considerations that seem to surface each time a court tries to pinpoint the proper forum for litigation. In this respect, three different categories can be identified: (a) factors relating to geographic convenience; (b) factors relating to litigation efficiency; and (c) factors relating to substantive justice"; and see, also, Jeffrey A-Van Detta, "Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product – Injury Case Studies" (2003) 24 *Northwestern Journal of International Law and Business* 53.

⁴⁶ See Samuels, *supra* n. 3, at 1081-82.

⁴⁷ See Clarkson and Hill, *supra* n. 16, at 129-130; and McClean and Beevers, *supra* n. 16, at 133-134.

⁴⁸ See, generally, Fentiman, *supra*, n. 6; and Hill and Chong, *supra* n. 14.

⁴⁹ *Oceanic Sun Line Special Shipping Co., Inc v Fay* (1988) 165 CLR 197.

⁵⁰ See *Voth*, *supra* n. 29; and see, generally, Gray, *supra* n. 29; Prince, *supra* n. 30; and Garnett, *supra* n. 30.

intuitiveness and the *Charybdis* of rigid inflexibility to ‘natural’ forum and imbued connectivity. The more restrictive Australian ‘abuse of process’ standard allows limited flexibility, but rejects dismissal unless the plaintiff’s forum choice was plainly intended to ‘vex or harass’ the defendant.⁵¹ It represents now a distinctive reformulation that adopts the venerable antiquity of the *forum non conveniens* doctrine with resonances of the traditional *St. Pierre*⁵² test. It stands in contrast to Anglo-American courts’ shift to a broader standard leading to dismissal whenever forum embracement in another country is considered more appropriate for whatever reason. It also stands in juxtaposition to the Brussels I Regulation internal regulatory scheme and lack of genuine discretion.

A feature of the Australian standard is avoidance of paternalistic comity arguments in that, “it does not require the Australian court to judge the quality or capability of a foreign legal system.”⁵³ “[T]he willingness of Australian courts to stay proceedings brought before them on the grounds of *forum non conveniens* is the litmus test of the country’s attitude towards the ‘superiority’ of its own courts and legal system, the respect of the courts and legal systems of other countries and the principle of international comity.”⁵⁴ This ‘superiority’ is applied to evaluation of key U.S. jurisprudential precepts involving U.S. multinational corporations and abuses of dominant position, and it is highlighted that more efficacious solutions can be effected by revivification of an abuse of process template.

Forum non conveniens considerations play a vital rôle in international commercial litigation.⁵⁵ Judicial economy and civil recovery processes are benefited by locating disputes within the venue of their natural forum. Expedition, party convenience and discretionary flexibility are all adventitious policy goals in any international litigation structure, and are promoted by the sophistication of the doctrine. The overt costs may prove to be lack of certainty and additional litigation brought about by the international chess battle on

⁵¹ The joint majority judgments provided in *Voth* by Mason C.J., Deane, Dawson and Gaudron J.J. asserted that the ‘clearly inappropriate forum’ standardisation they advanced, ‘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’; see *Voth*, *supra* n. 29, at 558.

⁵² *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 K.B. 382; see *infra* below at p. XX.

⁵³ See Jernagan, *supra* n. 9, at 1114.

⁵⁴ Michael Garner, “Towards an Australian Doctrine of Forum Non Conveniens” (1989) 38 *International and Comparative Law Quarterly* 361, 361.

determinative forum. Certainty and meeting party expectations constitute the essence of the Brussels I Regulation dichotomy to traditional common law. These benefits may be overridden by the approach to *lis alibi pendens* that enervates a race to the courthouse door with potentially an inappropriate forum seised of the dispute, allied to unfortunate hostility to *forum non conveniens* demonstrated by the Court of Justice in *Owusu*, and unfortunate consequential impact for U.S. litigants in Europe that are still to be fully determined.⁵⁶ The *via media* optimisation adopted in Australia presents the way forward for balancing policy goals, allied with a sybaritic enhancement of applicable law considerations at the venue resolution stage to effect a more intellectually coherent recategorisation.

II ENGLISH STANDARDISATIONS AND THE SPILIADA TEST

A. *The Development of English Law*

English law reacted slowly in shifting towards a more liberal and discretionary template to stay proceedings.⁵⁷ The ratiocination is that adjudicatory jurisdiction exists, but the issue is whether it should be exercised: ‘the existence of jurisdiction is one matter, the exercise of the jurisdiction is another.’⁵⁸ It is only over the course of the last three decades that *forum non conveniens* has developed to decline jurisdiction in favour of a foreign court which it views as a more appropriate forum for the determination of the dispute.⁵⁹ The evolution has

⁵⁵ See, generally, Born and Rutledge, *supra* n. 14; and Hill and Chong, *supra* . 14.

⁵⁶ See, generally, Ronald A. Brand, “Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments” (2002) 37 Texas International Law Journal 467; note the impact of the *lis pendens* provisions set out in Article 27 of the Brussels I Regulation: “1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member 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. 2. 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.”

⁵⁷ See, generally, Fentiman, *supra* n. 6., at 479-488; and Hill and Chong, *supra* n. 14, at 294-301.

⁵⁸ *Tehrani v Secretary of State for the Home Department* (Scotland) [2006] UKHL 47, before Lords Nicholls, Hope, Scott, Rodger and Carswell.

⁵⁹ The conceptual template, albeit not the application, can be traced back to the late 19th century, and early 20th century; see *Société Generale de Paris v Dreyfus Brothers* (1885) 29 Ch. D. 239; and *Rosler v Hilbery* [1925] Ch. 250.

proved much slower than adoption in U.S. federal law.⁶⁰ There are two fundamental and co-related issues engaged. If service of process occurs on a defendant who is present within the jurisdiction, then the defendant can apply for a stay or proceedings on the basis that a more appropriate alternative venue exists. The other side of the coin is that where exorbitant jurisdiction is sought under procedural rules contained in CPR 6.36, and service of process on an absent defendant abroad, this leave will be rejected unless the court is persuaded that the *lex fori* is *conveniens*.⁶¹ In each situation the parties are litigating to determine where to litigate,⁶² with imbued cost implications, and naturally the greater flexibility engrained in the adduced test then presumptively litigants will believe a venue challenge is more worthwhile.⁶³

In accordance with traditional principles, discretionary leave to challenge service abroad matured at an early developmental stage, but similar concepts were denied where English adjudicatory jurisdiction was invoked as of right.⁶⁴ It would be a rare and wholly exceptional case where a litigant would be disallowed from pursuing an action in England.⁶⁵ A classic statement of initial common law, summarising the developments over the course of a previous generation, was provided by Lord Justice Scott in an important statement of principle that embodied English law until 1974:

“The true rule.....may I think be stated thus: (1) A mere balance of inconvenience 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.

⁶⁰ See Paxton Blair, “The Doctrine of Forum Non Conveniens in Anglo-American Law” (1929) 29 Columbia Law Review 1.

⁶¹ See Hill and Chong, *supra* n. 14, at 295.

⁶² See, for example, *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460, at 464 per Lord Templeman.

⁶³ See, generally, A.G. Slater, “Forum Non Conveniens: A View from the Shop Floor” (1988) 104 Law Quarterly Review 554; J.D. McClean, “Foreign Collisions and Forum Conveniens” (1973) 22 International and Comparative Law Quarterly 748; A. Barma and D. Elvin, “Forum Non Conveniens: Where Do We Go From Here?” (1985) 101 Law Quarterly Review; J.J. Fawcett, “Lis Alibi Pendens and the Discretion to Stay” (1984) 47 Modern Law Review 481; and M Pryles, “The Basis of Adjudicatory Competence in Private International Law” (1973) 21 International and Comparative Law Quarterly 61.

⁶⁴ The traditional jurisdiction principles in English common law are predicated on three touchstones: (1) presence of a defendant within the jurisdiction; (2) submission; and (3) jurisdiction based upon service of process abroad within CPR 6.36, Rules of the Supreme Court; and, see, generally, Hill and Chong, *supra* n. 14, at 294-295.

⁶⁵ *Ibid.*, at 293.

(2) In order to satisfy 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 way; and (b) the stay must not cause an injustice to the plaintiff. On both, the burden of proof is on the defendant.”⁶⁶

The *St. Pierre* formulation, considered further below, established that a stay of proceedings would generally be refused even in the scenario where neither party was resident in or otherwise closely connected with England and the cause of action related to events which had transpired abroad.⁶⁷ It reflected an abuse of process standardisation whereby the choice of *lex fori* was not lightly to be disturbed, and promoted a more certain template with limited discretion for review. The essence of the doctrine provided that a mere balance of convenience did not provide a sufficient ground for depriving a plaintiff of the advantages of litigating the claim in England. A generous hand of welcome was presented to foreign plaintiffs pursuing actions in London, and Lord Denning in typical language reflected that this was of great benefit to all respective parties:

“No one who comes to these courts asking for justice should come in vain. The right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this ‘forum-shopping’ if you please, but if the forum is England, it is a good place to shop in both for the quality of the goods and the speed of service.”⁶⁸

Lord Denning’s statement in *The Atlantic Star*, reflected prevailing judicial attitudes focussing on presuppositions, rightly or wrongly at the time, concentrated on the ‘innate superiority’ of English justice and her court system.⁶⁹ It was only when the threshold of ‘vexation’ or ‘oppression’ was categorised that a stay would be granted, contrary to earlier deployment of *forum conveniens* principles under

⁶⁶ *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 K.B. 382, 398 (Eng. C.A. 1935).

⁶⁷ See, generally, C.G.J. Morse, “Not in the Public Interest? *Lubbe v Cape Plc*” (2002) 37 *Texas International Law Journal* 540; and, see, *Maharance of Baroda v Wildenstein* [1972] 2 Q.B. 283.

⁶⁸ *The Atlantic Star* [1973] 1 Q.B. 364, 381-82 (Eng. C.A. 1972).

⁶⁹ See, generally, J. Weiler, “Forum Non Conveniens – An English Doctrine?” (1978) 41 *Modern Law Review* 739.

Scottish law in an inherently discretionary manner.⁷⁰ A bar to change before English courts was the economic benefits attached to London as a centre for civil and commercial litigation:

“Although there has been considerable judicial condemnation of the practice of forum shopping, it appears in the past that the more the claimant has to gain from this practice the more likely he was to be allowed to continue his action in England. This may seem curious but it has to be borne in mind that there is a public interest in allowing trial in England of what are, in essence, foreign actions. When foreigners litigate in England this forms valuable invisible export, and confirms judicial pride in the English legal system.”⁷¹

A more liberal and relaxed English approach was eventually adopted by the House of Lords in the early 1970s in *The Atlantic Star*,⁷² developed further in *MacShannon v Rockware Glass Ltd*,⁷³ and in *The Abidin Daver*,⁷⁴ Lord Diplock confirmed that English law had become, “indistinguishable from the Scottish doctrine of *forum non conveniens*.”⁷⁵ Lord Reid dismissed the earlier ‘paternalistic’ views of Lord Denning as, “reminiscent of the good old days, the passing of which many regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races.”⁷⁶ Judicial chauvinism had apparently been replaced by judicial comity, and a few years later definitive guiding principles were established by the House of Lords in *Spiliada Maritime Corporation v Consulex Ltd*,⁷⁷ in a maritime contractual dispute.

The principles distilled from *Spiliada*, and subsequently adopted in *Lubbe*,⁷⁸ can be stated as follows:

- (i) The basic principle is that a stay will only be granted where the court is satisfied that there is some other available forum, having competent

⁷⁰ See, for example, *Sim v Robinow* (1892) 19 Rettie 665.

⁷¹ PETER NORTH AND J.J. FAWCETT, *CHESHIRE AND NORTH’S PRIVATE INTERNATIONAL LAW* 346-47 (13th ed., 1999).

⁷² [1974] A.C. 436. The House of Lords, by a bare majority, held that a stay should be granted in an action *in rem* between Dutch and Belgium shipowners which arose out of a collision in the River Scheldt leading to the port of Antwerp, and so in Belgian water.

⁷³ [1978] A.C. 436.

⁷⁴ [1984] A.C. 398.

⁷⁵ *Ibid.*, at 411.

⁷⁶ *The Atlantic Star* [1974] 1 A.C. 436, 478 (H.L. 1973) (appeal taken from Eng.).

⁷⁷ [1987] A.C. 460; and, see, in terms of policy critique, J.J. Fawcett, “Trial in England or Abroad: The Underlying Policy Considerations” (1989) 9 *Oxford Journal of Legal Studies* 205.

jurisdiction, which is the appropriate forum (not merely ‘convenient’) for the trial in that case, and where the action can be tried more suitably for the interests of all the parties and the ends of justice.⁷⁹

- (ii) The defendant has the burden of persuading the court to stay the proceedings, though whichever party raises a particular issue must prove it.⁸⁰
- (iii) The burden resting on the defendant is not just to show that England is not the natural or appropriate forum, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum, otherwise the stay application will be dismissed. By way of illustration, in *European Asian Bank AG v Punjab and Sind Bank*,⁸¹ a case involving a dispute regarding a letter of credit, having regard to all the circumstances of the action it was impossible to conclude that either India or Singapore was a clearly more appropriate forum than England for the trial of the action; in the circumstances the defendant’s application for a stay would be dismissed.
- (iv) The court’s duty is to look for connecting factors such as inconvenience or expense at trial, including the availability of witnesses, the governing law and the parties’ places of residence or business which point to what Lord Keith called in *The Abidin Daver*, ‘the court with which the action had its closest and most real connection.’⁸²
- (v) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.

⁷⁸ Lubbe v Cape Plc [2000] 1 WLR 12545; and see *infra* at p. XX.

⁷⁹ [1987] AC 460, at 476 per Lord Goff.

⁸⁰ *Ibid.*

⁸¹ [1982] 2 Lloyd’s Rep. 356; see, also, *Ark Therapeutic Plc v True North Capital Ltd.* [2006] 1 All ER (Comm.) 138; *Schapira v Ahronson* [1998] IL Pr. 587 (multistate libel disseminated by Israeli newspaper – England an appropriate forum for claimant, an English resident, to vindicate reputation even though small sales of offending newspaper within the jurisdiction); and see, also, *Zivlin v Baal Taxa* [1998] IL Pr. 106; and *The Hamburg Start* [1994] 1 Lloyd’s Rep. 399 (holding Cyprus to be an independent forum where the claim had little connection to Cyprus).

⁸² See, generally, *Morse*, *supra* n. 66.

- (vi) If, however, the court concludes at that stage that there is some other available forum which, *prima facie*, is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.⁸³ In this enquiry, 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: “The 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 suit 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 courts, or the unavailability of appropriate remedies.”⁸⁴

A properly conducted distillation of extant *Spiliada* principles reveals a casuistic two-stage enquiry.⁸⁵ The first prong, with attendant burden on the defendant, reveals iteration of the requirement to establish that there is another available forum abroad that is clearly or distinctly more appropriate than the English forum. The old jurisprudence, derived from the venerable *St Pierre* test, wherein only in exceptional cases would an English court stay proceedings commenced as of right, has been replaced by a more liberal approach, allowing a stay where England is an inappropriate forum. This involves solipsistic consideration of a wide-range of exogenetic factors, with the trial judge as empress of this deductive syllogism.⁸⁶

Once it has been established that there is a clearly more appropriate forum for trial abroad then the burden of proof, under the second prong of the enquiry,

⁸³ [1987] AC 460, at 478.

⁸⁴ [1984] AC 398, at 411 per Lord Diplock, and adopted by Lord Goff in *Spiliada*, at 478-79.

⁸⁵ See Fawcett, *supra* n. 76, at 210 who asserts: “The increased willingness to stay English proceedings which has occurred over the last decade can be seen, in the words of Lord Diplock in *The Abidin Daver* [1984] A.C. 398, at 3411, as the replacement of judicial chauvinism by judicial comity. More particularly, the courts have refused to make direct comparisons between the system of administration of justice and the alternative forum abroad. The courts have also given much less weight to the fact that the (foreign) plaintiff obtains an advantage from trial in England.”

⁸⁶ See, generally, Morse, *supra* n. 66.

shifts to the claimant to justify trial in England. The court, at this juncture, is concerned with the issue of whether substantial justice requires that a stay should not be granted.⁸⁷ A minimum standard of justice must apply in the alternative foreign forum, and effective access and redress in that venue, the lack of which needs to be supported by the existence of cogent and positive evidence.⁸⁸ A degree of replication exists with the federal U.S. standard adopted in *Gulf Oil/Piper Aircraft*, with collinearity in terms of a similar two-stage test, albeit that ‘amenability’ of the alternative forum is considered at the initial stage, followed by extirpation of private and public interest factors.⁸⁹ Under *Piper Aircraft*, U.S. courts sift through the multiple public and private factors to determine dismissal or retention of a case; in England, it is necessary to examine two distinct components relating to availability of a better forum and whether the claimant, not the forum, would be disadvantaged by dismissal. A major difference, as subsequently considered, is that English courts do not have an overt ‘discriminatory’ preference for home claimants over alien claimants.⁹⁰

The distinctive features of modern Anglo-American common law rules are the broad discretion provided to trial judges without effective appellate review, and the flexibility and intuitiveness of a wide range of balancing factors involved in the *forum non conveniens* equation.⁹¹ A schism exists with the framework provided in a European backdrop to civil and commercial recovery established by the Brussels Convention, and now Brussels I Regulation template.⁹² The conceptual edifice mandated is anathema to the very concept of *forum conveniens*, and this hostility has extended tendrils via the European Court of Justice decision in *Owusu v Jackson*.⁹³ The compartmentalised structure was set out by the

⁸⁷ *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, at 476.

⁸⁸ See, generally, Hill and Chong, *supra* n. 14 at 300-301.

⁸⁹ See generally, Petrossian *supra* n. 9.

⁹⁰ As Morse has cogently stated: “The fact that the claimant would be subject to different procedures or a lower level of damages abroad, for example, is not alone sufficient to demonstrate that justice will not be done abroad. Regard must be given to all the circumstances in a case, but it appears that those circumstances must demonstrate that the claimant will suffer serious injustice in the foreign forum before a stay of the English action will be denied, including being, in effect, unable to proceed in that forum at all”; *supra* n. 66, at 545.

⁹¹ See, generally, Alan Reed, “The Rome I Regulation and Reapprochement of Anglo-American Choice of Law in Contract: A Heralded Triumph of Pragmatism Over Theory” (2011) 23 *Florida Journal of International Law* 359.

⁹² *Supra* n. 26-27.

⁹³ *Supra* n. 28.

Schlosser Report that Title II of the 1968 Convention is based on the rationale that a properly seised court under the jurisdictional rule *must* determine the dispute to which the action relates.⁹⁴

The concepts of discretionary and flexible *forum non conveniens* principles are obfuscated by provisions in the Brussels I Regulation relating to *actor sequitur forum rei*, that the defendant should generally be sued at home, and that the first seised court hears the case to the exclusion of other impacted venues.⁹⁵ Principles of harmonisation and communitarianism apply, irrespective of connectivity elsewhere or putative natural forum, with all legal systems viewed in equipoise as ‘convenient’.⁹⁶ *Forum conveniens* is unique and distinctive to England and Ireland, and unknown in the laws of the Continental European countries. The Contracting States are not only entitled to exercise jurisdiction in accordance with the provisions laid down in Title II, but they are also obliged to do so. Principles of certainty and party expectations override any search for best or ‘most appropriate’ forum for the respective litigants.⁹⁷ The Brussels I Regulation reiterates the constriction whereby the fact that a foreign law has to be applied should not be considered a proper reason for declining jurisdiction.⁹⁸ The rigid scheme presented in the Brussels I Regulation, and particularised merits and demerits in application, are reviewed in the next section. Recent

⁹⁴ The Schlosser Report (1979) OJ C59/71 states: “The idea that a national court has a discretion in the exercise of jurisdiction either territorially or as regards the subject-matter of a dispute does not generally exist in Continental legal systems”; *ibid.*, at 97.

⁹⁵ See Article 2 and Article 27 of the Brussels I Regulation. Note as Lando has asserted, the general rule *actor sequitur forum rei* draws its rationale from the presumption that the defendant, as the party being pursued by the claimant, should be able to fight on ‘home ground’ where she can most easily conduct her defence; see Lando, “The Task of the Court of Justice and the System of the Brussels Convention” in Court of Justice of the European Communities (ed.), *Civil Jurisdiction and Judgments in Europe* (Butterworths, 1992) at 26-27.

⁹⁶ Note in Robertson’s view, both English and American legal systems should do without broad jurisdiction – declining discretion and should uniformly apply the better approach and adopted now in the Brussels I Regulation: “In terms of delay, expense, uncertainty and a fundamental loss of judicial accountability, the most suitable forum version of *forum non conveniens* clearly costs more than it is worth. It sets an unrealistic goal – getting each transnational case that arises into the best possible forum for its resolution – which entails a costly and wasteful methodology, essentially unfettered judicial discretion. A more realistic goal would be keeping *most*, transnational cases out of *wholly inappropriate* forums. That goal can be achieved with a sensible structure of jurisdictional rules coupled with a limited, fail-safe discretion to decline jurisdiction in abuse of process and similar situations; see Robertson, “Forum Non Conveniens in America and England: A Rather Fantastic Fiction” (1987) 103 *Law Quarterly Review* 388.

⁹⁷ The Schlosser Report (1979) OJ. C59/71 at 97-98; and see Hill and Chong, *supra* n. 14 at 129-130.

⁹⁸ *Ibid.*

developments over the course of the last decade have presented individualised difficulties for U.S. litigants before English courts, and the full extent or impact of the *Owusu* decision remains open to conjecture.

III THE BRUSSELS I REGULATION AND POST-OWUSU IMPLICATIONS

The antithesis of traditional common law discretionary principles is presented by the rigid autocracy and mechanistical jurisdiction – selecting template provided by Europeanization on jurisdiction and enforcement of judgments in civil and commercial matters between Contracting States.⁹⁹ The Brussels Convention 1968, described by a leading American commentator as, ‘the most impressive experiment in supranationalism the world has seen’,¹⁰⁰ has overtaken and diluted the reach of historical English doctrine to the chagrin of some traditionalists.¹⁰¹ It is essentially predicated on practical grounds, and establishes an intra-Convention mandatory system of jurisdiction. Intra-Convention it may have been intended, but the spatial reach is far wider in terms of regulating relations with non-Contracting states, and notable consequences for U.S. litigants in terms of civil procedure regulation.¹⁰²

The initial Convention, after a period of contemplation and reflection, has undergone careful reinterpretation with a revisionist Brussels I Regulation.¹⁰³ The combined effect has been that a pragmatic governing document has been promulgated, written on a “clean slate” and based predominantly by Article 2 on the maxim *actor sequitur forum rei*, by which the law leans in favour of the

⁹⁹ *Supra* n. 26-27.

¹⁰⁰ Friedrich Juenger, “Judicial Jurisdiction in the United States and in the European Communities: A Comparison” (1984) 82 Michigan Law Review 1195, at 1195.

¹⁰¹ See, for example, Adrian Briggs, “The Death of Harrods: Forum Non Conveniens and the European Court” (2005) 121 Law Quarterly Review 535, at 537 vituperatively criticising the European Court decision in *Owusu v Jackson* Case C-281/02 [2005] 2 W.L.R. 942 rejecting *forum non conveniens* principles: “which betrayed an utter inability to accept that English judges operate the doctrine to produce an outcome which is predictable, proportional, rational, and just. Some may find it curious that the court, whose principal judicial expertise is in promoting and enhancing free trade and fair competition within the internal market, can be so blind to the competition between legal services which arises from national laws on jurisdiction and judgments. But in this area, a *Stalinist monoculture prevails*”; *ibid.*

¹⁰² See, generally, Barry J. Roger, “Forum Non Conveniens Post-Owusu” (2006) 2 Journal of Private International Law 71.

defendant.¹⁰⁴ The concept of domicile is a key central element to the ascription of jurisdiction under the Brussels I Regulation. Pursuant to Article 2, persons domiciled in a Contracting State must, in general, be sued in the courts of that State, regardless of their nationality.¹⁰⁵

By adopting the domicile of the defendant as a connecting factor, the Committee of Experts widened the scope of the Convention by extending the rules of jurisdiction to all persons whatever their nationality domiciled within the European Union.¹⁰⁶ The plea of *forum non conveniens*, as stated, was considered in the Schlosser Report¹⁰⁷ to generally be incompatible with the Brussels Convention on the basis that courts were mandated to exercise jurisdiction under Title 2:

“The Contracting States are not only entitled to exercise jurisdiction in accordance with the provisions laid down in Title 2: they are also obliged to do so. A plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another ... the plaintiff has deliberately been given a choice, which should not be weakened by the application of the doctrine of *forum conveniens*.”¹⁰⁸

In essence, a vital feature of the Brussels Convention (now Regulation) is the drawing of a particularistic bright-line test of domicile, which is the central tenet of the impacted jurisdictional scheme, and proved an irremovable barrier in *Owusu*.¹⁰⁹ The template inculcates policy desiderata of legal certainty, harmonisation, and functionality, but as stated herein can also produce inconsistency, lack of connectivity, and failure to ‘exercise’ venue resolution appropriately.¹¹⁰ The question of whether a person is domiciled in the U.K., for the purposes of the Brussels Convention, is to be determined in accordance with

¹⁰³ See, generally, Clarkson and Hill, *supra* n. 16 at 70-80.

¹⁰⁴ *Ibid.* See generally, Stone *supra* n. 32.

¹⁰⁵ *Ibid.*, at 80.

¹⁰⁶ See PETER KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS 254 (1987).

¹⁰⁷ (1979) OJ. C. 59/66 at 97-98.

