Determining choice of forum is of crucial significance in the arena of international litigation.\(^1\) If a cross-border tort occurs or transnational contract is broken, the aggrieved individual(s) will be presented with the dilemma of choosing in which country to begin proceedings. If any part of the epicenter of the dispute touches the United States, the legal representative would be negligent not to explore the possibility of action therein. A number of distinctive features of the U.S. judicial system could be particularly attractive to plaintiffs, both foreign and resident.\(^2\) There is an enticing concoction of lower costs and higher recovery offered. Procedural advantages include: contingency fee arrangements for the plaintiff's attorney and, in the event of defeat, no liability for the defendant's attorney's fee; the existence of civil juries; very extensive pre-trial discovery that is not replicated elsewhere; simplified access to courts and lawyers; wider liability law; and favorable choice of law provisions selecting pro-plaintiff U.S. law.\(^3\) As a number of

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\(^3\) Note that the United States is not a magnet forum for all suits. Recovery for defamation is restricted by the First and Fourteenth Amendments of the U.S. Constitution. See New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964) (a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (when assessing damages for libel of a private individual, states may not impose liability without fault and may not permit recovery of presumed or punitive damages unless liability is based on
commentators have stated, forum-shopping in this regard should not have a pejorative connotation; it is simply part and parcel of the litigator’s job to explore the feasibility of bringing suit in the most advantageous forum, as part of an effective tactical strategy. Lord Denning cogently enunciated the appeal of the U.S. judicial system for litigants in typically vivid terms:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. The lawyers there will conduct the case “on spec” as we say, or on a “contingency fee” as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40 percent of the damages, if they win the case in court, or out of court on a settlement.

On both sides of the Atlantic, the principles that underpin establishment of jurisdiction are extremely liberal. Jurisdictional touchstones have been


6 A dichotomy exists under English jurisdiction principles between E.C Contracting State domiciliaries and non-E.C. defendants. In relation to the latter, the relevant principles are extremely liberal, and by the traditional exorbitant rules jurisdiction is predicated upon either presence, submission, or service of a claim form out of the jurisdiction under Order 11 of the Rules of the Supreme Court [hereinafter R.S.C., Ord. 11]. However, for the former group the jurisdictional touchstones are far more limited where the dispute relates to “a civil or commercial matter.” The Brussels Convention 1968 applies, which became operative in U.K. law from 1st January 1987 through the Civil Jurisdiction and Judgments Act 1982; see text infra p. 107. The Convention applies the criterion of the defendant’s domicile, rather than nationality, as the general basis for allocating jurisdiction to the courts of the Contracting States applying criterion, or this has the effect that proceedings against any person domiciled in a Contracting State must, save where otherwise provided under the Convention, be brought in the courts of that State; see
predicated on very tenuous links with the forum, and with dissonant metathetical results for the interested parties. Adjudicatory jurisdiction in the United States has evolved through the constitutional due process limits applied by the Fourteenth Amendment of the Constitution. The liberalized constitutional standard reached its peak when the Supreme Court, in *International Shoe Co. v. Washington,* held that "minimum contacts" were sufficient to obtain

*infra* pp. 107-09.

Under the traditional common law principles where the defendant is present within the jurisdiction, she may be validly served with the claim form even if her presence is of a temporary nature, and irrespective of the fact that the cause of action is not connected with England. For example, in *Maharanee of Baroda v. Wildenstein,* (1972) 2 Q.B. 283 (C.A.), the dispute arose out of a contract made in France between the claimant, an Indian princess resident in France, and the defendant, an art dealer, also resident in France. During a temporary visit to the Ascot races in England, the defendant was served with the claim form. The Court of Appeal upheld the validity of the service. *See id.* at 291. Equally, the defendant's submission may be sufficient to confer jurisdiction onto the English courts. Submission may take a number of forms. A defendant can be considered to have submitted where the parties have agreed, by means of a jurisdiction clause, to refer any dispute arising out of their relationship to the jurisdiction of the English courts. Alternatively, submission may take the form of the defendant voluntarily appearing in the English courts to defend the case on its merits; or by having commenced an action as a claimant, the defendant thereto makes a counterclaim. However, a defendant will not be regarded as having submitted if she appears before the English courts merely for the purposes of contesting jurisdiction. Where the defendant is not present in England, English courts may assume jurisdiction over her if the dispute comes within one or more subsections of R.S.C., Ord. 11, rule 1(1). This is done by the claimant applying to the High Court for leave to serve the claim form outside the jurisdiction. The High Court has a discretionary power, and will only grant the leave if it is satisfied that "the case is a proper one for service out of the jurisdiction." R.S.C., Ord. 11, r. 4(2). The applicable test, as reformulated by the House of Lords in *Seaconsar Far East, Ltd. v. Bank Markazi Jonhouri Islami Iran,* (1994) 1 A.C. 438, is that the claimant has to show that jurisdiction is established under R.S.C., Ord. 11, r. 1(1), that England is an appropriate forum, and that there exists a serious issue to be tried. *See Seaconsar* at 456-57.