¹⁰⁸ At para. 78.

¹⁰⁹ *Supra* n. 28.

¹¹⁰ See Briggs, *supra* n. 100.

the Civil Jurisdiction and Judgments Order 2001.¹¹¹ He is so domiciled if and only if: (a) he is resident in the U.K. and (b) the nature and circumstances of his residence indicate that he has a substantial connection with the U.K. The latter requirement is rebuttably presumed to be satisfied if that person has been resident in the UK for the last three months or more. The requirement of substantial connection appears to be understood in terms of duration of the residence, and therefore need not be more than minimal, provided that the individual is effectively resident in the U.K. A person will be regarded as resident in a particular part of the U.K. if that place is his settled or usual place of abode.¹¹²

The basic approach of the Brussels I Regulation is not radical. No definition of domicile of individuals is provided, so that this remains a matter for each Member State to apply to determine whether the defendant is domiciled in that state. However, Article 60(1) introduces a new autonomous definition of the domicile of corporations. It provides that a company or other legal person or association of natural or legal persons is domiciled at the place where it has its (a) statutory seat; or (b) central administration, or (c) principal place of business.¹¹³ The statutory seat means, for the purpose of the UK and Ireland, the registered office, or where there is no such office, the place of incorporation, or the place under the law of which the formation took place. It is impossible to sufficiently emphasise that the concept of domicile as a jurisdictional touchstone, and determination for exercise of venue resolution, lies at the cornerstone for good or ill of the European approach.

The general rule in Article 2 is supplemented by very limited special jurisdiction provisions under Article 5, allocating jurisdiction in various categories of dispute, where relevant factors ascribe factual connections between the cause of action and the forum. In a commercial context the most important of these

¹¹¹ See Statutory Instrument 2001 No. 3929, The Civil Jurisdiction and Judgments Order 2001, available at http://www.opsi.gov.uk/SI/si_2001/20013929.htm (noting that if domiciled in the United Kingdom consider section 1, para. 9(2) and (6), and if domiciled in England consider section 1, para. 9(5)).

¹¹² See, generally, *Bank of Dubai Ltd v Abbas* [1997] ILPr. 308; and see, also, *Cherney v Deripaska* [2007] 2 All ER (Comm. 785); *OJSC Oil Company v Abramovich* [2008] EWHC 2613 (Comm); and *High Tech International AG v Deripaska* [2007] EMLR 449.

¹¹³ See, generally, *King v Crown Energy Trading A.G.* [2003] EWHC (Comm) 163, [2003] Q.B. 489; and *Ministry of Defence and Support of the Armed Forces v Faz Aviation Ltd (Formerly FN Aviation Ltd)* [2007] ILPr. 538.

special jurisdictional rules are contractual matters under Article 5(1),¹¹⁴ tort [Article 5(3)],¹¹⁵ and disputes arising out of the operation of a branch, agency or other establishment [Article 5(5)].¹¹⁶ The special contract rule contained within Article 5(1)(a) states that a person domiciled in a Contracting State may be sued in another Contracting State, “in matters relating to a contract, in the courts for the place of performance of the obligation in question.” This general principle is modified to an extent by subparagraph (b), which indicates how place of performance is to be determined in certain types of cases, specifically contracts for the sale of goods and contracts for the provision of services.¹¹⁷ Connectivity to the dispute in tort is provided by Article 5(3), wherein a person who is domiciled in a Member State may be sued in another Member State in the courts for the place where the harmful event occurred or may occur.¹¹⁸ Internal regulatory provisions provide further succour towards a ritualistic jurisdictional framework: Article 22 allocates exclusive jurisdiction in mandatory circumstances; Article 23 covers prorogation of jurisdiction via the parties’ choice of court agreement;¹¹⁹ and a strict *lis pendens* rule is established in Article 27 of first seisure in that any court other than the court first seised shall stay its proceedings until such time as the jurisdiction of the court first seised is established.¹²⁰ This creates a rush to the

¹¹⁴ See, generally, Case 14/76 De Bloos v Bouyer [1976] ECR 1497; Case C-386/05 Color Drack GmbH v Lexx International Vertriebs GmbH [2007] ECR-I-3699; and Case C-256100 Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (Wabag) [2002] ECR I-1699.

¹¹⁵ Case 189/87 Kalfelis v Bankhaus Schröder, Munchmeyer, Hengst and Co. [1988] ECR 5565; Case C-68/93 Shevill v Presse Alliance S.A. [1995] ECR I – 415; and News at Holdings Ltd v Zani [2006] 1 Lloyd’s Rep. 707.

¹¹⁶ Case 33/78 Somafer S.A. v Saar-Ferogas AG (1978) ECR 2183.

¹¹⁷ See, generally, C. Forsyth and P. Moser, “The Impact of the Applicable Law of Contract on the Law of Jurisdiction Under the European Conventions” (1996) 45 International and Comparative Law Quarterly 190; K. Takahashi, “Jurisdiction in Matters Relating to Contract: Article 5(1) of the Brussels Convention and Regulation” (2002) 27 European Law Review 530; Alan Reed, “Article 5(1) of the Brussels Convention, Restitutionary Claims and the Need for a New Approach” (1997) 48 Northern Ireland Legal Quarterly 243; and Jonathan Hill, “Jurisdiction in Civil and Commercial Matters: Is There a Third Way?” (2001) 54 CLP 439.

¹¹⁸ See generally, Alan Reed and T.P. Kennedy, “International Torts and *Shevill*: The Ghost of Forum Shopping Yet to Come” [1996] Lloyd’s Maritime and Commercial Law Quarterly 108; Alan Reed, “Special Jurisdiction and the Convention: The Case of *Domicrest Ltd v Swiss Bank Corporation*” (1999) 18 Civil Justice Quarterly 218; and O. Bigos, “Jurisdiction over Cross-Border Wrongs on the Internet” (2005) 54 International and Comparative Law Quarterly 585.

¹¹⁹ See generally, Hill and Chong, *supra* n. 14 at 113-118.

¹²⁰ See Ronald A Brand, “Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments” (2002) 37 Texas International Law Journal 467, at 490 asserting: The Brussels system creates a strict race to the courthouse. The first court seised captures jurisdiction and an action filed in the court of a second Member State must be stayed, and ultimately dismissed, in terms of the favour of the first action.”

court house door, irrespective of natural or appropriate venue, in that once adjudicatory jurisdiction is established in the impacted forum, actions brought in the court of a second Member State must be stayed and dismissed in favour of the first court. No *forum conveniens* evaluation occurs in terms of convenience or appropriateness, but procedural efficiency governs over the exercise of convenience of the parties and the ends of justice.¹²¹

English courts, operating within traditional common law principles, will stay proceedings before them in circumstances where the courts of another country are clearly more appropriate to determine the dispute. This is anathema to continental legal systems, and the Brussels I Regulation avoids *forum non conveniens* discretion altogether, and acceptance prevails that within the sphere of the Regulation it is precluded.¹²² The logical question that follows is the sphere of influence of the Regulation between Contracting States, and by inference its reflexive effect¹²³ on non-Contracting States by joinder and other provisions of civil procedure. In this regard the ruling in *Owusu v Jackson*¹²⁴ is of vital significance in that it was determined that the court of a Contracting State has no discretion to decline to exercise the jurisdiction conferred upon it by Article 2 and *actor sequitur forum rei* governance on the predicate that the court of a non-Contracting State would be a clearly more appropriate forum.

¹²¹ See generally, Fentiman *supra* n. 6.

¹²² See A. BELL, *FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION* (Oxford University Press, 2003) at para 3.58 who asserts that the Brussels Convention (and subsequently the Brussels I Regulation: “[N]ot only in its conception, but also in its interpretation and development is a profoundly European instrument, tailored to specific European concerns, and reflecting continental legal traditions. “For arguments in support of the European template see G. Hogan, “The Brussels Convention, Forum Non Conveniens and the Connecting Factors Problem” (1995) 20 *European Law Review* 471, at 493: “[t]he intermittent allocation of jurisdiction to unsuitable forums as a result of the operation of the convention’s jurisdictional rules is but a small price to pay for the greater certainty and objectivity which these rules generally offer.”; and see, generally, W Kennett, “Forum Non Conveniens in Europe” (1995) 54 *Cambridge Law Journal* 552.

¹²³ As Rodger has stated, “an alternative approach would be to acknowledge that certain Convention /Regulation provisions have reflexive effect *vis-à-vis* non-Contracting states, primarily prorogation agreements in favour of the courts of non-Contracting state courts, and disputes where the subject-matter would fall within the exclusive competence of a non-Contracting State court”; see B.J. Rodger, “Forum Non Conveniens Post – *Owusu*” (2006) 2 *Journal of Private International Law* 71, at 92; and see further G. Droz, “Compétence judiciaire et effets des jugements dans le Marché Commun” (Etude de la Convention de Bruxelles du 27 septembre 1968), 1972, proposing the reflexive effect of various Convention provisions in relation to non-Contracting States.

¹²⁴ *Owusu v Jackson* (t/a Villa Holidays) Bal-Inn Villas) and Others (Case C-281/07) [2005] 2 *WLR* 942.

The scenario presented in *Owusu* represented a fundamental illustration of the need for a nuanced and balanced *lis pendens* investigation. The plaintiff, an English domiciliary, suffered a serious head injury whilst on holiday in Jamaica when he dived into waist-deep water and struck his head on a submerged sand bank, consequently rendering him tetraplegic. Proceedings for breach of contract were brought in England against the defendant, a fellow English domiciliary, who had let the plaintiff the villa in Jamaica, and he also sued various Jamaican companies in tort.¹²⁵ A stay of proceedings was sought on the basis that Jamaica represented a clearly appropriate forum as the ‘natural’ home of the dispute in all genuine senses. Virtually all the evidence was in Jamaica, the accident occurred there, and all claims could legitimately be presented for disposal in one set of proceedings in that forum.¹²⁶

Adjudicatory jurisdiction existed against the defendant in *Owusu* under Article 2 of the Brussels Convention (now Brussels I Regulation). A preliminary ruling was sought from the European Court as to whether a discretionary power existed to decline to hear proceedings in favour of a non – Contracting State to which connectivity applied. The matter received perfunctory treatment and the essence of the judgment barely covered a full page of text.¹²⁷ It was asserted that *forum non conveniens* was only acknowledged in a paucity of Contracting States (England and Ireland), and to accept it herein would distort affirmation of central uniformity ideals of the Convention,¹²⁸ an underlying part of its conceptual edifice. Allied to uniformity issues there was an expression that enhancement of the doctrine undermines legal certainty presumptions that formed the basis of the Convention and a key objective.¹²⁹ Discretion provided to a Member State was viewed as undermining the key predictability of rules of jurisdiction laid down in the governing template and prevented defendants from the protection they needed on certainty of suit in the identified legal system. Moreover, it was determined

¹²⁵ This was in accordance with CPR, r 6.20(3), as “necessary and proper” parties to the claim against the first defendant.

¹²⁶ The judge at first instance, Judge Bentley Q.C., affirmed that Jamaica was a more appropriately forum to hear the dispute, but incorrectly determined that no power to stay existed in this context derived from the Court of Justice decision in *Universal General Insurance Co. v Group Josi Reinsurance Co. SA* (Case C-412/98) [2000] I ECR 5925.

¹²⁷ The brief analysis provided concurred with the views expressed in the opinion of A-G Leger, delivered on 14 December 2004.

¹²⁸ At paragraph 43.

¹²⁹ At paragraph 41.

that the *actor sequitur forum rei* standardisation in Article 2 was mandatory in effect, ‘according to its terms’, and any derogations from this conscription were only those explicitly provided for in the schematic framework.¹³⁰ In that regard, no application for *forum conveniens* intuitiveness was provided for in application. The direct effect is that within the Brussels I Regulation a seised court is prevented from declining the jurisdiction conferred on it by Article 2 on the predicate that a Court of a non – Contracting State would be more appropriate, “even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.”¹³¹

The implications of *Owusu* are significant for non – Contracting State litigants, particularly U.S. multinationals and individuals, who are brought into litigation by joinder provisions or directly engaged themselves in proceedings in the first instance. The impact may be to irrefragably impose not simply an overarching internal regulatory system of adjudicatory jurisdiction, but also the blunt exercise of that mandate in terms of full venue resolution. The deleterious impact of this deontological mechanistic jurisdiction – selection, untempered by beneficial *forum conveniens* discretion, may prove to be inapt for a selection lacking connectivity to the actual dispute, an abrogation of natural forum, and consequential inconvenience, delays and enhanced costs.¹³² The full implications

¹³⁰ At paragraph 37. See Trevor C. Hartley, “The EU and the Common Law of Conflict of Laws” (2005) 54 International and Comparative Law Quarterly 824, at 827 who states: “The only attempt to set out any specific objects to *forum non conveniens* was made in paragraphs 42 and 43 of the judgment....[T]he final argument was that, since most EC States do not have the doctrine of forum non conveniens, allowing those that do to apply it would affect the uniform application of the rules of jurisdiction in the Convention. No attempt was made to explain why this was necessarily a bad thing. Uniformity for the sake of uniformity seems to be the rule.”

¹³¹ See Edwin Peel, “Forum Non Conveniens and European Ideals” (2005) Lloyd’s Maritime and Commercial Law Quarterly 363, at 366. For a contrary perspective to the articulated judgment by the Court of Justice in *Owusu* see further Lawrence Collins, “Forum Non Conveniens and the Brussels Convention” (1990) 106 Law Quarterly Review 535, at 538-39: “The Convention was intended to regulate jurisdiction *as between* Contracting States. Thus the Convention provides that in principle domiciliaries of a Contracting State should be sued in that state, subject to important and far-reaching exceptions, and not in other Contracting States. Once a court in a Contracting State has jurisdiction it is entitled, *vis-à-vis* other states, to exercise that jurisdiction and others cannot. But the States which were parties to the Convention had no interest in requiring a State to exercise a jurisdiction where the competing jurisdiction was in a non-Contracting State. The Contracting States were setting up an intra-Convention mandatory system of justification. They were not regulating relations with non-Contracting States.”

¹³² See generally, Adrian Briggs, “Forum Non Conveniens and Ideal Europeans” (2005) Lloyd’s Maritime and Commercial Law Quarterly 378; B.J. Rodger, *supra* n. 122; Edwin Peel, *supra* n. 130; Gilles Cuniberti, “Forum Non Conveniens and the Brussels Convention” (2005) 54 International and Comparative Law Quarterly 973; Jonathan Harris, “Stays of Proceedings and the Brussels Convention” (2006) 55 International and Comparative Law Quarterly 933; and

of *Owusu* are yet to be determined, with uncertainty surrounding the pervasiveness of the decision as applied to other aspects of the Regulation, and controversy *vis-à-vis* the retention in some areas of any discretionary elements.¹³³ The following postulations serve to illustrate the level of confusion that remains unabated, egregious potentialities for inappropriate venue resolution, and difficulties presented for U.S. parties:

- (a) The removal of a discretionary power to stay proceedings may produce, ‘blatantly chauvinistic jurisdictional practices against the rest of the world.’¹³⁴ In *Owusu*, the five other defendants embroiled in the litigational battle were all from Jamaica. They could, in other situations, be U.S. companies. The commencement of proceedings against the initial defendant in accordance with Article 2 provisions greatly enhances the likelihood of joinder provisions being activated to ensure no fragmentation of processes.¹³⁵ The likelihood is that U.S. parties are far more likely to be haled before an English court for actions and decisions taken elsewhere, irrespective of whether the London court presents a clearly inappropriate forum: the ‘sound and efficient administration of justice’¹³⁶ standard underpinning European Court of Justice reasoning is highly likely to prejudice foreign defendants from non – Contracting States without any recourse to flexibility to prevent resolutions that shock the conscience.¹³⁷

Adrian Briggs, “The Death of Harrods: Forum Non Conveniens and the European Court” (2005) 121 Law Quarterly Review 535; and see generally, Petrossian, *supra* n. 9.

¹³³ See Peel, *supra* n. 130, at 377-378.

¹³⁴ P. Kaye, “The EEC Judgments Convention and the Outer World: Goodbye to *Forum Non Conveniens*” [1991] Journal of Business Law 47, at 50.

¹³⁵ See Peel, *supra* n. 130, at 373 highlighting an avoidance of fragmentation argument adduced by Judge Bentley Q.C in *Owusu*; and see generally, Petrossian *supra* n. 9.

¹³⁶ This standardisation is a refrain that runs throughout European Court of Justice decisions; see generally, Case C-26/91 Jakob Handte & Co., GmbH v Traitements Mecano-chimiques des Surfaces S.A. [1992] ECR-I 39671 Case C-51/97 Reunion Europeenne S.A. v Spliethoff’s Bevrachtungskantoor B.V. [1998] ECR I-6511; and Case 189/87 Kalfelis v Bankhaus Schroder, Munchmeyer, Hengst & C. [1988] ECR 5565.

¹³⁷ See Richard Fentiman, “Jurisdictions, Discretion and the Brussels Convention” (1993) 26 Cornell International Law Journal 59, at 93 who asserts: ‘Such a preference for a “local” plaintiff, however, is merely a matter of degree where the identify of the *forum conveniens* is concerned. It does not involve giving such persons an unfettered right to sue, while insisting that “foreign” plaintiffs should face the risk that their actions might be stayed. It would be alarmingly Euro-centric if such a positing were accepted as correct and, if a rights-based argument is to be mounted at all, it must surely extend to all plaintiffs.’

- (b) The position is worsened post – *Owusu* for U.S. parties by the breadth of categorisation of ‘domiciliary’ status for corporations in Article 60(1) of the Regulation. It will be recalled that this embraces a corporation’s statutory seat, central administration or principal place of business. A corporation effecting tangential business through corporate offices in London may find that Article 2 domiciliary status is imbued to them, and English courts first seised under Article 27, with no opportunity to challenge the ‘exercise’ of jurisdiction in terms of a clearly inappropriate forum test or to adduce balanced factors in favour of trial abroad.¹³⁸

At an individual level, three months residence of any type or quality, comports to sufficient connectivity for the Article 2 mandatory provisions to apply. Consider, for example, an action in tort brought against U.S. individuals and corporations for negligently causing harm to a U.S. national in an amusement theme park in California. The individual defendant satisfies the Article 2 domicile requirement on limited jurisdictional touchstones as iterated, and if seised fragmentation prevention suggests joinder of parties. Post – *Owusu* the outcome is that no discretion exists to stay proceedings in terms of *forum conveniens* of a non-Contracting State, even though the whole dispute is insulated from a Contracting State in terms of the actual nationality of respective parties, adjectival evidence, location of harm and presence of witnesses.¹³⁹ As Briggs has cogently stated, where possible an English court should, “guide itself by the principle of *forum non conveniens*, because, in applying the relevant rules of its law, it will be doing precisely what a rational civilian jurist would expect it to do.”¹⁴⁰

- (c) The central tenet of the Brussels I Regulation involves protection of the defendant, by the Article 2 provision the general rule is that they should, in terms of fairness and due process, be sued at home. The

¹³⁸ See Peel *supra* n. 130, at 373 asserting that, “domicile may sometimes represent a tenuous connection for a company.”

¹³⁹ See Hill and Chong, *supra* n. 14, at 329-330.

¹⁴⁰ Adrian Briggs, “*Forum Non Conveniens* and Ideal Europeans” [2005] Lloyd’s Maritime and Commercial Law Quarterly 378, at 382.

litigational battleground is skewed in their favour in that they should not be taken by surprise over venue, they can reasonably anticipate being haled into the courts of their home forum in order to defend suit within their own particularised legal system. This presents a beguiling irony that lies at the very heart of *Owusu*. *Forum non conveniens* involves the application for a stay of proceedings by the defendant in asserting that the impacted venue is not suitable for resolution of the action and that a clearly appropriate forum should prevail abroad. Where the defendant applies for a stay in such circumstances then, self-evidently, it is equitable for the court to consider the application, especially in light of the solicitude behind defendant protection in terms of legitimate fora.¹⁴¹ Counter-intuitively, the decision in *Owusu*, obfuscates such principles in, ‘a curious inversion of the normal order of priority’,¹⁴² prioritisation is accorded to EC claimants over a home defendant.¹⁴³ If the defendant is unable to challenge venue resolution on appropriateness then contumeliously they are discriminated against as set against a non – Contracting State defendant to whom *lis pendens* applies. Inversion of principle applies and a schism is created in terms of international commercial litigation: “To deny the English courts (and any others which may wish to do similar) such a power is to sanction the risk of forum shopping against an EC domiciled defendant.”¹⁴⁴

- (d) The European Court of Justice in *Owusu* declined to answer the second posited question, beyond Article 2 mandatory restrictions, in terms of whether it is inconsistent with the internal regulatory schematic template provided, to decline jurisdiction in favour of the courts of a

¹⁴¹ See Hartley, *supra* n. 129, at 827.

¹⁴² See Peel *supra* n. 130, at 370; and see further Hartley *supra* n. 129, at 827 who asserts: ‘The first argument (in *Owusu*) was that a defendant (who is generally better placed to conduct his defence before the courts of his domicile) would not, under the doctrine of *forum non conveniens*, be able to foresee in which other courts he will be sued. This suggests that the purpose of the ban on *forum non conveniens* is to protect the defendant. The glaring fallacy of this argument is that it is the defendant who applies for a stay: if he wants to be sued in his own courts, all he has to do is not to apply for a stay. Moreover, since the defendant is by definition a domiciliary of the State of the forum, it is hard to see what interest the Community would have in protecting him from his own law.’

¹⁴³ See generally, Harris *supra* n. 131.

¹⁴⁴ See Peel *supra* n. 130, at 371.

non-Contracting State in all circumstances, or only in some: and, if so, which? This relates to procedural concerns addressing whether bespoke provisions allow limited discretion: in favour of non-Contracting States in terms of title to land; stays of proceedings in terms of choice of court proceedings elsewhere; and where a non-Member States courts' are first seised in a dispute involving collinearity between litigants and cause of action.¹⁴⁵ In such respects a number of commentators have articulated that the impact of *Owusu* is restricted to Article 2, and that national principles relating to *forum conveniens* may still have restricted domain,¹⁴⁶ and support for this proposition exists in terms of a judgment relating to choice of court jurisdiction in favour of a non-Member State.¹⁴⁷

The reality is that the pragmatic 'clean-slate' presented by the Brussels Convention and now Brussels I Regulation, abrogating *forum conveniens* in favour of universality, certainty and legitimate party expectations, has produced unfortunate side-effects. The lack of discretionary influence and equitable conscience at the epicentre of functional 'europeanisation' stands in contrast to Anglo-American traditional common law principles on venue resolution. Unfortunately, however, whilst the Brussels I Regulation represents 'supranationalism'¹⁴⁸ and rigidity in jurisdiction – selection that may operate capriciously against non-Member State litigants, the federal standard in the U.S. is also inherently flawed in terms of discriminatory treatment accorded to alien plaintiffs.¹⁴⁹ U.S. multinational corporations have insulated themselves from liability via reverse forum-shopping, deployed inapposite stalking horse arguments concentrated on international comity and anti-chauvinism, and this has

¹⁴⁵ See generally, Hill and Chong, *supra* n. 14, at 330-332; Peel *supra* n. 130, at 376-377; and Briggs, *supra* n-131, at 381-382.

¹⁴⁶ *Ibid.*

¹⁴⁷ See *Konkola Copper Mines Plc v Corfomin* [2005] 2 Lloyd's Rep. 555 where Colman J. in the English High Court supported the application in principle of reflexive effect to allow an exclusive jurisdiction clause supererogatory effect in favour of a non-Contracting State, consequentially facilitating a stay of proceedings pursuant to Article 23.

¹⁴⁸ See Juenger, *supra* n-99.

¹⁴⁹ See, generally, McParland *supra* n. 2; and Foley-Smith *supra* n. 9.

been aligned with ineffectual balancing of public/private interests.¹⁵⁰ Optimal pathways need to be explored in terms of a preferred edifice relating to limited *forum non conveniens* review, and retention of this venerable common law device in an efficacious fashion. A bulwark should be established, as Hartley has adumbrated: “The crass insistence that common law rules must be abolished even where no Community interest is at stake is the feature of this judgment [in *Owusu*] that will cause most difficulty for lawyers in England. It seems that the continental judges on the European Court want to dismantle the common law as an objective in its own right.”¹⁵¹

IV U.S. MULTINATIONAL ABUSES AND THE SHIELD OF FORUM NON CONVENIENS: TIME FOR REFLECTION

A. *The Federal Doctrine Of Forum Non Conveniens*

“When an American party sues another American party in a federal court, at least one thing is certain: so long as some court in the United States has jurisdiction (personal and subject matter) over the case, the case will be heard here. By contrast, when foreign parties are involved in litigation in a federal court, whether as plaintiffs, defendants or both, there is no such guarantee, even where the federal court is properly seised of jurisdiction (personal and subject-matter). While this result may at first appear intuitively obvious, the impact of the result on litigation in the United States – and the resulting policy-making of courts in this process – raises substantial concerns. If a court is properly seised of jurisdiction, why should the parties’ nationality matter? And if it does matter, why should the courts be making decisions on this issue when Congress has demonstrated its capacity and willingness to legislate in this arena. More narrowly, if a foreign plaintiff sues an American defendant in the district where the defendant resides, should there not be a presumption that the case should be heard there?”¹⁵²

The federal doctrine of *forum non conveniens* in the U.S. has developed in a piecemeal *ad hoc* fashion, and has engendered a skewed most appropriate forum

¹⁵⁰ See generally, Samuels *supra* n. 3; Jernagan *supra* n. 9; Karayanni *supra* n. 11; Gray *supra* n. 29; and Prince *supra* n. 30.