*8* 326 U.S. 310 (1945). Jurisdiction was dependent upon the quality and nature of the defendant's act in the forum and the circumstances of its commission. If a defendant acts purposefully in the forum and is sued there for damages allegedly resulting from that act, jurisdiction is undisputed. The Supreme Court identified only two situations where jurisdiction is proper over a defendant who has not been physically present in the forum: first, when the defendant places its product in a "stream of commerce" thereby entering the forum and subsequently causing injury and, second, when the defendant intentionally targets a forum as the state to be affected by its activities outside the forum. *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Calder v. Jones, 465 U.S. 783 (1984).
jurisdictional control over an absent defendant; this power would not violate due process where its exercise complied with "traditional notions of fair play and substantial justice." Subsequently in *Asahi Metal Industry Co. v. Superior Court of California,* the threshold due process jurisdictional test was articulated for foreign defendants. When sufficient contacts are identified (the first tier of the test), there is a further *Asahi* standard that requires that the

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9 There are two kinds of jurisdiction: general and specific. Specific jurisdiction exists where the defendant's actions within the state give rise to the cause of action. General jurisdiction, on the other hand, exists when the defendant's contacts with the state suffice to fulfill personal jurisdiction requirements, yet these contacts have no direct connection to the cause of action. See generally Lea Brilmayer, *Related Contacts and Personal Jurisdiction,* 101 Harv. L. Rev. 1444 (1988); Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies and Agency,* 74 Cal. L. Rev. 1 (1986); Harold Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards,* 37 Vand. L. Rev. 1 (1984); and Margaret Stewart, *A New Litany of Personal Jurisdiction,* 60 U. Colo. L. Rev. 5 (1989).

10 *International Shoe,* 326 U.S. at 316 (citations omitted). Significantly, while the determination in International Shoe was confined to in personam jurisdiction, *Shaffer v. Heitner,* 433 U.S. 186 (1977), extended such jurisdictional power to quasi in rem situations. In accordance with the so-called "transient rule," even the defendant's temporary presence in the forum state creates jurisdiction. This rule was challenged in *Burnham v. Superior Court of California,* 495 U.S. 604 (1990), but the U.S. Supreme Court upheld the lower court's decision, affirming that physical presence and in-state personal service of process are sufficient for in personam jurisdiction. The Supreme Court held that such a jurisdictional basis did not violate the Due Process clause of the Constitution because it complied with traditional notions of "fair play and substantial justice." Furthermore, most states have stretched their long-arm statutes to the limits of due process, and do not even require presence in order to obtain personal jurisdiction over a defendant.


12 In *Asahi* the litigation arose from a collision in California between a motorcycle and a tractor. The California motorcyclist, who was seriously injured in the accident, and whose wife was killed, sued several defendants: the manufacturer of the motorcycle, "Honda," and others, including Cheng Shin, the Taiwanese manufacturer of the tire tube. Eight of the justices, however, agreed that it was unconstitutional for a California court to exercise personal jurisdiction over a Japanese manufacturer of a tire tube valve in a suit for contribution by a Taiwanese company that had incorporated the valve in a tube. The tube maker had settled claims for death and injury with Californians in California caused by the defective tube. The Court held jurisdiction over the Japanese manufacturer unconstitutional, even if that component part maker had sufficient contacts with California such that it would have been subject to suit there to enforce the claims settled by the tube manufacturer. It was held that requiring a Japanese defendant who did not market a product directly in the United States to defend a claim for indemnity brought by another foreign manufacturer in the United States was unreasonable and therefore unconstitutional. See id. at 113-16; Russell J. Weintraub, *Asahi Sends Personal Jurisdiction Down the Tubes,* 23 Tex. Int'L L.J. 55, 62-63 (1988) (questioning the wisdom of *Asahi* 's "contact-plus" rationale).
exercise of jurisdiction be "reasonable" (the second tier of the test). However, it is submitted that the antediluvian development of United States jurisdictional principles through judicial interpretation of constitutional standards, reviewable via the Supreme Court, is regrettable. As Borchers has stated, "in an area in which stability and certainty are at a premium, the Court's intervention has produced a haphazard jurisdictional doctrine that has left matters in an unacceptable posture." Since International Shoe and its progeny, refuge has sought been, in the counter-balance of forum non conveniens operating to exclude inappropriate cases from the forum. The

13 The Court identified five factors to be considered when determining whether the assertion of personal jurisdiction complies with due process: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the matter; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the shared interest of the several states in furthering fundamental substantive social policies." Asahi, 480 U.S. at 113 (quoting World-Wide Volkswagen Corp., 444 U.S. at 292).

While these five factors overlap the factors considered in forum non conveniens analysis, the principle difference is that forum non conveniens analysis begins with the requirement that an alternative forum is available. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (holding forum non conveniens presupposes at least two forums in which the defendant is amenable to process). Consideration of the existence of alternative forum, on the other hand, is not a part of the due process analysis. Asahi, 480 U.S. at 113. But see Shute v. Carnival Cruise Lines, 897 F.2d 377, 386 (9th Cir. 1990) (listing availability of alternative forum as a valid factor in determining if jurisdiction was proper), rev'd on other grounds, 499 U.S. 585 (1991).

14 See Robertson, supra note 1; Juenger, supra note 2.

15 Borchers, supra note 7, at 122. He also asserted: The Supreme Court has evinced great uncertainty as to, and a great preoccupation with, the theoretical underpinnings of its doctrine, while steering an erratic course that confuses courts, counsel, academicians, and often the Justices as well. In contrast, the focus of the Brussels Convention is practice, not theory. Because the Convention's drafters were unencumbered by the theoretical musings that dominate the American jurisdictional landscape, the Convention is a pragmatic document written on a 'clean slate.' As a consequence, it makes sensible distinctions that are unknown to, and which may be unconstitutional in, the judicially developed system in the United States.

Id. at 122-23.

16 See Allan R. Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U.PA.L.REV. 781, 784-85 (1985) (asserting that forum non conveniens "interest analysis has... been employed to resolve the interstate dilemma left undecided by the doctrines designed to mediate between conflicting laws and jurisdictions. So used, the forum non conveniens doctrine has come to accommodate the collective shortcomings and excesses of modern rules governing jurisdiction, venue, and choice of law"); see also Stewart, supra note 7, at 1262-64 (arguing that the policies addressed by forum non conveniens are best considered
The doctrine has developed, especially in the United States, as a limiting counter-weight to the extremely liberal minimum contacts and reasonableness standards that arrogate in personam jurisdiction.\textsuperscript{17} Forum non conveniens is a common law doctrine which allows a court the discretion to refuse to hear a case, even though personal jurisdiction and venue are properly established, if the forum is inappropriate or inconvenient for the defendant.\textsuperscript{18} In recent decades the conceptual analysis of forum non conveniens in England, the United States, and other common law countries such as Australia, has focused upon what constitutes inconvenience in transnational cases. The central issue has been whether to apply a restrictive test\textsuperscript{19} in that such a test is necessary to demonstrate that the plaintiff has chosen in jurisdictional contexts and there is no valid continuing role for forum non conveniens, only a repetitive one).

\textsuperscript{17} A number of commentators have explored the inter-relationship between personal jurisdiction and forum non conveniens. See, e.g., Robertson, supra note 1, at 424 (asserting that "[a]s long as a broad most suitable forum version of forum non conveniens is around to do the lion’s share of the work, the jurisdictional and choice of law rules never will get straightened out"); Alex Wilson Albright, In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens, 71 TEX. L. REV. 351, 392-99 (1992) (arguing that general and specific jurisdiction should not be recognised as distinct concepts but should be regarded as points along a continuum of a sliding scale where the court balances the extensiveness of the contacts and the relatedness of the claim to determine whether or not jurisdiction exists, and advocating the continued use of forum non conveniens as a separate doctrine distinct from that of jurisdiction); Stein, supra note 16, at 841-46 (urging that regulatory interests of states be considered as part of the jurisdictional analysis); Linda J. Silberman, Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law, 22 RUTGERS L.J. 569, 590 (1991) (suggesting that "reasonableness" be eliminated as a constitutional standard for jurisdiction and instead be incorporated as part of discretionary forum non conveniens); William L. Reynolds, The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts, 70 TEX. L. REV. 1663, 1711 (1992) (asserting that forum non conveniens plays an important role in ameliorating expansive U.S. doctrines of jurisdiction and choice of law and permits the court to search for a better home for the litigation by placing the case where it really belongs).