¹⁵¹ Hartley, *supra* n. 129, at 828.

¹⁵² See Samuels *supra* n. 3, at 1059-60.

standard, delineated by discriminatory treatment against foreign plaintiffs.¹⁵³ The template produced has been derided as parochial and racist in impact.¹⁵⁴ The consequences, as suggested below, are to implicitly condone corporate malpractice, negligence and harmful conduct by American multinationals egregiously shielding them unduly from liability.¹⁵⁵ Behemoth corporations perspicaciously gravitate to underdeveloped countries without regulatory infrastructures to ‘deal’ with the dumping of harmful products, and are deleteriously protected by euphemistic *forum non conveniens* dismissals.¹⁵⁶ The reality, on many occasions, is that the case will never be heard at all in the identified *forum conveniens*, and a ‘cheerful’ wave from the U.S. courtroom ends the action.¹⁵⁷

The historical lineage of the doctrine may be traced back to equitable assumptions of venue, and first arose in state law manifestations in the U.S. centred around domestic corporate regulation and maritime disputes.¹⁵⁸ The

¹⁵³ It has been asserted that, “the present test for *forum non conveniens* – set forth by the Supreme Court in *Piper* and as interpreted by lower courts – creates confusion and uncertainty in application. That confusion, which results from an unclear test that is unevenly enforced, undermines the legitimacy and accountability of the federal courts.”; see Samuels *supra* n. 3 at 1060.

¹⁵⁴ See Walter Heiser, “Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions” (2005) 51 Wayne Law Review 1161; Peter Prince, “Bhopal, Bougainville and Tedi: Why Australia’s Forum Non Conveniens Approach is Better” (1998) 47 International and Comparative Law Quarterly 573; Leah Nico, “From Local to Global: Reform of Forum Non Conveniens Needed to Ensure Justice in the Era of Globalisation” (2005) 11 South Western Journal of Law and Trade in the Americas 345; and Elizabeth Lear, “Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power” (2006) 91 Iowa Law Review 1147.

¹⁵⁵ See Foley-Smith, *supra* n. 9, at 158 who states that, “[A]s a result, corporations have the dual advantage of profiting from their investments in areas where local citizens are likely to be effectively excluded from the host country’s legal and political systems, while also remaining insulated from actions in home country courts.”

¹⁵⁶ See Kathryn Lee Boyd, “The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation” (1998) 39 Virginia Journal of International Law 41, at 71 expressing the view that, “The doctrine appears to be not a convenience doctrine at all, but rather an outcome determination which could ask more nefarious motives such as xenophobia, a desire to protect multinational corporations for injuries in foreign countries, or fears of dealing with difficult issues of foreign law.”

¹⁵⁷ See Jacqueline Duval-Major, “Note, One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff” (1992) 77 Cornell Law Review 650, at 671-72 highlighting that the *forum non conveniens* dismissal constitutes the end of the line for many foreign plaintiffs; and David W. Robertson, “Forum Non Conveniens in America and England. A Rather Fantastic Fiction” (1987) 103 Law Quarterly Review 398, 418-419 considering a survey of 180 transnational cases dismissed on forum non conveniens grounds and identifying that none proceeded to a successful outcome for the plaintiff in the foreign court.”

¹⁵⁸ See Reus, “A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom and Germany” (1994) 16 Loyola of Los Angeles International and Comparative Law Journal 455. Federal admiralty courts used it to decline jurisdiction over

concept received greater recognition following a seminal Columbia Law Review article by Paxton Blair in 1929,¹⁵⁹ and examination by the Supreme Court in *Gulf Oil Corp v Gilbert*.¹⁶⁰ The factual nexus was limited therein in that the epicentre of the dispute focused simply upon domestic elements and parties, but nevertheless the template applied was adopted as the leading formulation for all federal *non conveniens* dismissals, regardless of whether they were admiralty, domestic, or even international cases involving one or more parties from foreign countries. Primordial effect, as iterated in the earlier *St Pierre* precept for English law, was prescribed to the plaintiff's initial choice of forum which was rarely to be displaced unless abuse of process was apparent.¹⁶¹ At the heart of the standardisation lay the principle that unless the balance of factors strongly favours a defendant, a court should be reticent to disturb a plaintiff's choice of forum.¹⁶² An abuse of forum standard prevailed in that in no event would the plaintiff be permitted to, 'vex, harass, or oppress the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.' This *St Pierre* reformulation reflected the original essence of the equitable balancing discretion identified in the doctrinal presumptions, and the trial judge was anthropomorphised as empress of the process with their solipsistic calculations only reviewable by an appellate court under a deferential clear abuse of discretion iteration.¹⁶³

suits between foreigners. See Hartman, "Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts" (1981) 69 Georgia Law Journal 1257, at 1278. The use of the doctrine in such cases was approved by the U.S. Supreme Court in 1885. See the *Belgenland*, 114 U.S. 355, 364-5 (1885). Gradually the doctrine was applied in other narrowly defined areas of litigation, such as between aliens and suits involving the internal affairs of foreign companies. As early as 1927, some states provided for a general clause granting judges discretionary power to decline jurisdiction over non-residents. See generally, Abbott, "The Emerging Doctrine of Forum Non Conveniens: A Comparison of the Scottish, English and United States Applications" (1985) 18 Vanderbilt Journal of Transnational Law 111.

¹⁵⁹ *Supra* n. 59

¹⁶⁰ 330 U.S. (1947).

¹⁶¹ The litigants in *Gulf Oil* were U.S. citizens, and the action was in federal court on the basis of diversity jurisdiction. It involved a cause of action for damages resulting from a fire in a warehouse located in the state of Virginia. Note that the Supreme Court recognised that the doctrine of *forum non conveniens* is inapplicable unless there are at least two jurisdictions in which the defendant is amenable to process, one of which is the plaintiff's chosen forum, *ibid.*, at 504-507. The factors associated with the doctrine are designed to help the court decide whether it is appropriate to decline jurisdiction and allow the litigation to proceed in an alternate forum.

¹⁶² *Ibid.*, at 508-509; and see generally, Karayanni *supra* n. 44, at 335-337.

¹⁶³ *Ibid.*, at 509-512. For criticism of the clear abuse of discretion standard see Friendly, "Indiscretion About Discretion" (1982) 31 Emory Law Journal 747, at 748-54.

An exogenetic list of balancing factors were adduced as relevant in deciding which forum the litigation would best serve the private interests of the litigants and the public interests of the forum in question.¹⁶⁴ This gallimaufry of potentially impacted concerns has produced a standardisation where predictive outcome may be as likely as tattooing soap bubbles for litigants, and an unfortunate opaqueness in result. Private factors were ascribed as embracing: the ease of access to evidence; the availability of compulsory procedures for forcing attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; the possibility of viewing premises if appropriate to the action; the enforceability of judgments abroad; and all other practical problems that would promote an easy, expeditious and inexpensive trial.¹⁶⁵ Public factors were stated to include: administrative difficulties flowing from court congestion ('crowded dockets'); the public interest in having local controversies decided at home; the public interest in having the trial of a diversity case in a forum familiar with the applicable laws; difficulties in the application of foreign law; avoidance of extensive forum shopping; and the unfairness of burdening citizens in an unrelated forum with jury and tax duties.¹⁶⁶ The reality, of course, is that a strict demarcation between private/public factors may be 'incoherent' in that a fudged coalescence of factors prevails in actual decision-making with the enquiry, "differentiating between considerations of geographical convenience, litigation efficiency and considerations of substantive justice."¹⁶⁷

The dispute in *Gulf* was insulated geographically to local parties, but subsequently in *Piper Aircraft*¹⁶⁸ a federal standard emerged, arguably xenophobic in derivative nature, and to be adopted where foreign plaintiffs sue in U.S. courts.¹⁶⁹ It involved a wrongful death action brought initially in a California

¹⁶⁴ *Ibid.*, see generally Karayanni *supra* n. 44; and Baldwin *supra* n. 12, at 754-55.

¹⁶⁵ *Ibid.*, at 508.

¹⁶⁶ *Ibid.*, at 508-509.

¹⁶⁷ See Karayanni *supra* n. 44, at 331.

¹⁶⁸ *Piper Aircraft v Reyno*, 454 U.S. 235 (1981).

¹⁶⁹ See Kevin M. Clermont, "The Story of Piper: Fracturing the Foundation of Forum Non Conveniens, in *CIVIL PROCEDURE STORIES* 193, 195 (Kevin M. Clermont ed, 2004) stating that, "[n]o procedural doctrine is so encapsulated in a single opinion that is so ill-conceived"; and see *Dow Chem. Co. v Castro Alfaro*, 786 S.W. 2d 674, 680 (Tex. 1990) where Doggett J. referred to *forum non conveniens* as a, "legal fiction with a fancy name to shield alleged wrongdoers", and furthermore that, "forum non conveniens...doctrine...has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad...."; *ibid.*, at 681.

state court by the representative of the estate of five Scottish citizens killed in an air crash in Scotland. It was alleged against *Piper* that defective manufacture had causally effected the wrongful deaths, and recovery was claimed on the predicates of negligence and strict liability. The plaintiffs enjoined the plane manufacturer (located in Pennsylvania) and the American company that manufactured the plane's propeller (located in Ohio) as the defendants in the action.¹⁷⁰ The suit was removed to federal court in California, and subsequently transferred to a federal district court in Pennsylvania, where the defendants moved to discuss on the grounds of *forum non conveniens*.¹⁷¹ This motion was supported by defendant's claims that numerous witnesses essential to the defence were geographically connected to Scotland and not subject to compulsory process in the U.S., the decedents and their heirs were Scottish citizens, and locational evidence at the accident scene centred on Scotland.¹⁷² This translated in their view to a clear preponderance of balanced factors in favour of an alternative *forum conveniens*. These contentions were met by substantive law concerns adduced by the plaintiff, suggesting that dismissal would be inequitable since Scottish law determinative to products liability was less favourable than the applicable law, and all the evidence concerning the manufacture of the plane was located in the U.S.¹⁷³ Despite the location of the defendant's corporate headquarters a short distance from the trial court, and even though adjudicatory jurisdiction applied, the case was dismissed in accordance with the *forum non conveniens* doctrine.¹⁷⁴

¹⁷⁰ 454 U.S. 238-40.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*; at 242-4. It was also highlighted by the Court that litigation had been instigated in the U.K. against several defendants, including *Piper*, and that the appropriate British governmental authorities had already undertaken an investigation; *ibid.*, at 239-240.

¹⁷³ In this regard the Court iterated that to give cognisance to substantive concerns would only encourage claimants to engage in egregious forum shopping and bring claims in the United States lacking appropriate connectivity, and better resolved elsewhere, and moreover not involving U.S. citizens; *ibid.* at 252. See, generally, J. Stanton Hill, "Towards Global Convenience, Fairness and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts" (2008) 41 *Vanderbilt Journal of Transnational Law* 1177.

¹⁷⁴ See *Foley-Smith supra* n. 9, at 171 iterating that the outcome in *Piper* represents an abrogation of venerable principles: "Although the doctrine of *forum non conveniens* was originally developed to prevent harassment of defendants, it has become a tool for U.S multinationals seeking to avoid liability for human rights abuses committed abroad. The doctrine's application should be modified to take into account globalization, the increasing rôle of TNC's, technological improvements available to trial courts, and the international interest in promoting fundamental human rights."

The federal standard articulated in *Piper* engages a two-part test.¹⁷⁵ First, a court must determine whether an adequate alternative forum exists. If it does the court proceeds with the second prong in determining which forum the litigation would best serve the private interests of the litigants or the public interests of the forum. In this regard there was confirmation of a shift from the abuse of process approach articulated in *Gulf Oil* to the ‘most appropriate forum’ approach in the evaluation of the criteria.¹⁷⁶ Moreover, as subsequently determined in *Sinochem*,¹⁷⁷ it is permissible for federal courts to rule on *forum non conveniens* motions even before establishing that the court has adjudicatory jurisdiction over the parties or subject-matter of the case, with such dismissals viewed as a less burdensome optional pathway.¹⁷⁸

Unfortunately, the Court in *Piper* failed to articulate the essential requirement of an ‘adequate’ alternative forum in any meaningful practical or realistic sense.¹⁷⁹ As charted below, this has created unfortunate consequences for dyspeptic foreign litigants precluded from U.S. court-room doors. In terms of ‘adequacy’ the Court simply articulated that:

“Ordinarily, this requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject-matter of the dispute.”¹⁸⁰

¹⁷⁵ See, e.g., *Wiva v Royal Dutch Petroleum Co.*, 226 F. 3d 88, 100 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

¹⁷⁶ See *Piper Aircraft*, 454 U.S. at 254-55. Note an adequate forum is identified as one that presents a remedy for the claim and will treat the claimant with a basic level of fairness. In general terms the defendant need only be subject to personal jurisdiction in the alternative forum for the forum to be adequate; *ibid.*

¹⁷⁷ *Sinochem International Co. Ltd v Malaysia International Shipping Corporation*, 127 S Ct. 1184 (2007); and see generally, EE. Daschbach, “Where There’s a Will, There’s a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiff’s Actions Against U.S. Multinationals,” (2007) 13 L & Bus. Rev. AM. 11.

¹⁷⁸ *Ibid.*, at 1192.

¹⁷⁹ See generally, Samuels *supra* n. 3, at 1111 who cogently opines: “*Piper* has led courts to interpret the two-part inquiry as they see fit without strict rules or guidelines. There is a real concern that the current doctrine is driven by what is best for defendants (and particularly American defendants) rather than by the policy goals of (a) protecting the domestic courts and the public they serve and (b) ensuring that wrongdoers are held accountable for their actions in forums where jurisdiction over them is proper.”

¹⁸⁰ See *Piper Aircraft*, 454 U.S. at 254 n. 22.

The ‘adequate’ alternative legal system presented in *Piper* was that of the U.K., advanced and developed in civil and commercial disputes, but this test has transplanted less successfully to alternative fora options in developing nations in other disputes.¹⁸¹ Allied to the ‘adequacy’ debate, the Supreme Court in *Piper* totally recast the parameters of a *forum non conveniens* enquiry in cases involving foreign plaintiffs that institute litigation in the United States.¹⁸² Diminished force is accorded to a foreign plaintiff’s choice of a U.S. forum, and lower federal courts must post-*Piper Aircraft* consider in transnational *forum non conveniens* litigation the very citizenship of the plaintiff:

“When the home forum has been chosen, it is reasonable to assume that this 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.”¹⁸³

The momentum shift in *Piper* towards a most appropriate forum balanced perspective, but skewed against foreign plaintiffs, represents an obfuscation of the original import behind the equitable and discretionary formulation.¹⁸⁴ The legitimate progenitor of the doctrine focused on protection of the chosen forum and the defendant from the inconvenience of challenging a dispute brought by the plaintiff in a clearly inappropriate forum. The new overarching incantation, allowing enhanced discretion for a trial judge, deploys considerations of universal

¹⁸¹ A preferred option, the antithesis of *Piper*, is the weighing of private and public interests conducted by the Second Circuit Court of Appeals in *Carlenstolpe v Merck and Co.*, 638 F. Supp. 901 (S.D.N.Y. 1986), *aff’d*, 819 F.2d 33 (2d Cir. 1987), wherein the district court emphasized: “The question to be answered is whether plaintiff’s chosen forum is itself inappropriate or unfair because of the various private and public interest considerations involved. That [the alternative forum] may have an interest in this lawsuit does not in any way alter the fact that plaintiff’s chosen forum also has a significant interest in its outcome or that the crucial liability evidence in this case is more convenient to the present forum than to the proposed alternative forum. Accordingly, [the foreign country’s] acknowledged interest in this lawsuit, even if it were stronger than the present forum’s interest – which this court does not find it to be – would not necessarily form adequate grounds for *forum non conveniens* dismissal.”

¹⁸² See *Piper Aircraft* 454 U.S. at 255-6; and see further McParland *supra* n 2, at 72 who asserts, “This distinction was expressed to be based not on a desire to disadvantage foreign plaintiffs, but was some form of rough rule of thumb for assessing the reasonableness and convenience of the plaintiff’s choice of forum in a U.S. court.

¹⁸³ *Ibid.*

¹⁸⁴ See Abbott, *supra* n. 157, at 143-7.

convenience and intuitive ends of justice principles.¹⁸⁵ The flexibility provided by a liberal specific factors myriad replaced the rigid autocracy of an abuse of process *St Pierre* traditional formulation.¹⁸⁶

B. (In) Adequacy of Alternative Fora and Avoidance of U.S. Multinational Abuses

The controversial nature of the discriminatory U.S. federal standard of *forum non conveniens* has been identified in a series of high profile cases that are set out below.¹⁸⁷ The jurisprudential bulwark to liability in *Piper* has, arguably, been deployed in Machiavellian fashion by U.S. multinationals against foreign plaintiffs in less-developed countries who are the real victims of corporate malpractice, negligence, human rights abuses and the unfortunate maxim of profit before principles.¹⁸⁸ A form of reverse forum shopping has been circuitously transplanted into the equation by large U.S. multinationals in a succession of product liability cases to circumvent ‘appropriate’ venue in their home forum. The reality, as Robertson and Miller have cogently identified is that, “Although courts and commentators routinely discuss *forum non conveniens* as if the issue at stake were a choice between competing jurisdictions, in fact, the usual choice is between litigating in the United States or not at all.”¹⁸⁹ It should be difficult to

¹⁸⁵ See generally Duval-Major *supra* n. 157; Mazzola, “Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno (1983) 6 Fordham International Law Journal 577; Carter-Stein, “In Search of Justice: Foreign Victims of Silicone Breast Implants and the Doctrine of Forum Non Conveniens “ (1995) 18 Suffolk Transnational Law Review 167; and see *Friends for All Children Inc. v Lockhead Aircraft Corp.*, 717 F. 2d. 602, 606-607 (D.C. Cir. 1983).

¹⁸⁶ See generally Prince *supra* n. 153; Duval-Major *supra* n. 157; and Solen, “Forum Non Conveniens and the International Plaintiff” (1994) 9 Florida Journal of International Law 343.

¹⁸⁷ See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F. 2d. 195, 206 (2nd Cir.) (affirming district court’s dismissal on forum non conveniens grounds), *cert. denied*, 484 U.S. 871 (1987); *Dow Chem. Co. v Castro Alfaro*, 786 S.W. 2d 674, 679 (Tex. 1990) (holding that Texas law precluded dismissal on forum non conveniens grounds), *cert denied*, 498 U.S. 1024 (1991); see Carney, “International *Forum Non Conveniens*: section 1404.5 – A Proposal in the Interest of Sovereignty, Comity and Individual Justice” (1995) 45 American University Law Review 415; and see *infra* at p. XX.

¹⁸⁸ As Jernagan has cogently stated, “when a U.S. corporation conducts activities abroad that have direct bearing on U.S. interests, such as attempting to fulfil drug – testing requirements as a pre-requisite for FDS approval, U.S. interests are extremely strong. Ultimately, even when the interests are weak, if jurisdiction can be maintained in the U.S. forum, then U.S. courts renege on their duty if they relinquish jurisdiction when no adequate alternative is available”.

¹⁸⁹ See Laurel E. Miller, “Comment, Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions” (1991) 58 University of Chicago Law Review 1369, at 1388; and see Robertson, *supra* n. 156.

countenance that when a plaintiff has selected the defendant's home forum, the latter ought not to be surprised by being haled into court there;¹⁹⁰ moreover, it translates to a, "perversion of the *forum non conveniens* doctrine to remit a plaintiff, in the name of expediency to a forum in which, realistically, it will be unable to bring suit when the defendant would not be genuinely prejudiced by having to defend at [its] home in the plaintiff's chosen forum."¹⁹¹ Pragmatically, this represents the corollary of the orthodoxy enunciated under *Gulf Oil/Piper Aircraft* where the crucial determinant to examine is whether, under 'adequate' alternative forum juxtaposed with the 'less deference' iteration, a presumption applies in favour of the foreign forum. Prejudicial effect is prescribed to the determinant that the plaintiff is not a home resident – this severely restricts the likelihood of a hearing in a state where the U.S. multinational is incorporated, even in the vicinity of the trial court.¹⁹² The 'home' domiciliary status of the defendant metaphorically constitutes a perfidiously inverted shield to liability.¹⁹³

The unfortunate impact of the skewed less deferential standardisation is exacerbated in personal injury disputes where the preponderance of adjectival evidence and relevant witnesses are located abroad in the country where the harm occurred. Pre-eminent interest is wrongly accorded to private interest factors of the parties, rather than public policy interests of the chosen forum in ameliorating environmental abuses and dumping of harmful products. The difficulties are propounded by the conclusion in *Piper* that a less favourable substantive law in the defendant's alternative forum will rarely constitute a ground of inadequacy. The effect has been that, "the doctrine does not serve convenience or fairness goals but rather serves to insulate TNC's from responsibility for their actions

¹⁹⁰ Robertson, *supra* n. 156, at 405.

¹⁹¹ *Pan Processes, S.A. v Cities Serv. Co.*, 650 F.2d 4078, 420 (2d Cir. 1981) (quoting *Manu Int'l S.A v Avon Prods., Inc.*, 641 F.2d 62, 67 (2d Cir. 1981).

¹⁹² See *Dow Chemical*, 786 S.W.2d 674 (Tex. 1990) where Doggett J. cogently stated: "The dissenters argue that it is inconvenient and unfair for farmworkers allegedly suffering permanent physical and mental injuries, including irreversible sterility, to seek redress by suing a multinational corporation in a court three blocks away from its world headquarters and another corporation, which operates in Texas this country's largest chemical plant. Because the doctrine they advocate has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad, I write separately..."

¹⁹³ See *Carlenstolpe v Merck and Co.*, 638 F. Supp. 901, 905 (S.D.N.Y. 1986), *aff'd*. 819 F.2d 33 (2d Cir. 1987) where the court iterated that promulgation of the *Piper* standard will, "eliminate the likelihood that the case will be tried ... discussion of convenience of witnesses takes on a Kafkaesque quality – everyone knows that *no* witnesses ever will be called to testify."

abroad”, and thereby, a tool for human rights abuses committed abroad.¹⁹⁴ In a number of instances, detailed below, it is apparent that multinational corporations have marketed to foreign countries products that have either been banned or untested in the U.S., causing severe harmful effects of a widespread nature.

The *forum non conveniens* dismissal formula has been perspicaciously deployed by U.S. multinational defendants to bypass internal regulatory laws.¹⁹⁵ The tactical game-playing is tantamount to a piece of modern pageantry as disappointed plaintiffs receive a one-way ticket home.¹⁹⁶ Defendants have invoked the federal standard as a defensive shield in international litigation, fought the venue battle with the utmost rigour, and resisted legitimate suit in their home forum.¹⁹⁷ The implicated resonance is that U.S. fora do not have a presumptive interest or public policy engagement in regulating the sale of products beyond their borders.¹⁹⁸ This is counter-intuitive, and as argued elsewhere should demand a rebalancing of the private/public interest orderings established in *Piper Aircraft*. It is vital to enervate a strong U.S. interest in assuring the safe regulation of American industry on an international and national level.¹⁹⁹ Consequently, it is important to avoid a ‘race to the bottom’²⁰⁰ amongst

¹⁹⁴ *Supra* n. 169.

¹⁹⁵ See generally, Lippman, “Transnational Corporations and Repressive Regimes: The Ethical Dilemma” (1985) 15 Cal. W. Int. L.J. 542.

¹⁹⁶ Duval-Major has highlighted that U.S. interest in regulating the conduct of U.S. corporations abroad is not entirely altruistic. A significant percentage of the profit of the largest U.S. multinationals is made abroad, up to 40 percent of their net profits, and much of these return to the U.S. and become part of the gross national profit; *supra* n. 156, at 675; and see further Carney *supra* n. 186.

¹⁹⁷ See GARY BORN AND PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS, 4th edn., 2077, at 386; who cogently state, “defendants who argue that it would be inconvenient for them to litigate in a court located only blocks away from their headquarters often encounter sceptical reactions: ‘It is, as Alice said, ‘curiouser and curiouser’.” (Lony v E.I. Du. Pont de Nemours and Co, 935 F. 2d 605, 608 (3rd Cr. 1991) (noting that ‘Du Pont’ which is headquartered in Wilmington, Delaware, and is the largest employer in that state seeks to move the action against it to a forum more than 3,000 miles away.”

¹⁹⁸ See generally, Street, “Comment, U.S. Exports Banned for Domestic Use but Exported to Third World Countries” (1981) 6 Int’l Trade L.J. 95; and see Beth Stephens, “Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations” (2002) 27 Yale J. Int’l L. 1.

¹⁹⁹ See generally, Beth Stephens, “The Door is Still Afar for Human Rights Litigation in U.S. Courts” (2005) 70 Brooklyn Law Review 533; and Margaret G. Stewart, “Forum Non Conveniens: A Doctrine in Search of a Role” (1986) 74 California Law Review 1259, 1284 asserting: “[I]f the defendant is a citizen of the forum, that forum is not ‘disinterest’ in the *Gilbert* sense, no matter how strong the interests of the competing forum. It is not in any sense unfair to impose upon the defendant’s home forum the economic burden of litigating claims brought against its citizens.

developing nations soliciting investors: and protection is needed so that they are not used as the ‘industrial world’s garbage can’²⁰¹ and ‘as dumping grounds for products that have not been adequately tested.’²⁰² A sea-change is needed so that inhabitants are not to be used as ‘guinea pigs for determining the safety of chemicals.’²⁰³

A significant problem with the federal standard of *forum non conveniens* has proved to be the ineffective examination of whether an alternative forum is truly ‘adequate’ in realistic and practical senses.²⁰⁴ There is a reluctance to examine another legal system to identify if the claim will be determined in an equitable, timely and impartial fashion.²⁰⁵ Examination transpires at a macro rather than micro level with a failure to evaluate what will actually occur in the alternative forum, and to challenge concerns of bias, corruption or wrong doing.²⁰⁶ This often derives from misplaced and mis-directed incantations of international comity and paternalistic imputations, revealed in the evaluation of a series of high-profile dismissal cases below.