Defendants typically argue for the adoption of a most-suitable-forum version of forum non conveniens, cautioning that otherwise the states whose courts hear more cases will become “a dumping ground for the nation’s homeless tort litigation.” According to defendants, such increases in litigation would discourage business investment in the states and squander scarce judicial
the legal system of a particular forum simply to "vex, harass, or oppress the defendant"\(^{20}\) (subsequently referred to as the abuse of process version). The Anglo-American experience in recent times, however, has been to move away from this long-standing approach—a doctrine established beneath the carapace of caution worn in sterner days—and to embrace instead a much broader discretionary test to decline jurisdiction.\(^{21}\) An action today will be stayed or dismissed whenever it appears to the court on whatever grounds that there is a more appropriate forum in another country (subsequently referred to in this article as the most appropriate forum version).\(^{22}\) There is a certain synchronization\(^{23}\) in this field as forum non conveniens has been embraced in both the United States and England as a wholly discretionary procedural device for the determination of a court's jurisdiction. This degree of collinearity has not been replicated in Australia,\(^{24}\) which has clung to a modified form of the less

\(\text{id.}\) at 952 (quoting Burrington v. Ashland Oil Co., 356 A.2d 506, 510 (Vt. 1976)) "by suiting in an inconvenient place to 'seek not simply justice but perhaps justice blended with some harassment.' " (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947)).

\(^{20}\) Robertson, supra note 1, at 405.

\(^{21}\) See David W. 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, 51-52 (David J. Sharpe & W. Wylie 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.

\(\text{id.}\) at 52.

\(^{22}\) In Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), the Supreme Court recognized the possibility that the motive for defendants' forum non conveniens motions may not be the desire to resolve the litigation in a more appropriate forum, but instead to engage in "reverse forum-shopping"—an attempt to have the litigation decided under laws that are perceived to offer a more favorable outcome. See Piper Aircraft, 454 U.S. at 252; see generally Abbott, supra note 4.


discretionary abuse of process doctrine; Australia's law provides an alternative template for consideration, and will be subsequently evaluated as an optimal rule-selection perspective.

Forum non conveniens has been employed solipsistically by the Anglo-American judiciary in the sense that they have creatively used the doctrine on a selective basis to reach desired conclusions. The relevant principles, when properly deconstructed, reveal an incremental development of pedagogic propositions that guide the discretionary process, and an adjudicative and interpretative system that is not unmediated and content neutral, but is inherently policy orientated. An overarching metanarrative has resulted that describes and legitimizes the structural prism through which forum non conveniens is viewed by the judiciary on both sides of the Atlantic.

A more fundamental alternative to forum non conveniens is provided by the more venerable principle, *iudex tenetur impertiri indicium* by which a court with jurisdiction over a case is bound to decide it. This perspective, a central tenet of the Brussels Convention On Jurisdiction And Enforcement of Judgments 1968, which has been adopted by numerous European Contracting

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26 See Clements v. Macaulay, 4 M. 583, 593 (Sess. 1866). The Supreme Court opinion in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), seemed to recognize the conflict between forum non conveniens and *iudex tenetur*. See *Gulf Oil*, 330 U.S. at 506. The Court purported to resolve the conflict by suggesting that a court's obligation to hear a case concededly within its jurisdiction is met when courts "apply all the applicable law, including, in those cases where it is appropriate, its discretionary judgment as to whether the suit should be entertained." *Id.*


28 For discussion of Article 2 of the Convention, the primary domicile rule, see *infra* pp. 76-78.

29 The Brussels Convention was designed to replace all pre-existing bilateral treaties, and to introduce a uniform expeditious process of recognition and enforcement. The Convention applies the criterion of domicile, rather than nationality, as the primary basis for determining jurisdiction, and the provisions contained therein apply automatically whether or not they are pleaded by the parties. In order to avoid possible conflicting interpretations to the provisions of the Convention, the six original Member States (Belgium, France, Germany, Italy, Luxembourg, and the Netherlands) also adopted the Brussels Protocol, based very largely on the principles of the Treaty of Rome. This Protocol was signed on 3 June 1971 and has the effect
States through legislation, stands in fundamental opposition to forum non conveniens. Any resemblance between them is ersatz. This option will be explored later in the article. The dichotomy is illustrated by the well-known statement of Chief Justice Marshall on the *iudex tenetur* principle:

It is most true that this court will not take jurisdiction if it should not: but it is equally true that it must take jurisdiction, if it should... With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be [properly] brought before us. We have no more right to

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of conferring the power to interpret the Convention's provisions upon the Court of Justice.

Note a number of accession conventions have subsequently been concluded, and the relevant conventions now include the following: (1) the original Brussels Convention 1968; (2) the Luxembourg Convention 1978 on the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention and the 1971 Protocol of Interpretation; (3) the Luxembourg Convention 1982 on the accession of Greece; (4) the San Sebastian Convention 1989 on the accession of Portugal and Spain; (5) the Brussels Convention 1996 on the accession of Austria, Finland and Sweden; (6) the Modified Convention 1982 adopted by the United Kingdom in order to apply similar provisions to those of the Brussels Convention within England, Wales, Scotland, and Northern Ireland; and (7) the Lugano Convention 1988, containing provisions parallel to those contained in the Brussels Convention, applied between EC and EFTA Member States.

The jurisdictional rules under the various conventions hinge on the time of the institution of the proceedings. Hence, insofar as the United Kingdom is concerned, the process of identifying the relevant convention is as follows:

(i) in cases where the proceedings were commenced before 1 January 1987, UK courts would apply the common law rules without recourse to any conventions;
(ii) if the proceedings began after 1 January 1987, but before 1 October 1989, the provisions of the Brussels Convention would apply;
(iii) if the proceedings were commenced on, or after, 1 October 1989, the Greek Accession Convention would apply;
(iv) where the proceedings began on, or after, 1 October 1991, the San Sebastian Convention would apply;
(v) where the proceedings involved one or more of the EFTA States and were commenced on or after 1 May 1992, the Lugano Convention would apply;
(vi) where the proceedings began on, or after, the date the Brussels Accession Convention 1996 comes into force, then jurisdiction will be regulated by the latter Convention; and
(vii) if the proceedings involved a choice of jurisdiction between the different parts of the UK, and began on, or after, 1 January 1987, the Modified Convention would apply.
decline the exercise of jurisdiction which is given, than to usurp that which is not given.\textsuperscript{31}

The Scylla of forum non conveniens on one side of the scales, and the Charybdis of \textit{iudex tenetur} on the other, demonstrates the controversial nature of the subject—material and ideological policy outcomes.\textsuperscript{32} As Prince has highlighted, the debate has smouldered in recent decades with views splenetically and intertemperately expressed.\textsuperscript{33} Criticism of forum non conveniens has included "accusations of parochialism,\textsuperscript{34} naked and open chauvinism\textsuperscript{35} and even outright racism.\textsuperscript{36} Proponents of forum non conveniens assert that the doctrine operates as a vital safety valve against overcrowded court dockets burdened by cases better resolved elsewhere. A bracing splash of cold water is poured on perambulatory foreign plaintiffs egregiously seeking redress in the form of U.S. damage awards in disputes that have focal epicenters elsewhere. Opponents view the most appropriate forum version of the doctrine as an inequitable shield which allows U.S. multinational corporations to prevent

\textsuperscript{31} Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); see also England v. Louisiana Medical Examiners, 375 U.S. 411, 415 (1964) (citing Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909), for the proposition that a court has a duty to take jurisdiction); Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909) (asserting that when a court has jurisdiction, it has a duty to exercise it); Board of Comm'rs v. Aspinwall, 65 U.S. (24 How.) 376, 385 (1861) ("[N]o court, having proper jurisdiction and process to compel the satisfaction of its own judgments, can be justified in turning its suitors over to another tribunal to obtain justice.").

\textsuperscript{32} There are a number of disparate reasons that make the doctrine enduringly controversial. For criticism see Paula K. Speck, \textit{Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul}, 18 J. MAR. L. & COM. 185, 206 (1987) (citing inconsistency and unpredictability as problems with the application of forum non conveniens); Leon Green, \textit{Jury Trial and Mr. Justice Black}, 65 YALE L.J. 482, 494 n.36 (1956) ("It will be observed how the recently improved doctrine of forum non conveniens... is already upsetting the equilibrium of litigation under the FELA. As a delaying tactic it has few equals; as a control of jury trial its significance is unfathomable."); Robertson, \textit{supra} note 1, at 414-25 (examining five shortcomings of U.S. forum non conveniens law); Stein, \textit{supra} note 16, at 785 (asserting that forum non conveniens doctrine has come to embrace jurisdiction, venue and choice of law); Stewart, \textit{supra} note 7 (asserting that the doctrine of forum non conveniens has outlived its usefulness).

\textsuperscript{33} See Prince, \textit{supra} note 18, at 573.


\textsuperscript{36} \textit{Id.} at 573. Lord Reid... referred to proponents of the traditional, narrow, \textit{forum non conveniens} approach as recalling 'the good old days... when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races.' Prince, \textit{supra} note 18, at 573 (quoting The Atlantic Star, [1974] A.C. 436, 453).
cases for environmental or other abuses perpetuated abroad, especially in developing countries from being legitimately heard in their home forum, but instigated in the United States. Criticism also focuses on the outcome-determinative nature of a dismissal and the lack of effective appellate review of overbroad discretion of the trial judge. This has led to numerous calls for abrogation or modification of the extant doctrine. Whatever perspective one adopts, (this article supports existing calls for urgent reform of Anglo-American perspectives), it is undeniable that the forum non conveniens issue has been the crux in determining the practical outcome of some highly significant international cases. It has featured in transnational cases involving aircraft disasters and huge products liability litigation. Particularly noteworthy is the 1984 disaster in Bhopal, India which involved the worst industrial accident of our era.