In *Abdullahi v Pfizer Inc.*,²⁰⁷ a terrible meningitis, measles and cholera epidemic arose in Nigeria where Pfizer was testing drugs on Nigerian residents. A new antibiotic Trovan, unapproved in the U.S., was tested on two hundred

²⁰⁰ See Duval-Major, *supra* n. 156, at 675; and see Benjamin Mason Meir, “International Protection of Persons Undergoing Medical Experimentation: Protecting the Right of Informed Consent” (2002) 20 Berkeley Journal of International Law 513, at 532 highlight that many African governments are so concerned about alienating pharmaceutical companies that they refuse to regulate their research activities or promulgate lawsuits against them.

²⁰¹ See Castro Alfaro, 786 S.W. 2d at 687 (Doggett J. concurring); and see Marc Galanter, “Bhopals, Past and Present: The Changing Legal Response to Mass Disaster (1990) 10 Windsor Y.B. Access to Justice 151.

²⁰² *Ibid*; and see generally, Benjamin Mason Meir, “International Protection of Persons Undergoing Medical Experimentation: Protecting the Rights of Informed Consent” (2002) 20 Berkeley Journal of International Law 513.

²⁰³ *Ibid*; and see Paul C. Johnson, “Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government” (1991) 25 Suffolk University Law Review 1, at 66 stating that harm inflicted abroad is often, “the culmination of foreseeable events resulting from the decisions and activities of a United States – based company.”

²⁰⁴ See generally, Samuels *supra* n. 3; and see John Bies, “Comment, Conditioning Forum Non Conveniens” (2000) 67 University of Chicago Law Review 489.

²⁰⁵ See, generally, Samuels *supra* n. 3; and see John R Wilson, “Note, Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation (2004) 65 Ohio St L.J. 659, at 661 highlighting that, “[T]he meaning of ‘inconvenience’ in the forum non conveniens inquiry has thus shifted away from the maliciousness implied by harassment to the comparatively benign problem of inappropriate forum choice”; and see further, P.J. Kee, “Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens” (2008) 83 Tulane Law Review 495.

²⁰⁶ See generally, Baldwin *supra* n. 12; and Boyd, *supra* n 155.

children, aged one through thirteen, to include in the experiment. These tests were conducted even though information existed that potential side-effects in children included joint disease, bone deformation and liver damage, and even though warnings existed that the studies contravened, “international laws, federal regulations and medical ethics.”²⁰⁸ Tragically, eleven children died following the study and ‘controlled experiment’ and numerous others suffered injuries. A group of Nigerian plaintiffs brought action in New York against the home defendant for multiple violations of international law. The action was stayed on *forum non conveniens* grounds with Nigeria viewed as an ‘adequate’ forum, not to be displaced on comity grounds amongst other rationales.²⁰⁹ An orator of hard truths would have demanded more than the perfunctory examination of whether Nigeria constituted an adequate forum. The plaintiffs contended that the alternative venue lacked, “adequate procedural safeguards” and the “modicum of independence and impartiality” required to ensure an effective remedy for the wrongdoing and misfeasance.²¹⁰ There were additional allegations that within the Nigerian legal system a fair trial would be rendered nugatory because of corruption, delay, inefficiency and understaffing.²¹¹ As Jernagan has cogently identified, these disparate inefficiencies and inequities were supported by a U.S. State Department report containing findings that Nigeria was not an adequate alternative forum.²¹² Interestingly, the Nigerian courts had disavowed any interest or intent in hearing the dispute, but this factor was disregarded.²¹³ It was not ‘grossly disproportionate’ to subject the defendant to litigation just outside their front door or inconvenient on an abuse of process standard.²¹⁴

A vital policy interest is at stake in not allowing U.S. multinationals to escape liability: “the United States and its courts have a strong public interest in

²⁰⁷ 77 F. App 2d; 48 (2d. Cir. 2003).

²⁰⁸ Abdullahi I, 2002 WL 31082956, at 1; and see Joe Stephens, Where Profits and Lives Hang in Balance, WASH. POST., Dec. 17, 2000.

²⁰⁹ Abdullahi III, 2005 WL 1870811 at 1, 18.

²¹⁰ Abdullahi I, 2002 WL 31082956, at 6.

²¹¹ *Ibid.*, at 8.

²¹² See Jernagan *supra* n. 9 at 1109.

²¹³ *Ibid.*, at 1100.

²¹⁴ See Jernagan, *supra* n. 9 at 1095. Note that Jernagan cogently states, “When a U.S. corporation conducts activities abroad that have a direct bearing on U.S. interests, such as attempting to fulfil drug-testing requirements as a pre-requisite for FDA approval, U.S. interests are extremely strong. Ultimately, even when the interests are weak, if jurisdiction can be maintained in the U.S. forum, then U.S. courts renege on their duty if they relinquish jurisdiction when no adequate alternative is available.”; *ibid.*, at 1102.

the behaviour and regulation of U.S. companies, particularly when U.S. involvement is the only way to protect U.S. public policy interests.”²¹⁵ It is also important to properly address the ‘adequacy’ test within the first prong of *Piper* in matters of transnational litigation. A failure to properly address financial considerations as a bar to suit arose in *Murray v British Broadcasting Corp.*,²¹⁶ a decision which in many respects is the corollary of *Lubbe*,²¹⁷ considered below. The action involved a claim for copyright infringement and unfair competition brought by the plaintiff against the British Broadcasting Corporation (BBC). It centred on violations of costume design rights in a well-known and popular fictional character, Mr Blobby, a feature of a television programme entitled ‘Noel’s House Party’. The estimated cost of the litigation was around £200,000 and at that point no contingency fee arrangement system operated in English law, and the plaintiff could not raise a loan for that significant sum. The Second Circuit refused to allow *fiscus conveniens* to trump *forum conveniens*, and determined that, “Murray’s claim of financial hardship may not be considered in determining the *availability* of an alternative forum but must be deferred to the balancing of interests relating to the forum’s convenience.”²¹⁸ It is submitted, however, that the obverse should be primordial: financial hardship in *Murray* precluded suit in any alternative forum and ought to have been part of the ‘adequacy’ question.²¹⁹ The primary inquiry should reflect the district court perspective in *Carlenstolpe*²²⁰ and whether the plaintiff’s chosen forum, “is itself inappropriate or unfair because of the various private and public interest considerations involved. That [the alternative forum] may have an interest in this lawsuit does not in any way alter the fact that plaintiff’s chosen forum also has a significant interest in its outcome.”²²¹

²¹⁵ *Ibid.*, at 1100.

²¹⁶ 81 F. 3d 287, 289 (2d Cir. 1996).

²¹⁷ *Lubbe v Cape Plc* [2000] 1 WLR 1545; and see *infra* at p. XX.

²¹⁸ *Ibid.*, at 292-93.

²¹⁹ See Samuels *supra* n. 3 at 1074 who states: “Flexibility is certainly valuable when courts are weighing the private and public interests and courts can and should have discretion in that inquiry. But that prong should only be reached when a court has established that an alternative forum exists for the action.”

²²⁰ *Carlenstolpe v Merck and Co.* (Carlenstolpe J), 638 F. Supp. 901 (S.D.N.Y. 1986); *aff’d*, 819 F. 2d 33 (2d Cir. 1987).

²²¹ *Ibid.*, at 909.

The reality under the federal standard is that a ‘modicum’ of ‘adequacy’ in the alternative legal system has satisfied U.S. courts.²²² In *Aguinda v Texaco*,²²³ a large group of Ecuadorian and Peruvian plaintiffs sued Texaco, a U.S.-based oil corporation in the Southern District of New York. The central allegations focused around environmental abuse and personal injury in that the defendant’s oil operations had polluted the rivers and rain forests of Ecuador and Peru. The causal effect was that the plaintiff’s had been, “exposed to toxic substances....and have or will suffer property damage, personal injuries, and increased risks of disease including cancer.”²²⁴ The case was dismissed on *forum non conveniens* grounds.

A similar jurisprudential bulwark was presented in *Flores*,²²⁵ a case where Peruvian plaintiffs sued an American company for environmental torts, alleging that their mining operations had caused pollution leading to personal injury in violation of international law. It was determined that the private and public interest factors overwhelmingly favoured dismissal.²²⁶ This also applied in *Turedi*²²⁷ where claims, *inter alia*, arose that Coca Cola, the American soft-drinks manufacturer, had, via their managers at a Turkish bottling plant, hired a branch of the Turkish police to inflict retributory injuries (international tort) on former plant employees engaged in a peaceful labour demonstration. International comity principles were dubiously raised to suggest that Turkey’s national interest in adjudicating the claims far out-weighed that of the U.S.²²⁸

Substantively the court in *Turedi*, following *Piper*, rejected lower recovery in the alternative forum as significant: “The contention that Turkish law may not contain provisions allowing causes of action or remedies precisely equivalent to those Plaintiffs assert in the instant action [does not] constitute a bar to a finding

²²² See Elizabeth T. Lear “National Interests, Foreign Injuries, and Federal Forum Non Conveniens” (2007) 41 U.C. Davis L. Rev. 559, at 602-03 suggesting that, “[f]ederal *forum non conveniens* decisions appear to depend more on the individual biases of district court judges than any identifiable legal standard”.

²²³ 142 F. Supp. 2d 543 (S.D.N.Y. 2001), *aff’d as modified*, 303 F. 3d 470 (2d. Cir. 2002); and see generally, Julius Jurianto, “Forum Non Conveniens: Another Look at Conditional Dismissals” (2006) 83 U. Det. Mercy L. Rev. 369.

²²⁴ *Ibid.*, at 537-38.

²²⁵ See *Flores v Southern Peru Copper Corp.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002).

²²⁶ *Ibid.*, at 543-44.

²²⁷ See *Turedi v Coca Cola Co.*, 460 F. Supp. 2d 507 (S.D.N.Y. 2006).

²²⁸ *Ibid.*, at 528.

that an adequate forum exists.”²²⁹ The impact is that U.S. multinational corporations enjoy two unfair advantages in the transnational process. They receive financial gain and huge profits from transacting business in less developed areas where local residents are precluded from redress for harms at home due to ineffective legal, economic and political infrastructures.²³⁰ This is correlated with U.S. corporations insulated by the federal standard from legitimate pursuit in the home forum.²³¹ In deploying an international comity argument, with paternalistic concerns *vis-à-vis* stigmatising the foreign venue as not meeting U.S. standards, the outcome is that a fair forum is not achieved on many occasions, but simply whether the alternative forum reveals that ‘*modicum*’ of independence and impartiality necessary to an adequate alternative forum.²³²

The weighing of the most suitable forum approach, as opposed to the abuse of process standard propounded in this article, and adoption of it as a barrier to U.S. actions against multinational corporations, was exemplified in sharp focus by the *Union Carbide* case,²³³ involving the most devastating industrial disaster of our time.²³⁴ During the early morning hours of December 3, 1984, a lethal gas known as methyl isocyanate was accidentally released from a chemical plant operated by Union Carbide India Limited (UCIL) in Bhopal, India. This

²²⁹ *Ibid.*, at 525.

²³⁰ See Goodrich, “Recent Decisions – Jurisdiction and Procedure Forum Non Conveniens” (1982) 15 Vanderbilt Journal of Transnational Law 583, at 598 highlighting that a U.S. defendant enjoys the protection of U.S. law and, therefore, should be subject to the limitations that this law places on it. Additionally, the U.S. has an interest in insuring that its citizens and residents are accountable as reflected by U.S. law. This enhances the value of the products and services offered in export by these citizens and residents and also indicates that the U.S. does not promote or allow the dumping of inferior and dangerous products in other countries by its own citizens.

²³¹ See Baldwin, *supra* n. 12, at 772 arguing that dismissals should only be apposite where: “(1) a truly adequate alternative forum is available, i.e., the human rights plaintiffs can easily and safely seek redress in a forum that will undoubtedly provide a fair trial, (2) the private interest factors strongly indicate that the defendants will suffer real inconvenience Forum Non Conveniens inconvenience, e.g. the defendants are all foreigners and all the key evidence and witnesses are located abroad, and (3) the alternative forum’s public interest in hearing the case substantially outweighs the United States’ strong interest in adjudicating international human rights claims.”

²³² See generally, Samuels *supra* n. 3, at 1111 concluding that: “There is a real concern that the current doctrine is driven by what is best for defendants (and particularly American defendants) rather than by the policy goals of (a) protecting the domestic courts and the public they serve and (b) ensuring that wrongdoers are held accountable for their actions in forums, where jurisdiction over them is proper; and see generally Foley-Smith *supra* n. 9.

²³³ See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 809 F. 2d 195, 197 (2d Cir. 1987).

poisonous chemical caused the deaths of over 2,000 Indian citizens. More than 200,000 were injured as a result of this release.²³⁵ Human tragedy arises in various guises and this proved one of the worst illustrations. Scores of victims lived in shanty towns just outside the gates of the Bhopal plant, and little attention was paid to the sound of the plant's emergency siren on the morning of the leak because the plant used this same siren regularly to signal changes in work shifts. In the immediate months following the Bhopal accident 145 purported class actions were commenced in federal district courts in the United States on behalf of victims of the disaster against Union Carbide Corporation (UCC), UCIL's U.S. parent company. Eventually these actions were consolidated by the Judicial Panel on Multidistrict Litigation and assigned to the Southern District of New York.²³⁶ The court, however, weighing the factors suggested by the Supreme Court in *Gulf Oil* and *Piper Aircraft*, granted conditional dismissal based on *forum non conveniens*.²³⁷

Judge Keenan determined that, 'no American interest in the outcome of this litigation outweighs the interest of India in applying Indian law and Indian values to the task of resolving this case.'²³⁸ The supererogatory effect was to promote international comity consideration to the status of outcome determinativeness.²³⁹ The court also cited other relevant factors to the dismissal solution: the victim's medical records and the plant's records regarding management, safety and personnel were located in India; the majority of these

²³⁴ *Ibid.* See generally, Cummings, "International Mass Tort Litigation: Forum Non Conveniens and the Adequate Alternative Forum in Light of the Bhopal Disaster" (1986) 16 Georgia Journal of International and Comparative Law 109.

²³⁵ *Ibid.*, at 197.

²³⁶ See *In re Union Carbide Corp Gas Plant Disaster at Bhopal, India* in Dec., 19874, 601 F. Supp. 1035 (J.P.M.D.L. 1985) (centralising 18 actions pending in 7 federal district courts).

²³⁷ See *Union Carbide*, 908 F. 2d at 198. Dismissal was conditional upon Union Carbide: (1) consenting to jurisdiction of the courts of India and continue to waive defences based on the statute of limitations; (2) agreeing to satisfy any judgment rendered by an Indian court upheld on appeal, provided the judgment and affirmance, 'comport with the minimal requirements of due process'; and (3) subject itself to discovery under the Federal Rules of Civil Procedure of the United States; *ibid.*

²³⁸ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec, 19084, 634 F. Supp. 842, at 867 (S.D.N.Y. 1986); and see generally, John Fellas, "Strategy in International Litigation" (2008) 14 ILSA J Int'l and Comp L. 317, 328 (stressing that although forum shopping is often viewed in a pejorative hue, it is a matter of simple logic that a party aims to select the most favourable venue).

²³⁹ See generally, Robertson, "The Federal Doctrine of Forum Non Conveniens: An Object Lesson in Uncontrolled Discretion" (1994) 29 Texas International Law Journal 353; and see Petrossian, *supra* n. 9, at 1271, suggesting that the federal standardisation of forum non

records were written in the Hindi language; and transportation costs for witnesses would have been substantial. Moreover, the court elaborated upon public factors, including crowded U.S. court dockets, and that India had a presumptive interest in adjudicating the claims in its courts according to its tort standards rather than imposing foreign (higher) standards upon them.²⁴⁰ It was suggested that the Indian government had an interest in responding to a dangerous injury, despite protestations to the contrary that U.S. regulatory standards were appropriate.²⁴¹

The *Bhopal* case is the most important illustration of the impact U.S. industry has upon less developed countries' (at the relevant time frame in India) infrastructures leading to serious injury for foreign victims.²⁴² The defendant, Union Carbide, was a multinational corporation with headquarters in Connecticut. Although the Bhopal pesticide plant was operated by a subsidiary, Union Carbide India Limited, the U.S. based parent company had a majority shareholding in this offshoot, and had veto power over many of its policies and practices. It was also determined that the U.S. parent company, 'supplied the Indian affiliate with the overall design for the plant', and one of its engineers had responsibility for approving the design when the plant began operations.²⁴³ At the very least the parent Union Carbide company had a case to answer for their causal involvement in the Bhopal tragedy. By application of the traditional doctrine, as intimated throughout the article, it was virtually inconceivable that a defendant could be harassed if the litigation playing field was within the defendant's home ground forum. In such circumstances it would be a rare individual, deploying ends of justice arguments, who could invoke the shield of undue inconvenience and disturb the equilibrium in favour of original plaintiff selection. The Union Carbide lawyer was so certain of dismissal of action on a *forum non conveniens* basis that constant reference was made to the federal standard. The enumerated references were so extensive that Judge Kennan called him 'Johnny one-note.'²⁴⁴

conveniens promotes systemic forum shopping, that this possibility was specifically adduced in *Piper*, but disregarded.

²⁴⁰ See Solen, "Forum Non Conveniens and the International Plaintiff" (1994) 9 Florida Journal of International Law 343, at 346; and see generally, Silberman, "Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard" (1993) 28 Texas International Law Journal 501.

²⁴¹ See generally Duval-Major *supra* n. 156; and Carney *supra* n. 186.

²⁴² See generally, Miller *supra* n. 188.

²⁴³ See Cummings *supra* n. 233, at 110-115.

²⁴⁴ *Ibid.*, at 122.

This confidence was not misplaced as the New York court held that, “The Indian interests far outweigh the interests of citizens of the United States in the litigation.”²⁴⁵ In Judge Kennan’s opinion, “The presence in Indian of the overwhelming majority of the witnesses and evidence....would by itself suggest that India is the most convenient forum for this.....case.”²⁴⁶

The *Piper* standard for *forum non conveniens* dismissals continues to provoke controversy. It has been deployed by U.S. district courts to defeat foreign claims being resolved internally in three high profile cases during the course of the last year. The determination in *In re Cadbury Shareholder Litigation*²⁴⁷ illustrated the tactical utility of the doctrine for foreign corporations transacting business in the U.S. The action involved a challenge by the plaintiffs against the actions of the Board of Directors of Cadbury in connection with a hostile takeover bid by Kraft Foods Inc., and suit was brought in New Jersey federal court, even though Cadbury is a U.K. company, U.K. law governed the Board’s conduct and the bidding process, and none of the parties resided in New Jersey. The court determined, in accordance with the dual standard articulated in *Piper*, the U.K. was an adequate alternative forum, that the plaintiff’s choice of New Jersey should be granted little deference, and the public and private interest factors weighed in favour of the U.K. It was also acknowledged that manifest differences between U.K. and U.S. takeover law, significantly less beneficial to the plaintiff’s action, did not detract from the availability of an adequate alternative forum and the possibility of redress elsewhere.

The civil litigation subsequent to aircraft crashes of *Spanair Flight 5022*²⁴⁸ and *Air France Flight 447*,²⁴⁹ mirror the *Piper* formulation and reveal the continued vitality of the doctrine for good or ill. In the former case the crash resulted in the deaths of 154 people and 18 injured, and consequently 204 plaintiffs of primarily Spanish citizenship brought 116 wrongful death and personal injury actions in the U.S. against U.S. manufacturing defendants, but not against Spanair. The suit was dismissed in district court just a few months ago on the predicate that Spain represented an adequate forum, and significant delays in

²⁴⁵ Union Carbide, 634 F. Supp. At 867.

²⁴⁶ *Ibid.*, at 866.

²⁴⁷ *In re Cadbury Shareholder Litigation*, No. 09-CV-5006 (D.N.J.).

²⁴⁸ *Re Spanair Flight 5022*, (2011) consolidated in Central District of California.

²⁴⁹ *Re Air Flight 447*, (2011) Northern District of California.

civil procedure therein pending resolution of criminal proceedings against the two mechanics who had worked on the aircraft before the crash, did not alter the outcome. Similarly, in the latter case suit was dismissed in favour of an alternative forum as the court was persuaded by the substantial evidence located in France, the plurality of French citizens aboard the aircraft, and ultimately that France had a greater interest in the litigation than that U.S., and provided a ‘superior’ forum. A U.S. plaintiff bringing an action against a foreign defendant can expect *prima facie* weight to be accorded to their selection of U.S. venue. Such respect is contemptuously rejected to foreign plaintiffs suing U.S. defendants, in that they are pejoratively relegated to the status of illegal immigrants before U.S. courts.²⁵⁰

C. *International Comity and Stalking Horse Arguments on Multinational Abuse Rectifications*

“If comity as ‘international respect’ is to be regarded as a legitimate factor in *forum non conveniens* cases, it would seem more respectful to other nations to ensure that multinational companies based in developed countries such as the United States are not allowed to escape the legal standards of their home country by virtue of an unnecessarily liberal *forum non conveniens* doctrine.”²⁵¹

Principles of international comity have often been equated with international respect towards foreign nation states by not interfering in the legal infrastructures of those countries.²⁵² Deference or respect is arguably shown to foreign sovereigns by allowing cases to proceed in their territory for ‘appropriate’

²⁵⁰ See generally, Carter-Stein, “In Search of Justice: Foreign Victims of Silicone Breast Implants and the Doctrine of Forum Non Conveniens” (1995) 18 Suffolk Transnational Law Review 167.

²⁵¹ See Prince, *supra* n. 30, at 580; and see Joel R. Paul, Comity in International Law (1991) 32 Harvard International Law Journal 1, at 71, asserting that: “By allowing transnational business to choose legal systems imposing a lower regulatory burden than the United States, U.S. courts have effectively lowered regulatory standards... [A] court effectively allows a U.S. manufacturer to avoid U.S. tort liability and encourages other manufacturers to locate plants abroad.”

²⁵² See Virginia A. Fitt, “The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts” (2010) 50 Virginia Journal of International Law 1021, at 1027 stressing: “An understanding of comity as a principle representing an important crossroads between courtesy and obligation, a signal of respect for separation of powers and foreign sovereignty, and an idea integral to the nations’ political and economic systems explain why

redress. In *Abdullahi*, the overriding determinant of a supposed comity interest overrode clear evidence that the ends of justice would not be served in any real sense by trial in Nigeria, or indeed Ecuador in *Aguinda*, Peru in *Flores*, and Turkey in *Turedi*. This primordial, but harmful sentiment, was clearly supererogatory in the *Bhopal* case, namely, ‘To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be revive a history of subservience and subjugation from which India has emerged.’²⁵³ No doubt such benign paternalistic incantations provided great succour to the many Bhopal sufferers who fifteen years after the tragedy had received no financial recompense whatsoever for harms endured.

Doctrinal principles aligned to international comity and anti-chauvinism have enjoyed a lengthy period of gestation, of an antediluvian nature dating back to Holland in the seventeenth century.²⁵⁴ The concepts received judicial support in the U.S. in *Hilton v Guyot* when Justice Gray asserted that, ‘Comity....is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.’²⁵⁵ Unfortunately its application in the *forum non conveniens* substantive arena has been seriously flawed, and has allowed local defendants sued by alien plaintiffs to circumvent the legitimate jurisdiction of their home forum.²⁵⁶ In *Abdullahi*, for instance, the U.S. multinational pharmaceutical company should have been held to account locally for internal decisions taken at home regarding ‘experimental’ drug trials abroad, as the foreign government itself requested.²⁵⁷ By similar accord, it transpired in

courts often choose deference in the face of corruption”; and see generally, Joel R. Paul, “The Transformation of International Comity” (2008) 71 *Law and Contemporary Problems* 19.

²⁵³ In re Union Carbide Corp Gas Plant Disaster at Bhopal India in December, 1984, 634 F. Supp. 842 (1986) at 865-7.

²⁵⁴ See Paul, *supra* n. 250, at 14-17.

²⁵⁵ 159 U.S. 113 (1895). Note the Supreme Court asserted that, “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 requires, “due regard both to international duty and convenience, and to the rights of [a nation’s] own citizens or of other persons who are under the protection of its laws”; *ibid.*, at 164.

²⁵⁶ See Fitt, *supra* n. 251, at 1044, concluding that: “In exercising discretion, American courts should increase their reliance on evidence of corruption, including reports from other governments or government branches, scholarly articles, non-governmental organisation reports, and evidence of potential case-specific injustice. Moreover, American courts should decrease the presumption of adequacy or reduce the evidentiary burden for plaintiffs to overcome the presumption”, and moreover, “...what is deemed convenient by American courts is not always convenient to the interests of justice.”