The polemics of the doctrine and its inter-relationship with in personam jurisdiction and venue determination will be addressed in five sections. It is propounded that, as we enter a new millennium, reform is expeditiously required of both U.S. jurisdiction principles and Anglo-American forum non conveniens doctrine. A newly tailored model for in personam jurisdiction in the United States is adduced, derived from the pragmatic and structured scheme laid down by the Brussels Convention, effective in the European Community between Contracting States. This Code represents a panacea to existing U.S. problems of instability and uncertainty. The preferred optimal solution is rectification by legislation of existing ad hoc judicial pronouncements and constitutional standards prescribed by the Supreme Court. Legislative response by Congress towards a new structured personal jurisdiction approach needs to be symbaritically combined with a fresh examination of extant forum non conveniens doctrine. The preferred outcome is a return to a modified abuse of process model as the preferred doctrine. Retention of a harassment standard, against which to examine inconvenience to the defendant, makes it far harder for U.S. multinational corporations to escape their home forum if taken to court there by a foreign plaintiff. It subverts the openly discriminatory U.S. approach, operating in favor of resident litigants, and eradicates the capricious obstruction presented to foreign plaintiffs trying legitimately to sue a U.S. company where they are domiciled.

37 See articles cited supra note 18.
38 This would replicate to a degree the abuse of process version that still applies in the United Kingdom in relation to antisuit injunctions, as laid down by the Privy Council. See Société Nationale Industrielle Aerospatiale v. Lee Kui Jak, [1987] A.C. 871 (P.C.). See infra note 431 for further discussion.
The first part will focus on the transmogrification of U.S. courts forum non conveniens from the early, limited and rarely invoked abuse of process version into the modern most appropriate forum version. This analysis examines the demonology behind this circumnavigation that lies at the heart of the triumvirate of crucial decisions—those of *Gulf Oil*,\(^{39}\) *Piper Aircraft*\(^{40}\) and *Bhopal*\(^{41}\)—that together have molded current orthodoxy. The second section explores the determinants and effects of the U.S. approach to forum non conveniens, and concludes that the existing chauvinistic and chaotic jurisprudence demands modification. There will be an examination of the true relevance of diverse issues such as docket congestion, international comity, and need for trial court discretion that were determinative in the trio of key cases. The deleterious consequences of the jurisprudence are explored further in that open discrimination now applies against foreign plaintiffs seeking suit in the United States. This discrimination contradicts the equitable conscience of forum non conveniens that lies at its origins. It is submitted that there is a vital policy interest at stake in not allowing U.S. multinationals to escape responsibility for environmental abuses and infliction of personal injuries even where the main effects of the impact of their actions are felt abroad.\(^{42}\) A properly structured personal jurisdiction system, operating in tandem with limited forum non conveniens review, ought to ensure that it comports with domestic liability for acts instigated or facilitated within the corporation’s domiciliary state. This system applies to economic corporate units acting through parent/subsidiary or branch activity relationships. The stark reality of the outcome-determinative effect of U.S. dismissal of the case is addressed. Foreign plaintiffs are left with no effective form of recourse in the foreign forum.

Section 3 of the article examines the historical development in the United Kingdom of forum non conveniens doctrine and synchronization with the United States; the shift towards collinearity occurring at a later stage in the “sceptre’d isle.” In Part 4, there is an examination of the myriad of relevant factors that have solipsistically developed on both sides of the Atlantic as part of the trial judge’s discretionarily exercise of a balancing test. A factor may be

\(^{39}\) 330 U.S. 501.

\(^{40}\) 454 U.S. 235.


promoted as crucially determinative in one particular case, but relegated to insignificant status in another. Through the wide spectrum of relevant criteria, exogenetic influences, and overbroad discretion allocated to the individual trial judge, judicial discretion has, in effect, become virtually limitless. Additionally, as a trial court decision can only be overturned where it has been clearly established that there has been an abuse of discretion, this standard of review means that in reality, first instance judgments are generally review proof. As Stein has stated, the result has been a "crazy quilt of ad hoc, capricious, and inconsistent decisions." This has infected English jurisprudence over the course of the last two decades with liberalisation of relevant principles and new flexible guidelines laid down by the House of Lords in Spiliada Maritime Corp. v. Cansulex, Ltd.