²⁵⁷ The stark reality is that for the plaintiffs in *Abdullahi* either a remedy could be obtained in the U.S. or not at all. Further, as Galanter has stressed, some fifteen years after the claim in Union

Piper that Pennsylvania was not a ‘convenient’ forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania.²⁵⁸ Public interests should dictate that the court ought to impose forum standards on home-based monolithic corporations engaged in the negligent marketing, design and sales of products abroad. Lack of respect and chauvinism applies, it is contended, when these companies extricate themselves inappropriately from the regulatory and tort standards of the forum. Expectations should prevail that where harm is effected in a foreign territory, but the substance of the tortious conduct is causally linked to actions determined within home borders, then ‘true’ as opposed to ‘false’ comity demands redress internally as no ‘abuse of process’ occurs via home resolution.²⁵⁹

The reality is that a game of ‘international chess’ applies with comity arguments, deployed by egregious defendants as a stalking horse. The rhetoric of comity is deployed to ‘check-mate’ unfortunate foreign litigants from seeking redress in the U.S.²⁶⁰ No clearer illustration of this international chess game – shifting can be provided than the strategic activities in *Bhopal*. Union Carbide unstintingly praised the overwhelming merits of the alternative Indian legal system in federal district court. The ‘quality’ of the alternative system must have deteriorated extraordinarily quickly as when the dispute was deposited on the jurisdiction of the Supreme Court of India, Union Carbide representatives,

Carbide was dismissed from a U.S. venue on the predicate of forum non conveniens, the preponderance of victims had received little or no compensation at all; see M. Galanter, “Law’s Elusive Promise: Learning from Bhopal”, in TRANSNATIONAL LEGAL PROCESSES 172, 175 (Michael Likosky ed. 2002) (“A few weeks after the gas leak, the Chief Justice of India observed: “These cases must be pursued in the U.S. It is the only hope these unfortunate people have.”); and see generally, Foley-Smith *supra* n. 9; Jernagan *supra* n. 9; and Petrossian *supra* n. 9.

²⁵⁸ See *Oceanic* (1988) 165 C.L.R. at 254 per Deane J.

²⁵⁹ See Jernagan, *supra* n. 9, at 1120 who cogently argues that: “U.S. courts need to re-evaluate their use of comity to ensure it is not used as a rote tool resulting in dismissals based on a rationale of deference to foreign forums that are not adequate alternatives. To determine whether a forum is realistically adequate, courts should rely on factual findings that the political branches are best equipped to make and look to analogous case law—both foreign and domestic – that objectively analyzes a forum’s adequacy with neither paternalism nor misplaced deference. A more realistic assessment of adequacy will also lead courts to renew their unflagging obligation to exercise the jurisdiction they have.”

²⁶⁰ See *Oceanic* (1988) 165 C.L./R. 197, at 254 per Deane J who states: [...if one turns from what is praised as judicial comity to what is condemned as judicial chauvinism, it seems that the broader forum non conveniens discretion is liable to bring with it the notion that ‘citizens or residents deserve somewhat more deference than foreign plaintiffs’ see *Piper Aircraft*...At least, any judicial chauvinism, which might, in earlier times, have been implicit in the traditional principle was well intentioned towards the foreign plaintiff.”

‘wantonly assailed the dignity and authority of the Indian Supreme Court.’²⁶¹ Tactically, the true feelings and public interests of foreign governments are a pawn in litigational disputes, and their genuine concerns are obfuscated by rhetoric and strategy.²⁶²

A number of academicians have supported the current federal standard, and less deferential treatment accorded to foreign plaintiffs, notably Weintraub²⁶³ and Reynolds²⁶⁴ who are also significant proponents of contrary arguments on comity and anti-chauvinism. Their arguments when distilled adopt the following considerations: it would be inappropriate to interfere with foreign countries’ regulatory and legal infrastructures indirectly via *forum non conveniens*;²⁶⁵ U.S. laws, policies and social mores should not be exported;²⁶⁶ empowerment of foreign nations incorporates improvement organically without U.S. interference or assistance;²⁶⁷ the threat of ‘massive damages’ accruing from an accident in the U.S. already compels perspicacity on corporations to follow a high level of care at their U.S. facilities;²⁶⁸ the U.S. must not become a ‘magnet for the afflicted of the world’²⁶⁹ through the clear adventitious benefits to the litigants of lower costs and higher recovery; and concerns over loss of an economic advantage and stable jobs in subjecting U.S. multinationals to U.S. regulatory standards when operating in less developed countries, ‘subjecting U.S. defendants to suit here by foreigners

²⁶¹ See Baxi and Dhanda, VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE (1990); and see also, Darmody, “An Economic Approach to Forum Non Conveniens: Dismissals Requested by U.S. Multinational Corporations – the Bhopal Case” (1988) 22 George Washington Journal of International and Economic Law 215.

²⁶² See Paul, *supra* n. 250, at 71 who iterates: “By allowing transnational business to choose legal systems imposing a lower regulatory burden than the United States, U.S. courts have effectively lowered regulatory standards. By refusing to exercise jurisdiction in a case like *In re Union Carbide*, a court effectively allows a U.S. manufacturer to avoid U.S. tort liability and encourages other manufacturers to locate plants abroad.”

²⁶³ Weintraub, “International Litigation and Forum Non Conveniens” (1994) 29 Texas International Law Journal 321.

²⁶⁴ Reynolds, “The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts” (1992) 70 Texas Law Review 1663.

²⁶⁵ Reynolds states: “If an American court, even one applying Indian “substantive” law, were to award damages many times higher than would an Indian court, Indian policy necessarily would be disrupted. The relatively low risk of an aware of significant damages probably plays a role in India’s ability to attract foreign business. The Indian government (including its courts) might find that risk is an acceptable price to pay for attracting an American company to build a plant there and stimulate a depressed economy”; *ibid.*, at 1708.

²⁶⁶ See Weintraub, *supra* n. 262, at 352.

²⁶⁷ *Ibid.*

²⁶⁸ See Reynolds, *supra* n. 263, at 1707-1708.

²⁶⁹ See Weintraub, *supra* n. 262, at 352.

injured abroad places our companies at a world-wide competitive disadvantage.’²⁷⁰

The arguments presented by Weintraub and Reynolds, have been adopted and extended in recent literature in support of the federal standardisation.²⁷¹ A number of commentators have decried that it is not for the courts of the United States to, “serve as arbiters to the world”,²⁷² that, “United States taxpayers should not bear the burden of an increased case load in United States courts because legislators of other countries are attempting to push cases, properly belonging in the foreign forum, into the United States”,²⁷³ and as the dispute is not concerned with protecting the rights and property of the forum’s taxpayers. Consequently, “the case more properly belongs in the plaintiff’s home country where he has contributed to the maintenance of the courts.”²⁷⁴ These arguments are aligned to concerns, endorsed and supported by U.S. multinational corporations, that U.S. courts represent ‘easy targets’ for forum shopping by alien plaintiffs abroad with attractions of extensive pretrial discovery, jury trials, contingency fee arrangements and higher damage awards.²⁷⁵ This coalesces with pre-emptive jurisdiction in some Latin-American countries such as Guatemala, Nicaragua and Panama to transmute cases back to the U.S. through manipulatively shutting their courtroom doors to home plaintiffs.²⁷⁶ In such circumstances, Stanton-Hill has argued for conditional *forum non conveniens* dismissals without jurisdiction so that foreign plaintiffs are compelled to rely on their ‘native’ jurisprudential systems for any remedies:

“By accepting claims that should be dismissed for *forum non conveniens*, the United States federal courts effectively condone the short-sightedness of developing countries. Rather, a basic sense of logic and fairness demands that developing countries open their courthouse doors – by whatever means

²⁷⁰ *Ibid.*

²⁷¹ See generally, Hal S. Scott, “What To Do About Foreign Discriminatory Forum Non Conveniens Legislation” (2009) 49 Harvard International Law Journal Online 95; Jennifer L. Woulfe, “Where Forum Non Conveniens and Preemptive Jurisdiction Collide: An Analytical Look at Latin American Preemptive Jurisdiction Laws in the United States” (2010) 30 Saint Louis University Public Law Review 171; and Stanton-Hill, *supra* n. 2.

²⁷² See Woulfe, *supra* n. 270, at 196.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*, at 195.

²⁷⁵ See Scott, *supra* n. 270 at 96. Interestingly, it is stated that the research for this paper was supported by a behemoth multinational corporation, Dole Food Company, Inc. Further comment is rendered superfluous!

²⁷⁶ *Ibid.*, at 99-101.

necessary – to shoulder a portion of the legal claims that arise from their conscious choice to embrace industrialization and welcome foreign multinational outfits. In the modern world where no single person is insulated from an international tortfeasor, a competent and convenient judicial forum from which to seek relief becomes a natural right of human existence.”²⁷⁷

The arguments that have been advanced by proponents of the U.S. federal standard and articulated policy arguments of comity, paternalism and anti-chauvinism, set out above, do not outweigh the deleterious consequences implied by that standard for deserving victims of malpractice, international torts, and abuses. American regulatory frameworks ought to apply to corporations domiciled therein, but also be operative in developing nations through diverse strands of their hierarchical enterprise. Weinberg’s aphoristic statement has a particular resonance in this context that, “[W]ords like comity, reciprocity, and mutuality, having a deceptively right ring, like good breeding and sweet disposition.”²⁷⁸ When applied to *forum non conveniens* the concept of comity has a hollow sound. The *forum non conveniens* inquiry must be refocused to more closely approximate the doctrine’s original intent. As stated below, the equitable conscience of the doctrine that underpins the discretionary test, derived from inconvenience to the parties needs to be revived, with a return to the traditional equipoise between domestic and alien plaintiffs. A template is provided by the extant approach adopted by the High Court of Australia in *Voth*,²⁷⁹ a test based on ‘clearly appropriate’ forum-selection. It is deeply implausible to suggest that state relations are threatened by breaches of international comity: it is a *brutum fulmen* to iterate that a foreign government would be affronted by their citizens being allowed to recover damages abroad against U.S. multinational corporations.²⁸⁰

Comity and anti-chauvinism have been employed by U.S. defendants in a strategic fashion and do not merit the *eminence grisé* currently accorded, nor

²⁷⁷ See Stanton-Hill, *supra* n. 2; at 1205. Note, in antithesis to the arguments presented in this article, it is further contended by Stanton-Hill that, “If conditional *forum non conveniens* dismissals without jurisdiction are more frequently employed by federal courts, then foreign plaintiffs will have no choice but to rely on their native judicial systems for relief. The resulting pressure should counteract the developing countries’ hastiness to create jobs and foster economic development without considering the long-term consequences.”; *ibid*.

²⁷⁸ See Louise Weinberg, “Against Comity” (1991) 80 Geo. L.J. 53, at 59.

²⁷⁹ *Voth v Manildra Flour Mills Pty. Ltd.* (1990) 171 C.L.R. 538; see *infra* at p. XX.

²⁸⁰ See generally, Prince, *supra* n. 390.

should they obfuscate a genuine and proper inquiry into whether the alternative forum is ‘adequate’ in a practical and realistic manner. Modern developments have blinded the requirement to establish injustice to the defendant, and allowed instead a myriad of ethereal and uncertain specific-interest factors to be presumptively used to allow a defendant to obtain a stay of proceedings. Indeed, Prince has cogently highlighted that, *forum non conveniens* is now, “such a straight forward mechanism for obtaining a dismissal – especially in the United States – that a defendant’s lawyer could rightly be accused of negligence if they did not seek to employ the doctrine, particularly against foreign plaintiffs.”²⁸¹ The original rationale of the doctrine needs to be re-examined, and a fresh reappraisal of the nature and importance of public interest analysis as part of an intellectually coherent juxtaposition between jurisdictional and choice of law precepts.

V ANGLO-AMERICAN PUBLIC AND PRIVATE INTEREST FACTORS: A GALLIMAUFRY OF EXOGENETIC INFLUENCES

“The doctrine of *forum non conveniens* is not a neat divider, like a fence, which separates the cases where jurisdiction should be retained from those where it should not. Instead, it meanders, like a river; and as a river with time may change its course by the erosion and build-up of its banks, so too the judge-made doctrine of *forum non conveniens* develops new twists and bends, shrinking and growing as it confronts novel factual situations.”²⁸²

When foreign disputants submit to English jurisdiction over their action then courts are prepared to advance the forum’s interest in trial in England. If, however, the defendant objects and applies for a stay the court must apply the *Spiliada* factors to identify the most appropriate forum in consideration of all the circumstances of the case, the interests of the parties and the ends of justice.²⁸³ Reciprocal principles apply within the contextual purview of the U.S. federal standard, articulated in *Piper*, which incorporates an ethereal myriad of private and public interest conditions. In determining whether the balance tips in favour

²⁸¹ *Ibid.*, at 588.

²⁸² See *Alcoa Steamship Co. v M/V Nordic Regent*, 654 F. 2d 165, 173 (1978) (Judge Timbers, dissenting in part), *rev’d en banc*, 564 F. 2d 147 (2d Cir. 1980).

of the claimant's choice or a foreign forum may depend upon the extent of the American tortfeasor's involvement in the alleged tortious conduct, adduced concerns of international comity or anti-chauvinism, or the residence of the litigants. Lord Templeman, presciently identified in *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."²⁸⁴ A range of epigenetic influences on venue selection in the U.S. has made prediction uncertain, and as Stein has stated the result has been, "a crazy quilt" of ad hoc, capricious and inconsistent decisions.²⁸⁵

A. *Applicable Law and Intellectual Coherence*

It is submitted that a vitally important development in this arena will be to refocus the connectivity between venue selection and applicable choice of law principles.²⁸⁶ The relevance of choice of law, as a public interest balancing factor, was articulated by the Supreme Court in *Piper Aircraft*, but has subsequently been downgraded in impact.²⁸⁷ Intellectual coherence should demand a functional reappraisal of their coalescence in pragmatic reconsideration of the doctrine,²⁸⁸

²⁸³ [1987] A.C. 460, at 465. See Robertson, *supra* n. 238, at 359 asserting: "The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application, make uniformity and predictability of outcome almost impossible."

²⁸⁴ [1987] A.C. 460, at 465.

²⁸⁵ See Stein, "Forum Non Conveniens and the Redundancy of Court Access Doctrine" (1985) 133 University of Pennsylvania Law Review 781, at 785.

²⁸⁶ See Spencer, *supra* n. 23; Litman, *supra* n. 23; Gray, *supra* n. 23; Jernagan *supra* n. 9; and see Jonathan Harris, "Choice of Law in Tort – Blending in with the Landscape of the Conflict of Laws?" (1998) 61 Modern Law Review 33, at 55 stating, "It is unsatisfactory to draft new legislation on choice of law without giving serious consideration to the impact that this will have on jurisdictional questions, and whether reliance can be placed on the meaning given to terms for jurisdictional purposes that are reproduced in the Act. No one would doubt the intimate link between the two in the litigation process; yet this seems to be overlooked when change of the law is mooted."

²⁸⁷ In evaluating public interests the Supreme Court in *Piper Aircraft*; 454 U.S. 235, at 260 stated that the choice of law inquiry should be accorded substantial weight. If the district court heard the case the jury would be confused easily, as the plaintiff's choice of forum required the application of a mixture of Scottish, U.S. federal and Pennsylvania state law. Additionally, the court noted that the U.S. forum's lack of familiarity with foreign law militated in favour of dismissal; *ibid.*, at 259-60.

²⁸⁸ See generally, Briggs *supra* n. 24; and see Spencer, *supra* n. 23, at 6759, that, "where the state is sufficiently interested in a dispute to have its laws govern, so too will it typically have an interest sufficient to support jurisdiction.; and see generally, Russell J. Weintraub, "Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change" (1984) 63. Or. L. Rev. 485.

and to assist arbiters towards effective resolution of the trial within a trial nature of *forum conveniens* litigational battles. This review ought not to be blinkered to the place where the injury occurred, but should address a ‘progenitor of harm’ perspective, addressing causally an evaluation of the locality where causally the harm-inducing conduct transpired, or elements of contractual breach were set in motion.²⁸⁹ This would facilitate an evaluation of whether the cause of action can be correlated to the defendant contracting to supply goods or services within the state, in a tortious sense the focus would be on whether the defendant caused in a broad sense the tortious injury within the ‘impacted’ state by act or omission.²⁹⁰

Alignment of jurisdiction, venue resolution and choice of law principles in private international law have proved enduringly controversial. It is contended, however, as Briggs has asserted that, ‘even today we still look at choice of law and on jurisdiction as if each was self-contained and neither was coloured by the other’, choice of law [is] a stepping stone to determining jurisdiction, not the other way round.’²⁹¹ Weintraub has also bemoaned the failure to link together synergous branches of law, “some of the most unfortunate statements in the jurisdictional decisions of the Supreme Court are those denying a relationship between jurisdiction and choice of law.”²⁹² The time is ripe to reappraise the *forum non conveniens* balancing test away from the private interests of the parties (often U.S. multinational corporations), but enhance the public interests of the impacted venue state in terms of the forum inquiry *and* with enhanced extirpation of applicable law where connectivity is indicated to the home forum.²⁹³

In terms of a nuanced connectivity approach to applicable law it is public ‘interests’ of the impacted state that ought to be primordially centred in the venue selection process. When we refer to choice of law, we are addressing the requirement of a policy selection process that, in multistate cases, necessitates a selection amongst forum policies facilitating systemic and functional concerns as well as the primary substantive issue of which party should prevail on the

²⁸⁹ See generally, Petrossian, *supra* n. 9.

²⁹⁰ See Spencer, *supra* n. 23, at 649-650.

²⁹¹ See Adrian Briggs, “In Praise and Defence of Renvoi” (1998) 47 International and Comparative Law Quarterly 877, at 878.

²⁹² See Russell Weintraub, “Due Process Limitations on the Personal Juristic of State Courts: Time for Change” (1984) 63 Oregon Law Review 485, at 525.

²⁹³ See Harris, *supra* n. 285, at 45 asserting that, “choice of law rules always seek to select the legal system whose law should most appropriately be applied.”

merits.²⁹⁴ The connectivity with the venue resolution choice should be irreducible. In essence, the forum court extrapolates practical, substantive and systemic values to implicate its law selection. The forum court, operating as a repository of justice, causistically implements values into its decisions.²⁹⁵ The aim of choice of law is to provide an intelligible and principled basis for choosing a substantive rule in tort or contract over the competing rule of another place.²⁹⁶ It legitimizes the overarching choice and explains why rejection of one law in favour of another is correct, in replication of why one venue is preferable to another.²⁹⁷

Anglo-American jurisprudence in tort choice of law has, over a span of time, considered the applicability of a variety of legal systems.²⁹⁸ In broad terms support existed for either the *lex fori* (the law of the forum) or the *lex loci delicti* (the law of the place where the tort was committed), or that these two perspectives be inter-twined.²⁹⁹ Dissatisfaction, however, with such jurisdiction-selecting rules, definitively linking widely defined legal categories with a given territory via the mechanism of so-called connecting factors, facilitated the U.S. revolution in choice of law principles through development of the proper law of the tort analysis and spawned government interest analysis.³⁰⁰ This allowed more consequentialistic reasoning in that the court was to focus upon the policies expressed in the rules of substantive law in apparent conflict and analyse the

²⁹⁴ See generally, Maier, "Baseball and Chicken Salad: A Realistic Look at Choice of Law" (1991) 44 Vanderbilt Law Review 827.

²⁹⁵ See Leflar, "Choice-Influencing Considerations in Conflicts Law" (1966) 41 New York University Law Review 267, at 276-278.

²⁹⁶ *Ibid.*

²⁹⁷ Note that Cardozo highlighted the intrinsic difficulty of these mental gyrations when he identified choice of law as "one of the most baffling subjects of legal science"; see Cardozo, *THE PARADOXES OF LEGAL SCIENCE* 67 (1928).

²⁹⁸ See generally, Reppy, "Eclecticism in Choice of Law: Hybrid Method or Mishmash?" (1982) 34 Mercer Law Review 645; Juenger, *CHOICE OF LAW AND MULTISTATE JUSTICE* (Boston; Nijhoff 1993); and Westbrook, "A Survey and Evaluation of Competing Choice of Law Methodologies: The Case for Eclecticism" (1975) 40 Mo L. Rev. 407.

²⁹⁹ See *Sutherland v Kennington Truck Service, Ltd*, 562 N.W. 2d 466, at 470 (Mich. 1997) where the Supreme Court of Michigan opined: 'only two distinct conflicts of law "theories actually exist. One, followed by a distinct minority of states, mandates adherence to the *lex loci delicti* RULE. The other, which bears different labels in different states, calls for courts to apply the law of the forum unless important policy consideration dictate otherwise.'

³⁰⁰ For evaluation of these competing [perspectives see Hay (1991) I Hague Recueil 281; and Bliesner, "Fairness in Choice of Law: A Critique of the Political Rights-Based Approach to the Conflict of Laws" (1994) 42 American Journal of Comparative Law 687.

respective state interests in having their imbued policies applied to a factual scenario not confined to that one state.³⁰¹

A cornerstone of government interest analysis is that a single mechanical formula does not produce satisfactory results when applied to all kinds of torts and to all kinds of issues. The spatial reach of local law, whether a state has a legitimate interest in the application of its own law to a specific case, is predicated upon the underlying policy (legislative intent) behind the law and the effectuality of applying that policy or interest to the facts at hand. It will be immediately apparent that the pre-eminent jurisprudential policy concern here is flexibility; government interest analysis allows different issues to be segregated to facilitate a more adequate extrapolation of relevant social factors involved.³⁰² In part, this analysis was adopted by the American Law Institute's Restatement Second of the Conflict of Laws 1968.³⁰³ It was laid out therein that, 'the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the *most significant relationship* to the occurrence and to the parties.'³⁰⁴

The attraction of a broadly defined 'interest' analysis is that it may allow flexible results, consequently avoiding outcomes that would offend our common sense. The sophistication of the required critique of 'interests, 'policies' and *dépeçage* of issues should coalesce together with the myriad of ethereal private/public concerns *vis-à-vis* appropriate venue resolution to provide an intellectually coherent framework.³⁰⁵ The demerits of such a solipsistic approach are, of course, perceived loss of certainty, predictability and uniformity of result which are claimed to follow from the application of a rigid jurisdiction-selecting

³⁰¹ Cavers described the dilemmatic choice between a jurisdiction-selecting or a rule-selecting approach in the following terms: "should a court in dealing with a claim that a foreign law is applicable to the case before it or to an issue in that case choose between its own and the foreign legal system or, instead, choose between its own rule and the foreign rule?" see (1970) III Hague Recueil 75, at 122.

³⁰² See generally, Currie, "Notes on Methods and Objectives in the Conflict of Laws" (1959) Duke Law Journal 171; and Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

³⁰³ See generally, McClean, MORRIS: THE CONFLICT OF LAWS (5th edn., Sweet and Maxwell, 2000).

³⁰⁴ RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS, s. 145.

³⁰⁵ See Juenger, "Conflict of Laws: A Critique of Interest Analysis" (1984) 32 American Journal of Comparative Law 1, at 45-48.

rule of a *lex loci delicti* governing system.³⁰⁶ In this regard a new intellectual framework for tort and contract has been provided within a European landscape by the important propagations of the Rome I and II Regulations relating to choice of law in contract and tort.³⁰⁷ The harmonised and communitarian perspectives therein can beneficially be considered in terms of ‘connectivity’ to Anglo-American *forum conveniens*. It is contended that the public interest of applicable law ought to be at the very forefront of any venue resolution balancing discretion.

The essential aim of the Rome II Regulation is to allay together considerations of certainty and flexibility. It has opened up a brave new world for European litigation practitioners dealing with non-contractual disputes in civil and commercial matters containing a foreign element. As of 11 January 2009, all Member States with the exception of Denmark, must apply the Rome II Regulation to choice of governing law proceedings, and its rules apply to events giving rise to damages occurring after 19 August, 2007.³⁰⁸ The breadth of the Regulation is impressive. Chapter II contains the overarching primordial rule for all torts (art. 4), with prescriptive special rules on product liability (art. 5), unfair competition (art. 6), environmental damage (art. 7) infringement of intellectual property rights (art. 8) and industrial action (art. 9); and subsequently specific provisions to compartmentalise unjust enrichment, *negotiorum gestio*, *culpa in contrahendo*, and certain transitional rules.³⁰⁹

The foundational edifice of the new structure is built around the residual rule contained in art. 4, which applies unless otherwise provided for in the Regulation, to identify the law applicable to a non-contractual obligation arising out of a tort/delict. The general rule of art. 4(1) is a presumption in favour of the *lex loci delicti*, which is defined as the law of the place of the injury where the damage occurs (*lex loci damni*) – the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred, and irrespective of the country or countries in which the indirect

³⁰⁶ See Yntema, “The Hornbook Method and the Conflict of Laws” (1928) 37 Yale Law Journal 468, 476-477; and see also Cook, “The Logical and Legal Bases of the Conflict of Laws” (1924) 33 Yale Law Journal 457, at 484-488.

³⁰⁷ *Supra* n. 25

³⁰⁸ See Reg. (EC) No 864/2007, OJ 2007 L. 199/40; and for interpretation see *Bacon v National Suiza* [2010] EWHC 1941; and *Homawoo v GMF Assurance S.A.* [2010] EWHC 1941.

³⁰⁹ See generally, Symeonides *supra* n. 25.

consequences of that event occur.³¹⁰ The place where damage occurs is consequently narrowly constrained, and the *lex loci damni* rule is said to strike a fair balance between the interests of the respective parties, and to reflect the modern approach to civil liability and the development of systems of strict liability.³¹¹ The general rule is followed in art. 4(2) by a displacement exception in favour of the parties' common habitual residence, and a flexible escape clause [art. 4(3)] allowing the applicable law to be guided by an alternative choice where the tort is manifestly more closely connected with another country. The ambit of this escape clause is unclear, but the purpose is to allow the court, "to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the dispute."³¹² An illustration of a manifestly closer connection with another country might be provided by a pre-existing relationship between the parties that is closely connected with the tort in question.³¹³ It may facilitate consideration, as suggested earlier, of the 'progenitor' of the harm where causally the harm-inducing conduct transpired.³¹⁴ The residual general rule is reflective of general practice, and the stated aims of European harmonisation and certainty in approach, but discretion applies in limited spheres, and certain areas remain open to solipsistic determination. The following postulations represent a vignette of the potential operation of art. 4., attendant difficulties for practitioners, and the potential for a sybaritic relationship with jurisdictional competence and connectivity:³¹⁵

- (i) A football match in Spain is negligently policed locally and a number of English fans are severely injured. In English domestic law terminology

³¹⁰ See Article 4(1) recital 17; and see *Dolphin Maritime and Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* [2009] 2 Lloyd's Rep. 123.

³¹¹ See generally, European Economic and Social Committee, Opinion of the EESC on the 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II)' [2004] OJ. C.241/3, para 5.1.

³¹² See European Commission, Rome II Proposal, com. (2003) 427, at 12; and see generally, Hill and Chong *supra* n. 14, at 600-601.

³¹³ See generally, Clarkson and Hill, *supra* n. 16, at 268-270; and see generally, Hill and Chong, *supra* n. 14, at 601.

³¹⁴ *Supra* n. 23 and 24.

³¹⁵ See generally, A Rushworth and A. Scott, "Rome II: Choice of Law for Non-Contractual Obligations" [2008] Lloyds's Maritime and Commercial Law Quarterly 274; J. Kozyris, "Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides: Missed Opportunity" (2008) 56 American Journal of Comparative Law 471; and Andrew Dickinson, *THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS* (Oxford, Oxford University Press, 2008).

they are primary victims.³¹⁶ Unfortunately a number of relatives of these injured parties watch the sad events unfold on television and consequently suffer nervous shock (secondary victims).³¹⁷ They seek advice on applicable choice of law principles under the new Regulation. The residual rule in art. 4 adopts the *lex loci damni* and not the event giving rise to the damage or where indirect consequences occur. It is submitted, however, addressing public interest policy concerns that English law ought to apply to such nervous shock victims, albeit art. 4 is not specific, by focusing on local damage to the claimant(s).³¹⁸

- (ii) Perishable goods are negligently transported through France, Germany and Belgium. On arrival in England they are found to be rotten. It is not possible to identify the situational source of damage in point of time. The default principle would suggest English law as the applicable law as *lex loci damni* (identifiable physical damage).
- (iii) Mining operations in the Swiss Alps cause an avalanche to occur in the French Alps injuring English tourists. In accordance with art. 4(1) the injurious conduct (events giving rise to the damage) occurred in Switzerland, the indirect consequential loss occurs in England, but the *lex loci damni* and applicable law is French, as the place of harmful physical impact.³¹⁹ The displacement exception and escape clause are inoperative.
- (iv) An English employment agency (central administration in London) recruits personnel to work abroad. The claimant, habitually resident in England, is hired to work in Germany on a building development.³²⁰ Unfortunately, she is seriously injured on the development, and no safe system of work was in place. In such a scenario the harmful physical impact (*lex loci damni*) occurs in Germany, but the displacement exception

³¹⁶ See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310.

³¹⁷ *Ibid.*

³¹⁸ See generally, Hill and Chong *supra* n. 14, at 598; and see Alan Reed, “Special Jurisdiction and the Convention: The Case of *Domicrest Ltd v Swiss Bank Corporation*” (1999) 18 Civil Justice Quarterly 218.

³¹⁹ In jurisdictional terms the European Court of Justice determined in *Case 21/76 Handelskwekerij GJ Bier BV v Mines de Potasse d’Alsace S.A.* [1976] ECR 1735 that the plaintiff within Article 5(3) of the Brussels Convention (now Brussels I Regulation) could elect to sue either at the place that damage occurred or the event giving rise to the damage.

³²⁰ See *Johnson v Coventry Churchill International Ltd* [1992] 3 All E.R. 14.

in art. 4(2) can apply given the party's common habitual residence in England, and thus prescribe the applicability of English law.

- (v) An architect, habitually resident in England, negligently prepares building plans which are forwarded to France, and then received and relied upon to their detriment by English clients in Spain.³²¹ This conundrum presents several difficulties in regard to the tort of negligent misrepresentation. Does harm occur where the report is prepared, transmitted or received and relied upon?³²² The *lex loci damni* may arguably constitute Spain where reliance occurs, but would the art. 4(2) displacement occur given the parties' common habitual residence? Moreover, could the art. 4(3) escape clause be supererogatory over either art 4(1) and art. 4(2) if England is identified as being manifestly closer connected to the negligent representation tortious conduct: progenitor of harm principles would align herein with jurisdictional competence and venue resolution.³²³

The maelstrom of European harmonisation of private international law principles has continued unabated: the Brussels and Lugano Convention templates for jurisdiction and enforcement have been extended into the field of choice of law via the effects of the implementation domestically of the Rome Convention and continuation of the work on unification.³²⁴ This harmonisation process has been further enhanced, and crystallised, by the direct effect given in 2009 to the Rome I Regulation for contractual obligations. The schematic template adduced provides for party autonomy in terms of express and implied choice, mechanistic rule-selection with deontological ascription in eight prescribed linking circumstances, and fundamentally the utilisation of the 'characteristic performance' focal epicentre test.³²⁵ The concept of 'characteristic performance'

³²¹ See Case 266/85 Shenavai v Kreischer [1987] ECR 239.

³²² See Reed, *supra* n. 317.

³²³ *Ibid.*, and see also Petrossian *supra* n. 9.

³²⁴ Convention On The Law Applicable to Contractual Obligations, June 19, 1980 1605 U.N.T.S. 79; and see generally Ole Lando, "New American Choice of Law Principle and the European Conflict of Laws of Contracts" (1982) 30 American Journal of Comparative Law 19.

³²⁵ For critical discussion of this concept in the context of an earlier draft of the Rome Convention see Hans Ulrich Jessurun D'Oliviera, "Characteristic Obligation" in the Draft EEC Obligation Convention " (1977) 25 American Journal of Comparative Law 303; and see generally, PETER NORTH, ESSAYS IN PRIVATE INTERNATIONAL LAW 23-51 (1993); PETER NORTH, PRIVATE INTERNATIONAL LAW PROBLEMS IN COMMON LAW JURISDICTIONS (Martinus Nijhoff 1993).

has Swiss derivations, and quintessentially identifies the ‘true seat’ of the contractual agreement.³²⁶ It essentially links the contract to the social and economic environment of which it will form a part.³²⁷ The synergistic link to venue resolution in contractual disputes should be self-evident in terms of appropriate connectivity and intellectual coherence. In Kaye’s view reference to the ‘essence of the obligation’ and ‘essential links’ harbour that the policy approach to be adopted is that of identifying the obligation whose character is the overwhelming feature of the contract, notably that which, “involves activities which are called upon in society and commerce as being essential to the maintenance and development of the fabric of national and international socio-economic co-existence including the channels of finance.”³²⁸ By way of illustration, in bilateral contracts the counter-performance by one of the parties which usually takes the form of money payment, is not the characteristic performance. Rather, it is the performance for which the payment is due, such as delivery of goods, the provision of a service, insurance, banking operations and security, which constitutes the socio-economic function of the transaction.³²⁹ The supposition is that in these discrete categories it is the party whose performance is the characteristic one who has the more active rôle to play, and, thus, it may reasonably be supposed, is the more likely to need to consult the law during performance. The concomitant is that it is generally reasonable to prioritise their convenience in being able to rely on their forum’s law, subject to limited displacement where closest connection is elsewhere.³³⁰ The contract may be territorially insulated both in terms of jurisdictional venue and applicable law via deployment of conjoined connecting factors and prioritisation of public interest considerations.³³¹

³²⁶ See generally, Georges R Delaume, “The European Convention On The Law Applicable to Contractual Obligations: Why a Convention?” (1981) 22 *Virginia Journal of International Law* 105.

³²⁷ See Council (EC) Report on the Convention on the Law Applicable to Contractual Obligations, No. C. 282 (Dec. 10, 1980) (Mario Giuliano and Paul Lagarde) at 20.

³²⁸ See PETER KAYE, *THE NEW PRIVATE INTERNATIONAL LAW OF CONTRACT OF THE EUROPEAN COMMUNITY* (1993) at 180.

³²⁹ *Ibid.*

³³⁰ See OLE LANDO, 3 *THE INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW*, ch. 24 (1976).

³³¹ See generally, Anthony J.E. Jaffey, “The English Proper Law Doctrine and the EEC Convention” (1984) 33 *International and Comparative Law Quarterly* 531.

The coalescence of natural forum and applicable law presents encomium solutions since, “it contributes towards an efficient administration of justice if trial is held in the country whose law is to be applied.”³³² The corollary is that if an English court has to apply a foreign law, then it must grapple to decipher the guiding framework of the foreign legal system: presumptively it raises the challenge on numerous occasions of delineation between competing foreign expert witnesses, and consequentially wasting judicial times and resources with attendant litigational delays.³³³

If the posited applicable law is English, this is a significant transmutation factor to provide important succour for the trial to be held in England. Avoidance of trial abroad takes on heightened significance, given that the foreign court will face recurring problems concerning the efficient administration of justice, necessitating the proof of English law. This factor, quite legitimately, has proved decisive in a series of precedential authorities. In *E.I du Pont de Nemours*,³³⁴ a case involving product liability insurance contracts, where the proper law controlling the Lloyd’s policy, the lead policy, was English and notice of potential claims was to be given to Lloyd’s brokers, and consequently it was established that England was clearly the more appropriate forum for trial of the action. This was mirrored in both *Cleveland Museum of Art v Capricorn Art International S.A.*³³⁵ and *The Lakhta*.³³⁶ The former involved a large reliquary which was not returned under a loan agreement governed by the law of Ohio, and this was crucially significant in the eyes of Hirst J, in staying English proceedings in favour of the Ohio court as the latter was clearly the more appropriate forum for the trial of the action. In *The Lakhta* all crucial documents were in the Russian language and all witnesses would have to come from Russia, with increased expense, and great personal inconvenience to the court, parties and witnesses. In identifying that Russia would be a clearly and distinctly more appropriate forum for trial,

³³² See J Fawcett, “Trial in England or Abroad: The Underlying Policy Considerations” (1989) 9 Oxford Journal of Legal Studies 205, at 221.

³³³ See *Charm Maritime Inc. v Kyriakou and Mathias* [1987] 1 Lloyd’s Re. 433; and *Banco Atlantico S.A. v British Bank for the Middle East* [1990] 2 Lloyd’s Rep. 504.

³³⁴ [1987] 2 Lloyd’s Rep. 585.

³³⁵ [1990] 2 Lloyd’s Rep. 166.

³³⁶ [1992] 2 Lloyd’s Rep 209; and see Richard Fentiman, “Foreign Law in English Courts” (1992) 108 Law Quarterly Review 142. Note that where the parties have agreed on English law to govern their contract, or have agreed upon trial in England over any disputes, these are

considerable weight was attached to the applicable law in the discretionary balancing exercise.³³⁷

A triumvirate of cases have supported the direct connectivity in English law between applicable law in contract and venue resolution: *Cadre S.A.*³³⁸ involved a disputed maritime insurance claim; *Dornoch Ltd*³³⁹ engaged a contested reinsurance concern; and *Bear Sterns*³⁴⁰ the validity of a contract in English law. In each precedential authority the connection of the applicable law as a primordial factor towards identification of the natural forum was explicitly identified: ‘the issues in this case are essentially concerned with the application of English law principles...this factor *greatly strengthens* the case for saying that England is the appropriate forum’;³⁴¹ in *Dornoch* it was iterated as a ‘powerful’ factor; and in *Bear Sterns* it provided a ‘distinct’ advantage in determining the issues between the parties.³⁴² The applicable law that gives the contractual dispute represents a vital public interest matter in determination of the natural forum.

As previously stated, a number of leading American commentators have lamented the lack of connectivity in private international law between different branches of the discipline: “The affinity between personal jurisdiction analysis and choice of law analysis – which gives great consideration to a state’s interest in having its laws applied to a dispute – is one that the Supreme Court has unfortunately never endorsed.”³⁴³ On occasions, however, the rubicon has been

powerful factors against a stay; see also, *Akai Pty Ltd vi People’s Insurance Co. Ltd.* [1998] 1 Lloyd’s Rep. 90, at 105-106.

³³⁷ It is noteworthy that the language of witnesses and documents has also been significant to venue determination in U.S. jurisprudence; see *Miller supra* n. 3; *Robertson and Speck supra* n. 5; and *Karayanni supra* n. 11; and see *Union Carbide*, 634 F. Supp. At 862 (because of the large number of Indian language-speaking witnesses, the jurors would be required to ensure continual translates that would double the length of the trial).

³³⁸ See *Cadre S.A. v Astra Asigurari* [2005] EWHC 2504 (Comm.) (Eng).

³³⁹ See *Dornoch Ltd v Mauritius Union Assurance Co.* [2005] EWHC (Comm) 1887.

³⁴⁰ See *Bear Sterns Plc v Forum Global Equity Ltd* [2006] EWHC 1666 (Comm) (Eng).

³⁴¹ *Cadre* [2005] EWHC at [13].

³⁴² *Dornoch Ltd*, [2005] EWHC, at [86]; and see *Bear Sterns*, [2006] EWHC., 1666 at [21]. Fentiman has asserted that where the parties have agreed on English law to govern their contract, or have agreed upon trial in England over any disputes, these are powerful factors against a stay; *supra* n. 335; and see also Kenneth B. Reisenfeld, “The Usual Suspects: Six Common Defence Strategies in Cross-Border Litigation”, in *INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE* 75 (Barton Legum ed., 2005).

³⁴³ See *Spencer, supra* n. 23, at 645; and see also *Spencer Waller*, “A Unified Theory of Transnational Procedure” (1993) 26 *Cornell International Law Journal* 101; *Luther McDougall III*, “Judicial Jurisdiction: From a Contacts to an Interest Analysis: (1982) 35

crossed and a passing nod to connectivity has beneficially been promulgated in terms of public interest analysis. By way of illustration in *McGee v International Life Insurance Co.*,³⁴⁴ still a leading case on contract jurisdiction, the Supreme Court determined that in evaluation of a *forum non conveniens* balancing exercise, the state of California had a ‘manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims’;³⁴⁵ and in the context of libel the Supreme Court in *Keeton*³⁴⁶ evaluated whether the residents of New Hampshire had a, ‘legitimate interest in holding the respondent answerable on a claim related to their activities’³⁴⁷ and in *Calder*³⁴⁸ the terminology of interest analysis was also deployed in the context that the lex fori presented a natural forum to hear libel proceedings brought by a California resident because the ‘effects’ of the conduct would be considered within the home forum.³⁴⁹ The ‘place of the tort’ rule was also transplanted into the natural forum test in *Lewis v King*,³⁵⁰ an English action for libel, where it appeared irrefragable to the court that the ‘harm’ principle applied to *forum non conveniens*.³⁵¹ This was in a scenario where the plaintiff’s domicile and thus presumably the place where the claimant’s reputation was primarily damaged coincided.³⁵²

The applicable law public interest factor should be of vital significance to the *forum non conveniens* balancing equation. The import and policy rationale behind connectivity, intellectual coherence and a wider progenitor of harm perspective have been advanced at length in this section; the other exogenetic indicators that follow are deconstructed more briefly. Decisions about what is convenient to the court inevitably contain judgments about the forum’s connection to the litigation and necessarily implicate the state’s interest in the application of

Vanderbilt Law Review 1; Litman, *supra* n. 23; and Lonny Hoffmann and Keith Rowley, “Forum Non Conveniens in Federal Statutory Cases” (2000) 49 Emory Law Journal 1137.

³⁴⁴ 355 U.S. 220 (1957); and see Terrence L. Goodman, “Minimum Contacts and Contracts: The Breached Relationship” (91983) 40 Washington and Lee Law Review 1639.

³⁴⁵ *Ibid.*, at 223.

³⁴⁶ *Keeton v Hustler Magazine Inc.*, 465 U.S. 770 (1984).

³⁴⁷ *Ibid.*, and see Alan Reed, “Multistate Defamation Jurisdiction: A Comparative Analysis of Prevailing Jurisprudence in the U.S. and the European Union” (1996) 18 Communications and the Law 29.

³⁴⁸ 465 U.S. 783 (1984); and see Reed *supra* n. 346.

³⁴⁹ *Ibid.*

³⁵⁰ See Fentiman, *supra* n. 6, at 502.

³⁵¹ *Ibid.*

its substantive policies.³⁵³ Substantive concerns ought to be casuistically distilled, and factoring them into the *forum non conveniens* calculus is consistent with the doctrine's rôle as an equitable, discretionary and unique litigation – allocation device. It shows a maturity and solicitousness in doctrinal perspective that sadly has been lacking in federal and state court developments.³⁵⁴

B Fiscus Conveniens and Court Delays

An important dichotomy prevails in Anglo-American treatment of impecuniosity and cost factors as part of the *forum conveniens* balancing template. The position in English law was clarified by the House of Lords in the significant decision of *Lubbe and Others v Cape plc*,³⁵⁵ with their Lordships rejecting public interests in favour of private interests of the parties, at least in their judicial pronouncements. The reality, however, was rather different as ultimately the dispute demanded reconciliation of explicit policy interests of a very public nature.³⁵⁶

The action in *Lubbe* was brought initially by five individuals, representative of test cases for 3,000 South African victims of asbestos-related disease. The scale of the action, and suffering of the unfortunate victims, mirrored the *Bhopal* tragedy which entered global consciousness. The focus of the complaint centred around the contention that the defendant as a parent company had failed to effect its duty or care to comply with appropriate standards of health and safety when carrying out overseas business via subsidiaries. Laws regulating the use of asbestos existed in the U.K. from 1931, but the conditions at Cape's asbestos mining operations in South Africa were regarded as appalling and inhumane. A government health inspector, Dr Gerritt Schepers observed:

³⁵² In jurisdictional terms for defamation actions see the perspectives advanced by the European Court of Justice in Case C-68/93 *Shevill v Presse Alliance S.A.* [1995] ECR I – 415, evaluating the ambit of Article 5(3) of the Brussels Convention.

³⁵³ See McDougall *supra* n. 342 at 5, stating that, “contacts are relevant only to the extent that they indicate the interests and policies at stake in a controversy.”

³⁵⁴ See generally Martin Davies, “Time to Change the Federal Forum Non Conveniens Analysis” (2003) 77 *Tulane Law Review* 309.

³⁵⁵ [2000] 1 W.L.R. 1545 (H.L.); see generally Morse *supra* n. 66; Peter Muchlinski, “Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases” (2001) 50 *International and Comparative Law Quarterly* 1; and Edwin Peel, “Forum Non Conveniens Revisited” (2001) 117 *Law Quarterly Review* 187.

³⁵⁶ See Morse *supra* n. 66, at 552; and Muchlinski, *supra* n. 354, at 21-22.

“Exposures were crude and unchecked. I found young children completely included within large shopping bags, trampling down fluffy amosite asbestos, which all day long came cascading down over their heads. They were kept stepping down lively by a burly supervisor with a hefty whip. I believe these children to have had the ultimate of asbestos exposure. X-ray revealed several to have asbestosis with corpulmonale before the age of 12”³⁵⁷

The substantive claims, as stated, were based principally on the negligent control of the company’s world-wide asbestos business from England and failure to take measures to reduce asbestos exposures to a safe level.³⁵⁸ Venue resolution became the litigational battleground and subsequent litigation was hard fought on all sides. Lord Bingham, who delivered the leading judgment,³⁵⁹ was quite explicit that South Africa, the focal epicentre of relevant adjectival evidence, was clearly and distinctly the most appropriate forum to hear the case (first limb of *Spiliada*). However, interests of substantial justice (second limb) persuaded the court that the stay action should be refused. The plaintiffs had no effective means of obtaining essential professional representation and vital expert evidence to justify proceedings in South Africa with no legal aid possibility. The procedural novelty of the action, if pursued in South Africa, persuaded him that overarching disincentives applied to any person or body considering whether or not to finance the proceedings, and legal representation on a contingency fee basis would be unavailable. This aligned together with a deficiency in the South African legal system at the relevant time *vis-à-vis* conducting sophisticated group action litigation:

“If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and expert evidence which would be essential if these claims were to be justly decided. This would amount to a

³⁵⁷ See Meeran and McIntosh, “When is there a Duty of Care”, *The Times*, January 11, 2000; and see also, Meeran. “The Unveiling of Transnational Corporations: A Direct Approach” in Addo (ed.), *HUMAN RIGHTS AND THE RESPONSIBILITY OF TRANSNATIONAL COMPANIES* (The Hague, Kluwer Law International, 199) at 161-170.

³⁵⁸ Lubbe, [2000] 1 Lloyd’s Rep., at 143.

³⁵⁹ Lubbe [2000] 1 W.L.R. at 1558-1560. It was evident that within the purview of the first stage of the *Spiliada* test that South Africa was the most closely connected forum, but a stay should be refused as substantial justice (second limb) could not be effected in South Africa. Note this position was given enhanced weight by the intervention of the South African government in the appeal to the House of Lords where these points were iterated; see Statement of Case on Behalf of the Republic of South Africa, 26 May 2000, paras. 4.11-4.15.

denial of justice. In the special and unusual circumstances of these proceedings, lack of means, in South Africa, to prosecute these claims to a conclusion, provides a compelling ground, at the second stage of the *Spiliada* test, for refusing to stay the proceedings here.”³⁶⁰

The unanimous decision of the House of Lords in *Lubbe* to refuse to accede to a stay is to be welcome; they were undoubtedly on the side of the angels in upholding legal policy concerns that the claims of those who have not behaved in bad faith should be given an airing. The concentration, however, on *fiscus conveniens*, and the consequential rejection of overriding significance being attached to ‘public’ *forum non conveniens* factors, flatly contradicts earlier cases not referred to in the judgment. The effect for the dyspeptic litigant is that the *forum non conveniens* balancing equation remains intuitive, subjective and amorphous:

“public interest considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the court has to make. Where a catastrophe has occurred in a particular place, the fact that numerous victims live in that place, that the relevant evidence is to be found there and that site inspections are most conveniently and inexpensively carried out there will provide factors connecting any ensuing litigation with the court exercising jurisdiction in that place. These are matters of which the *Spiliada* test takes full account.”³⁶¹

It is entirely apposite that in *Lubbe* an English parent company, a local defendant, should fail to obtain a *forum non conveniens* dismissal for activity instigated from their home jurisdiction, and with a ‘progenitor of harm’

³⁶⁰ *Ibid.*, at 1559. Note that Lord Bingham was also mindful of the fact that at the relevant time there was no legitimate procedures to handle significant group actions within South Africa.

³⁶¹ *Ibid.*, at 1561 per Lord Bingham; and see Muchlinski *supra* n. 354, at 21: “This aspect of the *Cape* case raises the question of whether the American ‘public interest factors’ analysis has any place in the *Spiliada* doctrine...there was a fundamental difference between the American and English perceptions of the public interest issue which made the American case law, culminating in the *Bhopal* litigation, inapplicable or at least distinguishable. In the first place, the American cases on this issue were all concerned with keeping out of American courts disputes against American companies which involved events and harms outside the United States. The American courts would not afford a foreign plaintiff’s choice of American forum the same deference that would be accorded to such a choice by an American plaintiff. Furthermore, since most U.S. cases focused on inter-state rather than international cases, the issue was more one of convenience than appropriateness.”

connecting to applicable law for negligent decisions within the forum.³⁶² The basis of the stay discretion, however, should not be the inherently discretionary ‘interests of justice’ formula purveyed solipsistically, but rather under the alternative template provided by the Australian High Court in *Voth*, as subsequently propounded.³⁶³ The claims against Cape PLC were eventually settled for around £21 Million, providing some recompense for egregious corporate activity.³⁶⁴ Contrary to the views expressed by Lord Bingham and Lord Hope in *Lubbe*, it was ultimately public policy interests, widely defined, that produced an equitable outcome facilitated by state legal and procedural framework evaluation, and policy interests in funding and facilitation of civil recovery.³⁶⁵

Public policy interests also arose in terms of *fiscus conveniens* in *Connolly v RTZ Corporation*,³⁶⁶ a sister-case to *Lubbe*. Their Lordships determined that where a plaintiff lacks funds to pursue his claim in the alternative forum, but has resources to litigate in England, this may, depending on the precise circumstances of the litigation, encourage the court to assume jurisdiction, even where the foreign forum is *prima facie*, a more appropriate forum. The claimant, a British subject, was employed for several years by the defendant as a foreman fitter in a uranium mine in Namibia. On his return to Britain, the claimant developed cancer of the throat as a result of which he became permanently disabled. His impecuniosity meant that he was not in a position to cover the costs of legal proceedings in Namibia, and accordingly issued proceedings against the defendants in England, where they were registered and where he was eligible for legal aid. He claimed damages arising from the defendant’s negligence in failing to afford protection to its employees from the effects of ore dust at the uranium mine. The battle for venue resolution was invoked. Undoubtedly, Namibia, under the first stage of the *Spiliada* inquiry, was the country with which the dispute had its most real and substantial connection. In reply, the claimant asserted that, through financial factors, substantial justice would not be done by trial in Namibia. A classic dichotomy was presented thereby. Did the impecuniosity of this claimant, who was eligible for legal aid as well as benefiting from

³⁶² See generally, Petrossian *supra* n. 9; and Jernagan *supra* n. 9.

³⁶³ See general, Prince, *supra* n. 30.

³⁶⁴ See Richard Meeran, “Cape Pays the Price as Justice Prevails”, *The Times*, January 15, 2002.