The final section of the article considers the important need for reforming existing principles. There is a demand for the United States to move away from the constitutionally-driven personal jurisdiction developments of the Supreme Court toward an effective legislative response. The preferred optimal solution advanced by the Brussels Convention, as adopted into U.K. law by the Civil Jurisdiction and Judgments Act of 1982, is promulgated. The schematic approach has a number of academic supporters in the United States. A leading proponent is Robertson who has stated:

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44 See JONATHAN HILL, THE LAW RELATING TO INTERNATIONAL COMMERCIAL DISPUTES 274 (2nd ed. 1998).

45 Stein, supra note 16, at 785.


47 See Borchers, supra note 7, at 153-57.

48 See Juenger, supra note 27, at 1202; Silberman, supra note 2, at 504; Borchers, supra note 7, at 123; Robertson, supra note 1, at 399. But see Weintraub, supra note 2; Reynolds, supra note 17. For diametrically opposed academic opinions on the success or failure of the Convention jurisdiction scheme, see Gerard Hogan, The Brussels Convention, Forum Non Conveniens and the Connecting Factors Problem, 20 EUR. L. REV. 471, 471-72 (1995) ("the principles underlying the Brussels Convention, together with the emerging caselaw, will probably together form the basis of an embryonic system of civil procedure for the whole of western Europe in the years to come"); cf. J.G. Collier, Conflict of Laws, 1994 ALL ENG. L. REP. ANN. REV. 79, 79-80 ("the Brussels Convention is now, nearly 30 years after its conclusion, in a somewhat unsatisfactory state and needs considerable amendment . . . the convention's provisions nearly all deal with what are simple situations, whereas real life, particularly commercial life, can produce extremely complex ones").
The Act and the E.E.C. Convention on which it is based contain carefully structured and detailed jurisdictional rules reflecting a decent but not hypersensitive regard for both comity and defendant’s rights. With such rules in place, there is no need for broad jurisdiction-declining discretion, and the Convention seems to operate quite well without it. The Convention, which has been in force in the original Common Market countries since 1973, has been applied in more than 30 decisions of the European Court of Justice and in many decisions of national courts. The resultant approach to transnational jurisdictional issues has won scholarly praise as a “functional and pragmatic” demonstration “that multistate jurisdictional problems are amenable to rational solutions.” It can be hoped that England’s experience under the new Act will reinforce the lesson that jurisdictional rules can be made to do the work of allocating transnational cases; broad jurisdiction-declining discretion is unnecessary.49

Primary focus in the final reform section is on the amendment of existing Anglo-American forum non conveniens doctrine towards a modified abuse of process test, with comparisons drawn with jurisprudence of the High Court of Australia in *Oceanic Sun Line Special Shipping Co. v. Fay*50 and *Voth v. Manildra Flour Mills Proprietary, Ltd.*51 There is a factual synthesis of the current mass tort litigation before the English courts in *Lubbe and Others v. Cape Plc.*52 This action, brought by five individuals is a test case for two thousand South African victims of asbestos-related disease. The scale of the action and the suffering of the unfortunate victims mirrors the Bhopal tragedy which has entered global consciousness. These actions, in tandem with the decisions in *Bhopal* and *Piper Aircraft*, are re-interpreted by assimilating the ascription of the Australian test (a modified abuse of process format) as an optimal rule-selection standard to govern forum non conveniens. It is argued that this would prevent local corporations from escaping domestic standards when operating overseas. It arguably affects the

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49 Robertson, supra note 1, at 427.
52 [2000] 1 Lloyd’s Rep. 139 (C.A.); [1999] I.L. Pr. 113 (C.A.); and see the recent House of Lords judgment, [2000] 1 W.L.R. 1545, delivered by their Lordships just before publication of this article, and referred to in the postscript.
appropriate balance between parochialism and colonialism, and it reflects the social conscience that lies behind forum non conveniens.

II. THE U.S. EXPERIENCE

When a stranger resides with you in your land, you shall not wrong him. The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt.\(^5\)

A. Acknowledgment of Forum Non Conveniens in the Federal System: Gulf Oil Corporation v. Gilbert

The derivation of forum non conveniens doctrine arose in equity as a discretionary exception to the requirement that a court must hear a case where jurisdiction was properly established.\(^4\) The doctrine first appeared in the United States in several early state court decisions, but it was generally limited to maritime disputes and cases concerning internal corporate matters.\(^5\) It gained broader currency after its recognition in a seminal law review article in 1929. Federal criteria emerged in 1947 with the express acknowledgement

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\(^{54}\) The exception originated in several Scottish cases in the nineteenth century, which used the term “forum non competens” to dismiss cases “both where the court lacked jurisdiction and where it was not expedient for the due administration of justice to hear the case.” Edward L. Barrett, Jr., The Doctrine of Forum Non Conveniens, 35 CAL. L. REV. 380, 387 n.35 (1947) (citing cases); see Robert Braucher, Comment, The Inconvenient Federal Forum, 60 HARV. L. REV. 908, 909 (1947). An embryonic version of the doctrine first appeared in American law as early as 1801. See, e.g., Willendson v. Forsoket, 29 F. Cas. 1283, 1284 (Pa. D. 1801).