³⁶⁵ See Morse *supra* n. 66, at 557, stating that, “It is hard to believe that this outcome is inimical to any legitimate public interest.”

contingency fee arrangements in one jurisdiction (England), but ineligible in the other (Namibia), tip the scales in favour of a refusal to stay.³⁶⁷

The majority of the House of Lords in *Connolly* determined that a stay should not be granted.³⁶⁸ The availability, or otherwise of financial assistance could, as Lord Goff articulated, operate as a determinative factor if the claimant could show that substantial justice would not be done if he had to proceed in a forum where no assistance was available to him.³⁶⁹ This overriding exception applied to *Connolly*'s circumstances on the predicate that substantial justice could not be achieved in the clearly appropriate forum, Namibia, but could be effected in England where the necessary resources were available.³⁷⁰ A number of primordial influences impacted upon the stay discretion: (a) that the jurisdiction invoked by the claimant was not an extravagant one, for the defendant company was incorporated in England and had its registered office in England;³⁷¹ (b) that the trial could not take place without financial support; and (c) that the financial support available in England was not sought to obtain a Rolls Royce presentation of his case, as opposed to a more rudimentary presentation in the appropriate forum.³⁷²

The decision in *Connolly* in line with *Lubbe* presents an important jurisprudential bulwark to stays of proceedings in English courts. The conclusions reached, in refusing to accede to a stay in either circumstance is to be welcomed and reflects positive affirmation of state paternalism in favour of home forum deliberations, albeit skewing a 'natural forum' balance equipoise.³⁷³ Their Lordships, utilising principles of heightened judicial activism to extend the *forum conveniens* doctrine, were on the side of the angels in upholding legal policy concerns that promote legitimate 'amenability' of forum considerations and

³⁶⁶ [1998] A.C. 854; and see also, *Carlson v Rio Tinto Plc* [1999] CLC 559.

³⁶⁷ See generally, Edwin Peel, "Forum Non Conveniens and the Impecunious Plaintiff – Legal Aid and Conditional Fees" (1997) 113 Law Quarterly Review 43.

³⁶⁸ *Ibid.*, at 873-874.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*, at 873.

³⁷¹ See generally, *Cherney v Deripaska* (No. 2) [2010] 3 All E.R. (Comm.) 456.

³⁷² *Ibid.*, at 875 per Lord Bingham. Note that Lord Hoffmann dissented on this principle, strongly arguing that there was no defensible principle which could justify a refusal to grant a stay: "It means 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. Such distinctions will do the law no credit"; *ibid.*, at 875 – 876.

³⁷³ See *Hill and Chong*, *supra* n. 14, at 310.

outcome determination. The concentration, however, on *fiscus conveniens*, and the consequential rejection of overriding significance being attached to a balanced *forum non conveniens* investigation, obfuscated earlier ideals and contradicted earlier judicial precepts.³⁷⁴ Whilst, as Lord Goff stated, “the doctrine can be regarded as one of the most civilised of legal principles”,³⁷⁵ nonetheless it has also engendered a complex web of exogenous influences, pervading uncertainties over attribution of legitimate factors, and the generation of litigation to determine where exactly to litigate.

A judicial divining-rod may be needed to assist the litigant through this fog of uncertainty. In *Murray*,³⁷⁶ for example, a wholly different perspective applied to impecuniosity in U.S. courts. It will be recalled that the action focused on claims for copyright infringement and unfair competition brought by the plaintiff before the Second Circuit, and with litigation costs estimated at £200,000 no contingency fee arrangement system operated in England, the ‘alternative forum’ at the time. Financial hardship was categorically rejected as a factor in evaluating whether an amenable alternative forum to hear the case existed: in any event the plaintiff had the option to sell his house and car to fund the matter.³⁷⁷ It did not apply to substantial justice in the ambit of amenability, but was deferred for consideration, and ultimately rejected, when balancing the private/public convenience arguments: “[T]he majority of courts deem a plaintiff’s financial hardships resulting from the absence of contingent fee arrangements to be only one factor to be weighed in determining the balance of convenience *after* the court determines that an alternative forum is available.”³⁷⁸ This perspective, the antithesis of the English approach, reveals the inherently intuitive nature of the *forum non conveniens* debate, and potential for disparate promulgation of relevant factors.³⁷⁹

This disparity is revealed by contradictory approaches to delays in proceedings abroad in the balancing equation. Extreme delays may obfuscate the potential for a genuine remedy in the alternative forum. It is impossible to

³⁷⁴ See, for example, *The Nile Rhapsody* [1992] 2 Lloyd’s Rep. 399; and *The Polessk* [1996] 2 Lloyd’s Rep. 40.

³⁷⁵ See *Airbus Indus. G.I.E. v Patel* [1999] 1 A.C. 119, 141 (H.L. 1998) (appeal taken from Eng.).

³⁷⁶ 81 F. 3d 287, 289 (2d Cir. 1996); and see earlier discussion *infra* above at p. XX.

³⁷⁷ *Murray*, 906 F. Supp. At 864.

³⁷⁸ 81 F. 3d 287, 289 (2d Cir. 1996), at 292.

³⁷⁹ See generally, *Fawcett supra* n. 331.

disagree with the statement in *Bhatnagar v Surrendra Overseas Ltd* that, “wherever the line may be drawn separating tolerable delays from intolerable ... delays of up to a quarter of a century fall on the intolerable side of that line.”³⁸⁰ Delays of up to fifteen years for a case to proceed the Philippine system have represented a clear factor for declining the amenability of the alternative forum.³⁸¹ Dissonant outcomes, however, may present a beguiling Hobson’s Choice for the interested parties. In *The Nile Rhapsody*,³⁸² delays in Egypt of four years before an action came to trial were not treated as inordinate, and the court refused to make invidious comparisons with foreign systems. This was replicated in *The Polessk*,³⁸³ a case involving a loss of cargo when a Russian vessel sank in the South Atlantic. The court refused to countenance that the parties would not receive a fair trial in St. Petersburg through excessive delays in the Russian legal system, or that the Admiralty Court in England should be preferred on the ground of experience or expertise.

Delays in the eyes of English courts may, on occasions, receive primordial effect as a relevant factor declining a stay. In *The Vishva Ajay*,³⁸⁴ for instance, there was a collision between two vessels at a port in India; the Indian court was *prima facie*, the natural forum for the action, in the sense of being that forum with which the action had the most real and substantial connection. A substantial body of evidence existed that if the case were to proceed in the High Court of Bombay the trial would be delayed for many years. Apparently at that time, many actions did not reach trial in less than ten years and it would be wholly exceptional for an action to come on for trial in less than six years.³⁸⁵ Delays of this magnitude were viewed as a denial of justice. However, in *The Varna (No. 2)*³⁸⁶ delays before the Bulgarian court, self-evidently the *forum conveniens* for the resolution of the dispute focused on a Bulgarian charter-party, were not treated as

³⁸⁰ 52 F. 3d 1220, 1228 (3d. Cir. 1995).

³⁸¹ See *Martinez v Dow Chem. Co.*, 219 F. Supp. 2d 719, 740-741; and see generally, *Lear supra* n. 39.

³⁸² [1992] 2 Lloyd’s Rep. 399 and see by way of contrast the decision in *Radhakrishna Hospitality Service Private Ltd. v EIH Ltd* [199] 2 Lloyd’s Rep. 249, intimating that delays within the Indian legal system were of less significance to venue resolution.

³⁸³ [1996] 2 Lloyd’s Rep. 40; and see also *Konananeni v Rolls-Royce Industrial Power (India) Ltd* [2002] 1 All E.R. 979.

³⁸⁴ [1989] 2 Lloyd’s Rep. 588; and see also *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd’s Rep. 286 on the relevance of divergences in relevant damage awards.

³⁸⁵ *Ibid.*, at 560 per Sheen J.

³⁸⁶ [1994] 2 Lloyd’s Rep. 41.

a significant circumstance making it unjust to grant a stay of the action. Extreme delays can be a decisive factor in the balancing equation, but it is unclear what constitutes such a circumstance.³⁸⁷ Recourse is needed again to our judicial divining-rod to provide guidance.

C. *Evidential and Procedural Issues*

The list of evidential and procedural issues that may or may not be relevant are so indeterminate that virtually no effective guidance is forthcoming; by way of illustration a California state court opinion outlined an extensive list containing 25 factors that *could* be relevant to a *forum non conveniens* dismissal.³⁸⁸ The result is a doctrine that is no more than ‘a set of habitual practices and attitudes.’³⁸⁹ It is suggested herein that a number of the private/public factors articulated in *Gulf/Piper* remain relevant, and that in many instances modern technological advances in evidentiary matters have overtaken prescribed doctrine. In many instances the divide between competing factors is no longer apt as they coalesce together.³⁹⁰

A primary instance of new advances supplanting old perspectives relates to the prominence of witness protection as a cogent and genuine factor. This refers to protecting witnesses from the inconvenience of travelling to a far away forum to give evidence. It will be relevant, as Fawcett has identified, to evaluate the ‘disruption to caused by others by the absence of witnesses from their work place.’³⁹¹ This factor received supererogatory effect in *The Rothnie*.³⁹² The plaintiffs, an English company resident and carrying on business in England, were the disponent owners of the Rothnie vessel pursuant to a bareboat charter. The defendants were an English company carrying on business as a ship repairer in Gibraltar. By a contract between the parties, the defendants agreed to carry out

³⁸⁷ See generally, Clarkson and Hill *supra* n. 16, at 128-129.

³⁸⁸ See *Great N. Ry. Co. v Alameda County*, 12 Cal. App. 3d, 105, 113-114, 90 Cal. Repr. 461, 466-467 (Cal. Ct. App. 1970) *cert denied*, 401 U.S. 1013 (1970); and see generally, Reus, “Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany” (1994) 16 *Loyola of Los Angeles International and Comparative Law Journal* 455, at 480.

³⁸⁹ See Robertson and Speck, *supra* n. 5, at 971.

³⁹⁰ See generally, McParland *supra* n. 2.

³⁹¹ Fawcett, *supra* n. 331, at 208 (quoting *The Sidi Bashr* [1987] 1 Lloyd’s Rep. at 43.

³⁹² [1996] 2 Lloyd’s Rep. 206; and see further *Sharab v Al-Saud* [2009] 2 Lloyd’s Rep. 160, highlighting the relevance of procedural fairness in that it would be significantly easier to enforce an English judgment than a Libyan award.

certain repair and maintenance work to be vessel in dry-dock in Gibraltar, and the dispute centred on the quality of this repair work.³⁹³ The court determined that the action had the most real and substantial connection with Gibraltar. Of decisive significance was that the work had been carried out in Gibraltar, and thus it would be highly disruptive to the workings of a shipyard in Gibraltar to have to bring a number of key personnel to give evidence in England. The concern here is that the convenience of those who are professionally interested in litigation should carry little weight in comparison with the convenience of those whose normal occupation in life would be interrupted by attendance in court to give evidence.³⁹⁴ Similar principles underpinned the decision in *MacShannon v Rockware Glass Ltd.*,³⁹⁵ where all the witnesses were in Scotland, a vital factor in identifying Scotland rather than England as the appropriate forum. Lord Diplock stated that:

“the administration of justice within the United Kingdom should be conducted in such a way as to avoid any unnecessary diversion to the purposes of litigation, of time and efforts of witnesses and other which would otherwise be spent on activities that are more directly productive of national wealth or well-being.”³⁹⁶

The experience in the U.S. has been similar, and concentration has focused upon matters such as: the location of the witnesses and documents;³⁹⁷ the cost of translating documents and testimony;³⁹⁸ the cost of travel for key witnesses;³⁹⁹ the cost of producing the evidence at trial;⁴⁰⁰ and the location of the physical

³⁹³ *Ibid.*, at 211.

³⁹⁴ See generally, Jonathan Hill, “Jurisdiction in Civil and Commercial Matters: Is There a Third Way?” (2001) 54 CLP 439.

³⁹⁵ [1978] A.C. 795

³⁹⁶ *Ibid.*, at 813-814.

³⁹⁷ See *Piper Aircraft*, 454 U.S. at 258.

³⁹⁸ See *Constructora Ordaz, N.V. v Orinoco Mining Co.*, 262 F. Supp. 90, 92 (D-Del. 1966) (concluding that litigation in the U.S. court would obviate the need for translation into Spanish of every documentary piece of testimony); and *Liassatos v Uio Shipping Co.*, 350 F. Supp. 1053, 1056 (D. Md 1972) (remarking that language barriers would require constant translation of relevant documents from Greek to English).

³⁹⁹ *Union Carbide*, 634 F. Supp. At 858 n. 20 (noting that victims and their medical records were located in India).

⁴⁰⁰ *Ibid.*

evidence.⁴⁰¹ Minimal procedural devices need to be available in the alternative forum, but need not be as advantageous or sophisticated as that adopted within the purview of the U.S. civil justice system. By way of illustration in *Zermeno v McDonald Douglas Corp.*,⁴⁰² amenability to venue existed in the Mexican court system despite the lack of a jury trial, problems submitting photographs and photocopies into evidence, and discovery limitations. Procedural difficulties prevailing in Indonesian law in *Carney v Singapore Airlines*⁴⁰³ did not deprive their courts of the opportunity to stand tall and hear the case; and similar principles were replicated before the First Circuit in *Mercier v Sheratan International*,⁴⁰⁴ acknowledging that Turkish courts have their own procedures for compelling discovery and should not be castigated as ‘inadequate’ merely because it is less generous to litigants than under the American framework.⁴⁰⁵

The practical reality, of course, is that these factors have reduced importance, and become obsolete in some respects, because technological innovations and ease of travel have diminished the practical impact and judicial significance of these considerations.⁴⁰⁶ Interestingly, a minority of federal courts have asserted that private interest factors weigh against *forum non conveniens* dismissals when the product has been designed, tested or manufactured in the U.S.; the focal gravity of the cause of action is determinative of venue resolution.⁴⁰⁷ These courts have downplayed the fact that witnesses and medical records regarding the specific cause and extent of the claimant’s injuries may be located abroad.⁴⁰⁸ The courts have simply pointed out that a defendant’s inability to compel foreign witnesses to testify in a trial in the U.S. can be ameliorated by procuring testimony in disposition or documentary form.⁴⁰⁹ Whatever the merits

⁴⁰¹ See *Sibaja v Dow Chemical Co.*, 757 F. 2d 1215, 1217 n. 4 (11th Cir.) (noting that accessibility to sources of proof is an important factor in forum non conveniens determinations), *cert denied*, 474 U.S. 948 (1985).

⁴⁰² 246 F. Supp. 2d 646, 659 (S.D. Tex. 2003) (the procedural difficulties were, not so great as to deprive the plaintiffs of any remedy in the Mexican court”); *ibid.*

⁴⁰³ 940 F. Supp. 1496 (D. Ariz. 1996).

⁴⁰⁴ 981 F. 2d. 1345 (1st Cir. 1992).

⁴⁰⁵ *Mercier*, 981 F. 2d at 1352-1353.

⁴⁰⁶ See generally, Karayanni *supra* n. 11.

⁴⁰⁷ See generally Litman *supra* n. 23; Boyd *supra* n. 155; and Abbott *supra* n. 157.

⁴⁰⁸ See generally, Carter-Stein, “In Search of Justice: Foreign Victims of Silicone Breast Implants and the Doctrine of Forum Non Conveniens” (1995) 18 Suffolk Transnational Law Review 167; and see also Duval-Major *supra* n. 156; and Cummings; *supra* n. 233.

⁴⁰⁹ See, for example, *Picketts v International Playtex Inc.*, 576 A. 2d 518 (Conn. 1990) (Canadian family member claimants sued a Canadian tampon manufacturer and its U.S. parent

of venue resolution, the contextualised approach in these authorities is flagrantly contradictory to the federal standard enunciated in *Gulf Oil/Piper Aircraft*. As Born has cogently identified, modernity developments have reduced the impact of private interest factors connected to, “relatively minor logistical issues, which can be overcome by modern communications”,⁴¹⁰ and deleteriously supercede, “the vastly more important effects that foreign non conveniens dismissals have on the substantive outcome of litigation”,⁴¹¹ their overarching utility should be challenged.

At a functional level, a dismissal in adoption of the federal standard has an outcome determinative effect on the litigation as it is highly unrealistic to assume that the disaffected plaintiff can bring the action in the supposedly more suitable foreign court.⁴¹² Invocation of the *Piper* test takes on a subliminal resonance that will, “eliminate the likelihood that the case will be tried...discussion of convenience and witnesses takes on a Kafkaesque quality – everyone knows that *no* witnesses ever will be called to testify.”⁴¹³ In this regard, iteration of docket congestion as a relevant public interest factor represents a stalking horse argument, akin to international comity and anti-chauvinism, as considered earlier. The docket clearing process, entirely wrongly, operated as an enlivening force towards the adoption of a more liberal *forum non conveniens* dismissal techniques.⁴¹⁴ A cathartic panacea, in the limited eyes of some, to expeditiously

Corporation for the death of their wife and mother resulting from use of defendant’s product. The Connecticut Supreme Court reversed the trial court’s dismissal on forum non conveniens grounds. It was held that the defendant still retained the burden of showing that the Connecticut forum was seriously inconvenient for evidence purposes. Given modern technological innovations, such as videotaped depositions, the court found the absence of certain witnesses during the trial of limited weight; *ibid.*); and see *Foley-Smith supra* n. 9, at 177-178.

⁴¹⁰ See GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 336 n. 12 (1996). Note Born also highlights the issue of the relevance of a myriad of other private interests, such as, a party’s, “interest in having a dispute decided by a court with a reasonable, predictive connection to the parties’ conduct.”

⁴¹¹ See Robertson, *supra* n. 95, at 418-420; and Duval-Major *supra* n. 156, at 670-671.

⁴¹² See Robertson, *ibid.*, at 428.

⁴¹³ See Miller *supra* n. 3, at 1380 (federal courts frequently raise docket congestion concerns to justify dismissing a foreign plaintiff’s suit on the ground of forum non conveniens); and see Alexander, “Forum Non Conveniens in the Absence of an Alternative Forum” (1986) 86 *Columbia Law Review* 1000, at 1019 (a principal purpose of forum non conveniens in modern law is to reduce the deleterious effects of forum shopping on already over-crowded court dockets).

⁴¹⁴ See generally, Reus, “Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany” (1994) 16 *Loyola of Los Angeles International and Comparative Law Journal* 455, at 471; and see also Petrossian *supra* n. 9.

promote adventitious trials for U.S. residents and citizens was to exclude foreign plaintiffs seeking a U.S. hearing; recourse was sought to solve the dilemmatic choices presented via this device rather than appropriate reformation of inadequate in personam jurisdiction principles.⁴¹⁵ A capricious schism emerged as the Supreme Court accepted docket congestion as a relevant consideration for *forum non conveniens* dismissals, but disregarded it in other ambits. This divide is extremely unfortunate as convenience of the court (not the litigants) and judge's unwillingness to hear genuine disputes are illegitimate factorisations outwith *forum non conveniens* appraisals.⁴¹⁶ The disappointing result in the U.S., and still of significance, is that administrative hyperbole has skewed legal principles on choice of venue, with consequential inequality between litigants. The presumptive favouritism vis-à-vis an American claimant suing a foreign defendant, in contradistinction to an alien plaintiff seeking redress from a home defendant, is egregious. The burden ought to be reversed to challenge U.S. plaintiffs with the hurdle of providing a rationale of why the action cannot be determined in the jurisdiction of the foreign defendant, thereby facilitating better utilisation of court resources and time:

“The American courts’ overt reliance on calendar congestion as a standard reason for dismissing cases tips the scales far too heavily against retaining jurisdiction. Furthermore, the statement of such a justification for closing the nation’s courts (against foreign plaintiffs) is extremely demoralising to the disappointed litigants and comes into obvious conflict with the system’s need for ‘justice to be seen to be done’.”⁴¹⁷

The discretionary *forum non conveniens* doctrine, it should be recalled, demands a preliminary hearing to resolve the venue dispute; representatively it constitutes a trial within a trial as the parties are litigating to decide where to litigate.⁴¹⁸ The hearing is preliminary only in the sense of initial as all relevant factors locating the action need to be explored, and these myriad of ethereal and hybrid considerations incorporate the substantive merits of the dispute. In light of the outcome determinative nature of the inquiry the respective litigants will be advised to expend vast amounts of time, money and resources in obtaining

⁴¹⁵ See Robertson, *supra* n. 95, at 417.

⁴¹⁶ See generally, Fentiman *supra* n. 6; and see also, Duval-Major *supra* n. 156, at 676.

⁴¹⁷ See Duval-Major, *supra* n. 156, at 676.

extensive discovery documents to aid their arguments. The perceived benefits of clearing docket congestion through liberal *forum non conveniens* dismissals is seriously emasculated through expenditure and resource implications. Entirely contrary to arguments advanced by proponents of the current federal standard, potential administrative benefits may be rendered nugatory as, “dockets will not be cleared, but instead will be cluttered with motions to determine applicability of *forum non conveniens*.”⁴¹⁹

The English landscape on docket congestion is markedly different than the U.S. A distinctive hue and shading affects the palette of relevant factors in that the legal system does not enjoy the same attractive features to the claimant in a transnational dispute, the global nature of civil and commercial business attracted tends to be of a high quality, and is valuable from an economic stand point:⁴²⁰

London is a centre for international foreign businessmen who have confidence in English courts and it is a service to international trade to assist in the settlement of international commercial disputes....There are undoubted invisible export benefits to the nation when foreigners come to England to litigate and it is also to be hoped that persons who bring litigation to the country will also bring trade.”⁴²¹

It is disappointing that the administrative concern of docket congestion has mistakenly obfuscated the *forum non conveniens* balancing equation in the U.S. As Born and Rutledge⁴²² have clearly asserted: “complaints of docket congestion quickly become self-fulfilling prophecies – once one judge states that a court’s docket is overcrowded, subsequent judges can seize upon that language in future cases to support dismissal.”⁴²³ The impact has been deleteriously inured by alien

⁴¹⁸ See Fawcett, *supra* n. 331, at 145.

⁴¹⁹ GARY BORN AND PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS, 4th edn., (2007) at 397; and see also, Brand and Jablonski, FORUM NON CONVENIENS, HISTORY, GLOBAL PRACTICE AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS (2007).

⁴²⁰ See Fawcett, *supra* n. 331.

⁴²¹ See generally, McParland *supra* n. 2

⁴²² See generally, Born and Rutledge, *supra* n. 419.

⁴²³ See A.G. Slater, “Forum Non Conveniens: A View from the Shop Floor” (1988) 104 Law Quarterly Review 554, at 569 opining that a dichotomy exists herein in contrast with the venerable St Pierre standardisation whereby it was: “relatively easy to decide whether it is so obvious that a trial should take place elsewhere that it would be ‘oppressive’ to refuse a stay. It is much more difficult to carry out a balance of all the relevant factors on each side in the knowledge that such balancing may be very near the line. A test of the latter type calls for a

plaintiffs excluded from U.S. courts, and has precluded effective distillation of *in personam* jurisdiction principles.⁴²⁴ The focus has been on the wrong public interest factor, and attention as iterated at length above should reflect a wider applicable law inquiry as part of an intellectually coherent discipline. The Anglo-American adoption of a broad most appropriate forum standardisation has left the trial judge as empress of this realm, and with ubiquitous power to balance exogenetic factors to determine whether a more suitable forum exists abroad.⁴²⁵ The rôle of empress is aligned with virtually unreviewable judicial discretion, and the trial judge is insulated from effective appellate review which only arises where there has been a clear abuse of discretion. The decision can be immunised from review by broadly reciting the litany of factors established in *Piper*, and this amorphous discretion makes predictive outcome extremely problematic given the intuitive and subjective processes engaged.⁴²⁶ This is self-evident by reference to the variety of categorisations that have proved singularly determinative across a wide field of juridical precepts: language of documentation; consolidation of related actions; evaluation of substantive merits of the dispute; and enforceability of judgments.⁴²⁷ The ‘crazy quilt’⁴²⁸ of exogenetic influences and considerations to the balancing equation in *forum non conveniens* continues unabated.

D. *Minimum Standards of Justice*

It is absolutely vital that the exercise of a court’s adjudicatory discretion should not constitute a denial of justice. The ‘ends of justice’ analysis may occur at different ends of the spectrum under Anglo-American law, but ultimately the same issue arises as to genuine amenability of the alternative foreign forum in terms of minimum standardisations of effective redress.⁴²⁹ In the U.S. consideration of the availability of an adequate remedy is beset with dilemmatic choices that relate to the very epicentre of the *forum non conveniens* doctrine. The federal test establishes that if, ‘the remedy offered by the other forum is clearly

secondary trial but the expenditure of time and money which that would involve is out of all proportion to the importance of the question under consideration.”

⁴²⁴ See generally, Robertson and Speck, *supra* n. 5.

⁴²⁵ See generally, Hill and Chong, *supra* n. 14, at 300-314.

⁴²⁶ See Stein *supra* n. 284.

⁴²⁷ See Foley-Smith *supra* n. 9, at 191 concluding that, “appellate courts should engage in a more searching review of trial courts’ application of the doctrine to ensure that trial courts take all relevant considerations into account.”

⁴²⁸ *Piper Aircraft*, 454 U.S. 235, 254 n. 22 (1981).

unsatisfactory, the other forum may not be an adequate alternative'.⁴³⁰ This sweeping generalisation, lacking in specificity or particularity, was tempered by the Supreme Court admonishment that a finding of inadequacy occurs only in 'rare circumstances', extrapolated as circumstances where the alternative forum, 'does not permit litigation on the subject-matter of the dispute.'⁴³¹ A famous exposition of such distinct factorisation occurred in *Perkins v Benguet Consolidated Mining Co.*,⁴³² where the availability of effective redress in Ohio impacted on venue resolution set against no recovery elsewhere. It was impossible for the defendant, a Philippine corporation, to be sued at home at the time of the suit in light of the ongoing war between Japan and the U.S., with the latter occupying the Philippines. A claim anywhere but in Ohio, which allowed the litigation to proceed, was in essence a *brutum fulmen*.

A number of factors have been embraced by U.S. court in determining the 'amenability' question for respective parties.⁴³³ A litigant may be excluded from access to alien courts because of coercive political pressure in that jurisdiction, but as stated, the 'amenability' concern has generally been inadequately appraised.⁴³⁴ A potpourri of concerns have been adduced, but failed to meet the lack of amenability threshold: distinct procedures;⁴³⁵ lack of access to a jury in the alternative forum; extensive delays in litigation abroad;⁴³⁶ and vastly reduced compensation levels.⁴³⁷ The search has rudimentarily addressed the 'putative'

⁴²⁹ *Ibid.*, and see generally, Martin Davies, "Time to Change the Federal Forum Non Conveniens Analysis" (2002) 77 Tulane Law Review 309.

⁴³⁰ 342 U.S. 437 (1952); and see further, John P. Dobrovich Jr., "Dismissal Under Forum Non Conveniens: Should the Availability Requirement be a Threshold Issue when Applies to Nonessential Defendants" (2006) 12 Widener Law Review 561.

⁴³¹ See generally, Samuels *supra* n. 3.

⁴³² *Ibid.*, at 1081 where Samuels stresses the following cogent template: "What then are the features of an American federal district court that provide the lowest common denominator of acceptable justice in an alternative forum? This Article suggests that these features include the following: jurisdiction, meaningful remedy, fair treatment of parties, access to the courts, procedural due process, and stability of the forum. If these are the factors that an American court expects in itself, then it stands to reason that any alternative forum should provide the same features.:

⁴³³ See *Union Carbide*, 634 F. Supp at 847. The plaintiff's expert argued India was still rooted in its colonial origins and could not handle the litigation due to its lack of broad-based legislative activity, inaccessibility of legal information and services, and burdensome court filing fees.

⁴³⁴ *Ibid.*, at 848.

⁴³⁵ *Ibid.*, at 848-849.

⁴³⁶ See generally, Julius Jurianto, "Forum Non Conveniens: Another Look at Conditional Dismissals" (2006) 83 U. Det. Mercy L. Rev. 369.

⁴³⁷ Samuels *supra* n. 3. The conclusion from this thorough review of extensive federal court decisions is that a new standardisation ought to apply to the test of an 'adequate available forum' embracing six factors: "(1) whether all defendants are subject to the jurisdiction of F2

availability of the foreign legal system in a liberal capability sense, rather than adventitious procedural or adjectival benefits to the individual, and as such most foreign venues have satisfied the test despite no effective means of redress. The imposition of a financial burden on the disaffected claimant has been generally ineffective to alter venue as an irreducible minimum ‘standards of justice’ test.⁴³⁸

The ‘amenability’ test has been subjected to a detailed and comprehensive recent examination by Samuels, reviewing every published federal court decision (nearly 1500 decisions in all) over the course of the last three decades.⁴³⁹ This critique supports the limited court review that occurs under the first – prong of *Piper* regarding the adequacy template. It is rare cases that meet this threshold in terms of minimum standards of justice. The rare illustrations presented, as unique as ostrich eggs, reflected genuine abuses or no opportunity at all of any redress: political or social persecution; systemic corruption or bias in the foreign legal system; denial of entry for the claimant; and lack of a stable forum.⁴⁴⁰ By way of illustration in *Licea*,⁴⁴¹ the plaintiff faced political and social prosecution if forced to return to Cuba to litigate the case; in *Presbyterian Church of Sudan*,⁴⁴² the non-Muslim plaintiffs had no opportunity of a fair trial or means of effective redress in Sudan at the relevant time; in *Cabiri*,⁴⁴³ a threat of torture and persecution applied to the party if the claim was pursued in Ghana; in *Martinez*,⁴⁴⁴ flagrant corruption in the Honduran judiciary system prevented a fair trial therein; and in *I.T. Consultants*⁴⁴⁵ the political instability in Pakistan

according to the law of F2; (2) whether F2 provides a meaningful remedy; (3) whether the plaintiff will be treated fairly in F2; (4) whether all plaintiffs have practical access to the courts of F2; (5) whether F2 provides procedures due process; and (6) whether F2 is a stable forum. If the court hearing the forum non conveniens motion determines that any of the six factors is not true for F2, then it should find the alternative forum unavailable.”

⁴³⁸ See *Lear supra* n. 39; and Samuels *supra* n. 3.

⁴³⁹ See *Licea v Curacao* 537 F. Supp. 2d 1270 (S.D. Fla. 2008).

⁴⁴⁰ See *Presbyterian Church of Sudan v Talisman Energy, Inc.*, 224 F. Supp. 2d 289, 335 (S.D.N.Y. 2003).

⁴⁴¹ *Cabiri v Assasie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996).

⁴⁴² See *Martinez v Dow Chemical Co.*, 219 F. Supp. 2d 719 (E.D. La 2002).

⁴⁴³ *I.T. Consultants, Inc. v Islamic Republic of Pak.*, No. 01-0241 (PLF), 2003 U.S. Dist.

⁴⁴⁴ See, for example, *Accordia Northeast, Inc. v Thesseus International Asset Fund, N.V. Inc.*, 205 F. Supp. 2d at 179 (determination that Kosovo did not comport with the first limb of the *Piper* test because, “the chaos that has characterised...the territory [to the extent that it] may be lacking even the rudiments of the rule of law”).

⁴⁴⁵ See *Fentiman supra* n. 6, at 514-517.

prevented a legitimate consideration of the claim. Only in the most extreme and palpable cases have substantial justice incantations prevailed in the U.S.⁴⁴⁶

The experience in England has proved rather different, and denial of effective redress on the predicate of substantial justice has been determined, as Fentiman asserts, where no equivalent remedy lies in the alternative forum, where bias exists, statutory and other bars mean the claim presumptively fails, and for reasons of undue prejudice.⁴⁴⁷ The substantial justice inquiry occurs at a later stage than the federal standard.⁴⁴⁸ Lord Goff clearly established that the initial burden rests upon a defendant to convince the court that a stay ought to be granted because there is another available forum which is 'clearly more appropriate' than England.⁴⁴⁹ If that threshold is met the burden shifts to the plaintiff in accordance with the second prong of the test to adduce that a minimum standard of justice cannot be obtained in the foreign forum.⁴⁵⁰ A clear dichotomy thus applies between the *Piper* test and *Spiliada*, but the practical reality has been that each test has been coalesced together, or on occasions subverted as in *Mohammed v Bank of Kuwait and the Middle East K.S.C.*,⁴⁵¹ wherein a standard of justice requirement was imported into the more appropriate forum balancing equation.

The issue in *Mohammed* presented a classical illustration of inadequacy of redress abroad. The plaintiff, an Iraqi citizen, sought redress for payments due from his Kuwaiti employer under his service contract. Evidence was presented that for disparate reasons he was unable to return to Kuwait subsequent to the invasion there by allied forces. It was affirmed by Lord Justice Evans, presenting the leading judgment in the Court of Appeal, that 'substantial justice' was a vital and relevant factor to the test of 'appropriate and available forum', thus importing it into the first limb of *Spiliada*.⁴⁵² It was regarded by the appellate court as quite inimical to the stay discretion to disregard questions of practical or substantial justice. The plaintiff, denied access to Kuwait, to any representation there, or

⁴⁴⁶ *Ibid.*

⁴⁴⁷ [1987] A.C. 460, at 476-478.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ [1996] 1 WLR 1483; and for criticism of coalescence of the *Spiliada* two-prong test see further Louise Merrett, "Uncertainties in the First Limb of the *Spiliada* Test" (2005) 54 International and Comparative Law Quarterly 211.

⁴⁵⁰ *Ibid.*, at 1495-1496.

⁴⁵¹ See also *Askin v Absa Bank, Ltd.* [1999] I.L. Pr. 471 (C.A.).

execute legal documents in that venue, clearly demonstrated that he was denied ‘substantial justice’ in the foreign forum and met the standardised test established in *Spiliada*.⁴⁵³

The judicial precepts of bias and ineffective foreign legal systems have prevailed as part of the substantial justice iteration. In *Oppenheimer v Louis Rosenthal and Co. A.G.*,⁴⁵⁴ for reasons of inherent prejudice abroad, an English court was identified as *forum conveniens* for resolution of an action between a German citizen working in England and a German company, his employers. The plaintiff was excluded from access to the alien venue and clearly would have been unable to obtain legal representation. A minimum standard of justice must be available within the foreign legal system, although English courts are generally reluctant to embark on a detailed comparative examination of the alternative framework or processes. This rationale formed the predicate for rejecting Saudi Arabian jurisdiction in *Islamic Arab Insurance Co v Saudi Egyptian American Reinsurance Co.*,⁴⁵⁵ where the Saudi Arabian courts lacked expertise in insurance law disputes and where no specialist courts or legal representation was available. On occasion, as in *Dornoch Ltd*,⁴⁵⁶ the English court have rejected a stay through acceptance of the argument that the matter would inevitably and unduly fail abroad in the foreign venue: remedies and defences were not available in the tortious aspect of the claim in Mauritius.

In truth, however, the exogenetic factors that are considered in Anglo-American law as part of the balanced equation remain vague and amorphous. Developments have occurred in an ad-hoc fashion by judicial creativity. The likelihood of predicting the determinative factor in the overall template, certainly in relation to the English *Spiliada* standard, is subject to ‘hyperfine factual

⁴⁵² [1937] 1 All E.R. 23; and see also *Herceg Novi v Ming Galaxy* [1998] 4 All ER. 238.

⁴⁵³ [1987] 1 Lloyd’s Rep 315.

⁴⁵⁴ See *Dornoch Ltd v Mauritius Union Assurance Co.* [2005] EWHC (Comm. 1`887; and see further *Novus Aviation Limited v Onur Air Tasimacilik* [2009] EWCA 122.

⁴⁵⁵ See Patrick J. Borchers, “Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform: ((1992) 40 American Journal of Comparative Law 121, at 122.

⁴⁵⁶ See Bickel, “The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion” (1949) 35 Cornell Law Quarterly 12, at 45 (referring to the undesirability of treating the technique of discretionary dismissal as a matter of the court’s power to regulate its calendar).

distinctions' that remain unduly impressionistic and vague.⁴⁵⁷ The adjudicative and interpretative proves is not unmediated and content-neutral, but is inherently policy-orientated. The amorphous nature of the federal standard and *Spiliada* principles demands reform, and arguably the certainty imbued with limited flexibility adopted by the High Court of Australia in *Voth v Manilora Flour Mills Pty, Ltd.* represents the best way forward for the doctrine. It is to extant law therein that the focus now shifts.

VI LESSONS FROM AUSTRALIA: THE WAY AHEAD FOR FORUM NON CONVENIENS

An alternative perspective and solution applies to resolution of the *forum non conveniens* debate. The Australian High Court has chosen to adopt the classical theory of the doctrine, demanding evidence that suit is brought in an oppressive, vexatious or abusive process, that the forum will be clearly inappropriate rather than the modern Anglo-American template. This arguably presents an encomium panacea in the adoption of a more limited rôle for *forum non conveniens*, aligned with properly structured personal jurisdiction principles. A residual place should exist for discretionary flexibility, as a fail-safe device, where proceedings are egregiously brought against a home defendant simply to vex and harass them – actions where it is unduly inconvenient to allow them to proceed in the seised forum. A return to the old abuse of process standard-bearer would allow the inquiry to more closely mirror the original intent and social conscience of the doctrine, best serving the convenience of the parties and the ends of justice:

“[A] specially narrow area of discretion can be circumscribed to protect foreign defendants in cases of great hardship. There should be dismissal only when flagrant injustice would be done by allowing the suit to proceed. This would mean cases in which all factors of convenience point to the defendant’s forum and the [plaintiff’s] only possible purpose in bring suit here was to harass the defendant into an unfavourable settlement.”⁴⁵⁸

⁴⁵⁷ See *Dow Chemical Co. v Castro Alfaro*, 786 S.W. 2d 674, 681 (Tex. 1990), *cert denied*, 498 U.S. 1024 (1991).

⁴⁵⁸ See generally, Prince *supra* n. 30.

The adoption of a clearly inappropriate forum standardisation would preclude multinational corporations from Macchiavellian game-playing *vis-à-vis* litigational venue resolution tactics. It supercedes the assertion that it would be ‘inconvenient’ for them to hold a trial in the home forum, even when the corporation’s world headquarters is located in the state where suit is brought and within three blocks of the courthouse.⁴⁵⁹ Trial courts, when determining dismissals (or stays) of proceedings, should consider the specific circumstances and burdens faced by personal injury victims of multinational abuses in developing countries, give substantial weight to the inadequate remedies in these countries, and prescribe *forum non conveniens* dismissals in abuse of process cases as subsequently modified by the Australian model. The venerable origins of the process would be retained, promoting certainty tinged with limited flexibility to deal with hard cases.⁴⁶⁰

One year after the House of Lords decision in *Spiliada*, the High Court of Australia followed an entirely different pathway in *Oceanic Sun Line Special Shipping Co. Inc. v Fay*,⁴⁶¹ rejecting the most suitable forum test. Vituperative academic criticism has been engendered against the abuse of process standard in Australia, but it has been retained and applied over the last two decades.⁴⁶² The antediluvian reformulation of an ‘oppressive and vexatious’ template derived from *St Pierre* has held sway, dictated by ‘policy, precedent and legal principle.’⁴⁶³ Access to Australian legal system should not lightly be refused: “It is a basic tenet of our jurisprudence that, where jurisdiction exists, access to our courts is a right.”⁴⁶⁴ Oppressive, according to Justice Deane, should in this context, be understood as meaning, ‘seriously and unfairly burdensome, prejudicial or damaging’; vexatious should be understood as meaning ‘productive

⁴⁵⁹ (1988) 165 CLR 197; and see generally, Richard Garnett, “Stay of Proceedings in Australia: A Clearly Inappropriate Test?” (1999) 23 Melbourne University Law Review 30; and Mary Keyes, JURISDICTION IN INTERNATIONAL LITIGATION (Federation Press, Sydney, 2005).

⁴⁶⁰ See Gray *supra* n. 29; Garnett *supra* n. 258; Keyes *supra* n. 458; and Reid Mortenson *supra* n. 30.

⁴⁶¹ See *Oceanic Sun*, (1988) 165 CLR 197, at 252 per Deane J.

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*, at 247; and see further Pryles, “Judicial Darkness on the Oceanic Sun” (1988) 62 Australia Law Journal 774.

⁴⁶⁴ *Ibid.*, and see Garner, “Towards an Australian Doctrine of Forum Non Conveniens” (1989) 38 International and Comparative Law Quarterly; and Lawrence Collins, “The High Court of Australia and Forum Conveniens; A Further Comment” (1989) 105 Law Quarterly Review 364.

of serious and unjustified trouble and harassment.’⁴⁶⁵ The prevailing general approach was stated in the following terms:

“A party who has regularly invoked the jurisdiction of a competent court has a prima facie right to insist upon its exercise and to have his claim heard and determined....In this country, [certain] special categories of cases have not traditionally encompassed a general judicial discretion to dismiss or stay proceedings in a case within jurisdiction merely on the ground that the local court is persuaded that some tribunal in another country would be a more appropriate forum.”⁴⁶⁶

The Australian approach to *forum non conveniens* was further developed by the High Court decision in *Voth v Manildra Flour Mills Pty Ltd.*,⁴⁶⁷ and more definitive rules were forthcoming. In *Voth*, the Court had the opportunity to consider the liability of professional accountants for negligent misrepresentation in an international context. The plaintiffs, although not themselves carrying out business in the United States, were part of a group structure which operated there. The defendant provided accounting, auditing and related services to MMC (the group’s operating company) in Missouri. The plaintiffs contended that the defendant owed a duty of care with respect to the services rendered to MMC. It was alleged that his conduct in failing to draw the attention of MMC and the other companies in the group to withholding tax under the U.S. Internal Revenue Code⁴⁶⁸ fell below the professional standards appropriate to that duty of care, resulting in damage to the plaintiffs under Australian revenue law. The plaintiff obtained leave to serve based upon damage suffered within New South Wales. The High Court declared that, within Australia, a stay of proceedings should be granted only when the forum chosen by the plaintiff was clearly inappropriate. The power to stay should be exercised only in a clear case where the continuation would be vexatious and oppressive. It would have to be shown that there was an

⁴⁶⁵ (1990) 171 CLR 538. The majority judgment was that of Mason C.J., Deane, Dawson and Gaudron JJ.

⁴⁶⁶ The income which MMC paid to the plaintiffs would, under Australian revenue laws, have constituted exempt income in the hands of the plaintiff.

⁴⁶⁷ See generally, Prince *supra* n. 30; and see also Lawrence Collins, “The High Court of Australia and Forum Conveniens: The Last Word?” (1991) 107 Law Quarterly Review 182.

⁴⁶⁸ (1991) 171 CLR 538, at 548.

appropriate foreign tribunal which had jurisdiction and which would exercise it.⁴⁶⁹

The majority of the Court articulated the constrained template for adoption:

“First, a plaintiff who has regularly invoked the jurisdiction of a court has a *prima facie* right to insist upon its exercise. Secondly, the traditional power to stay proceedings which have been regularly commenced, on inappropriate forum 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 and the rationale for the exercise of the power to stay is the avoidance of injustice between the parties in the particular case. Thirdly, the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay. Finally, the jurisdiction to grant a stay or dismiss the action is to be exercised with great care or extreme caution”.⁴⁷⁰

The Australian High Court has reaffirmed their adherence to the basic tenet that a plaintiff's choice of forum is not lightly to be dismissed. An individualistic test has been purveyed which is out of kilter with Anglo-American common law, that is unique in the Commonwealth, but which minimises the need to evaluate the quality of justice promulgated in competing foreign legal systems nor engage in a burdensome comparative law search.⁴⁷¹ The delicate balance between litigants is respected, albeit legitimately skewed in favour of a plaintiff's selection of appropriate venue. If a plaintiff chooses a forum purely for higher damages (the moth to the U.S. flame) or more extensive discovery, but the selective forum had no focal epicentre to the litigation (i.e. the forum was clearly inappropriate), then under the Australian model the defendant can obtain

⁴⁶⁹ See generally, Garner *supra* n. 463.

⁴⁷⁰ The optimal pathway for this approach was cogently asserted by the High Court in *Voth*: “The ‘clearly inappropriate’ forum test...recognises 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...On the application of traditional principles, a stay would be refused in such a case, notwithstanding that the selected forum was clearly an 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.” Note the impact is that under the ‘clearly inappropriate forum’ test it is most unlikely that a *forum non conveniens* dismissal will be granted where resident Australian companies or individuals are sued by foreign plaintiffs in Australia.

⁴⁷¹ See generally, Foley-Smith *supra* n. 9; and Baldwin *supra* n. 12.

dismissal even where the plaintiff did not behave in a vexatious or oppressive manner in bringing suit. The traditional abuse of process test, entitling dismissal of an action only where the plaintiff is bringing suit in an oppressive or vexatious manner, is modified to incorporate dismissal on an unconscionability basis; this arguably reflects the true conscience of the doctrine.⁴⁷²

The application of the ‘true conscience’ of *forum non conveniens* would have produced vastly different results in the controversial U.S. cases referred to earlier, and more adventitious outcomes advanced. In *Abdullahi*, it was not an abuse of process for a large pharmaceutical drugs company to be sued in their home forum for decisions taken by the U.S. parent company regarding experimental trials of a new antibiotic Trovan in Nigeria with consequential serious harm; in *Aguinda* it was not clearly inappropriate for a U.S. based oil-company to be sued in New York for organisational decisions therein about corporate activities polluting the rain forests of Ecuador and Peru; and this was replicated in *Flores* and *Turedi* with their corporate manifestations and operational control in the U.S. In a similar vein if such a standard had been determinative in *Bhopal*, it would have been more burdensome for Union Carbide to deny jurisdiction in the New York court. The determinative case of *Piper Aircraft*, should beneficially be evaluated in this new light. The nexus between the defendants’ activities in their home forum of Pennsylvania and the claims brought there – the base of their manufacturing site and state of incorporation – properly arrogated personal jurisdiction. In such a scenario the impacted state has an undoubted interest in regulating manufacturing within its borders. It is submitted that a concomitant of this is that it is their activities in the U.S. that defendants must justify, for activities in which corporations are intentionally engaged and to which they could reasonably have foreseen forum law being determinative.⁴⁷³ The optimal rule-selection technique advanced by the Australian traditional standard would effect an efficacious result demarcating the veritable essence of the doctrine. The action in Pennsylvania was not brought simply to vex or harass the defendants; in no sense was it ‘clearly inappropriate’ for a Pennsylvanian manufacturer to be sued in their home state for conduct effected therein. Health and Safety Regulations for manufactured products should be

⁴⁷² See *Carlenstolpe v Merck*, 638 F. Supp. 901, 909 (S.D.N.Y. 1986).

⁴⁷³ See generally, *McParland supra* n. 2.

applicable to home residents regardless of domestic or international sales destinations.

A corollary exists between the possible adopted in *Voth* and the perspective advanced by the Second Circuit Court in *Carlenstolpe*,⁴⁷⁴ reflective of good practice in promoting public interest concerns to the epicentre of venue resolution. The outcome therein constitutes the very antithesis of unfortunate determinations in U.S. multinational abuse case such as *Abdullahi, Aguinda and Flores* amongst others, wherein international comity and anti-chauvinism arguments were deleteriously employed. The dispute in *Carlenstolpe* concentrated upon a claim by a U.S. multinational pharmaceutical company to dismiss a Swedish plaintiff's tortious claims regarding a novel vaccine developed in the U.S., but marketed and distributed in Sweden. The dismissal claim was rejected, quite correctly, a progeniation of any harms accrued in the U.S. and public policy interests demanded recourse to a local courtroom for resolution.⁴⁷⁵ The principles laid down by the Second Circuit echo the optimal pathway charted in *Voth*:

“The question to be answered is whether plaintiffs chosen forum is itself inappropriate or unfair because of the various private and public interest considerations involved. That [the alternative forum] may have an interest in this lawsuit does not in any way alter the fact that plaintiff's chosen forum also has a significant interest in its outcome or that the crucial liability evidence in this case is more convenient to the present forum than to the proposed alternative forum. Accordingly, [the foreign country's] acknowledged interest in this lawsuit, even if it were stronger than the present forum's interest – which this court does not find it to be – would not necessarily form adequate grounds for *forum non conveniens* dismissal.”⁴⁷⁶

The abuse of process standard in *Voth* adopts the correct balance between certainty and flexibility in venue resolution. It presents a bulwark to the discriminatory treatment accorded to alien plaintiffs identified in *Piper Aircraft*, the nature of which was cogently and evocatively criticised by the Washington Supreme Court in *Myers v Boeing Co.*, a rare illustration of refusal in the U.S. to adopt the Supreme Court's tautological reasoning:

⁴⁷⁴ See *Voth supra* n. 465.

⁴⁷⁵ See generally, *McParland supra* n. 2.

“The Court’s logic does not withstand scrutiny. The Court is comparing apples and oranges. Foreigners, by definition, can never choose the United States as their home forum. The Court purports to be giving lesser deference to the foreign plaintiffs’ choice of forum when, in reality, it is giving lesser deference to foreign plaintiffs, based solely on their status as foreigners. More importantly, it is not necessarily less reasonable to assume that a plaintiff from British Columbia, who brings suit in Washington, has chosen a less convenient forum than a plaintiff from Florida bringing the same suit? To take it one step further, why it is less reasonable to assume that a plaintiff who is a Japanese citizen residing in Wentachee, who brings suit in Washington, has chosen a less convenient forum than a plaintiff from Florida bringing the same suit? The Court’s reference to the attractiveness of United States courts to foreigners, combined with a holding that, in application, gives less deference to foreign plaintiffs based on their status as foreigners, raises concerns about xenophobia. This alone should put us on guard.”

VII CONCLUSION

Forum Non Conveniens has a vital rôle to play as a ‘species’ of alternative dispute resolution. It forms a significant ingredient within international commercial litigation, and may operate to temper exorbitant jurisdictional principles prevalent in Anglo-American law. It legitimately promotes natural justice with the engrained putative search for a true seat and natural forum for venue resolution. This discretionary and equitable device can operate to promote efficiency and settlement of disputes. As stated herein, a nuanced and selective operation of the doctrine needs to be retained. The sophistication provided ought not to be lost to ‘supranationalism’, but the template can beneficially be combined with applicable choice of law public interest factors to promote further intellectual coherence in this substantive arena.

It is an apposite time for a fresh reappraisal of appropriate levels of connectivity between adjudicatory jurisdiction and applicable choice of law principles. This article has suggested a need for enhanced consideration of public interest and progenitor of harm precepts in shifting the equipoise in balancing relevant factors towards venue resolution. The recent momentum shift towards

⁴⁷⁶ *Ibid.*, at 1281

further harmonisation of choice of law standardisations in contract and tort, provided by the promulgation of the Rome I and II Regulations, provides a backdrop for beneficial coalescence of reciprocal branches of private international law. In this transmogrification, however, it is vital that *forum non conveniens* continues to operate, and to reflect the venerable antiquity and sophistication of the doctrine's origins.