\(^{55}\) Federal admiralty courts used the doctrine to decline jurisdiction over suits between foreigners. See Kathi L. Hartman, Note, Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts, 69 GEO. L.J. 1257, 1278 (1981). 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, 364-65 (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, supra note 4, at 135; Reus, supra note 23, at 460-61.

of relevant guiding principles by the Supreme Court in *Gulf Oil Corp. v. Gilbert.*

The litigants in *Gulf Oil* were U.S. citizens, and the action was in federal court on the basis of diversity jurisdiction. The plaintiff, a Virginia resident, brought an action in the federal district court of New York to recover damages for the destruction of its Virginia warehouse and its contents by fire resulting from the defendant's negligence. New York was one of the states, including Virginia, in which Gulf Oil Corporation was qualified to do business. It was conceded that the New York court possessed jurisdiction over the parties, however, the defendant moved to remove the action from New York under the forum non conveniens doctrine, contending that Virginia constituted the appropriate forum to litigate the case. The defendant asserted that Virginia was where (i) the plaintiff lived; (ii) the defendant did business; (iii) all events in the litigation had taken place; (iv) most of the witnesses resided; and (v) both state and federal courts were available to the plaintiff and able to obtain jurisdiction over the defendant. The Supreme Court, upholding the district court's dismissal of the case, agreed that Virginia not New York, constituted the appropriate forum in which to conduct the litigation.

58 See id. at 502.
59 Although Gulf Oil Corporation was incorporated under the laws of Pennsylvania, id. at 503, and the facts giving rise to the case arose in Virginia, the plaintiff justified his decision to instigate the trial in New York on the basis that a New York jury could more easily relate to the large sum of money damages claimed and that a New York jury would be less susceptible to "local influences and preconceived notions" id. at 510.
60 The Supreme Court recognized 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. See id. at 504-07. 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.
61 See id. at 503. Defendant's motion was based on the application of New York's state law of forum conveniens. The district court felt that because this action was brought in federal courts on the diversity jurisdiction, under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the application of appropriate state law was mandated. See *Gulf Oil*, 330 U.S. at 503.
62 See id.
63 Note in *Koster v. Lubermans Mutual Casualty Co.*, 330 U.S. 518 (1947), the Supreme Court, as in *Gulf Oil*, applied the forum non conveniens doctrine to dismiss the case. A New York citizen brought a derivative action in New York against an Illinois insurance company. See id. at 519. As all the evidence and witnesses were located in Illinois and no convenience was established on behalf of the plaintiff for bringing the action in New York, the complaint was dismissed on grounds of forum non conveniens. See id. at 520-21. The court noted that a presumption in favor of a plaintiff's choice of forum exists, which will normally outweigh any inconvenience to a defendant. See id. at 524. Nevertheless, a clear showing that oppressiveness
In *Gulf Oil* the Supreme Court instituted a two-step procedure for deciding whether to dismiss a case on forum non conveniens grounds in a federal court. First, a court must determine whether an adequate alternative forum exists. If it does, the court proceeds with the second step of deciding in which forum the litigation would best serve the private interests of the litigants and the public interests of the forum in question.\(^6\) Private factors incorporate 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.\(^6\) Public factors 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 law; 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.\(^6\)

The motion to dismiss was granted in *Gulf Oil*. The Supreme Court, however, tempered the decision by declaring that unless the balance of factors strongly favors the defendant, a court should rarely disturb the plaintiff's choice of forum.\(^6\) The specific factors test, and the balancing of private and public interests were to be weighed in light of the various advantages or obstacles they would present in maintaining a fair trial. 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" (an abuse of process format). Forum non conveniens determination was to be within the discretionary purview of the trial judge, whose determination was reviewable by an appellate court only under a deferential clear abuse of discretion standard.\(^6\)

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\(^6\) *Gulf Oil*, 330 U.S. at 508.

\(^6\) See id. at 508-09.

\(^6\) See id.; see also Miller, *supra* note 42, at 1371-73.

\(^6\) See *Gulf Oil*, 330 U.S. at 509-12. For criticism of the clear abuse of discretion standard
Significantly, whilst *Gulf Oil* involved solely domestic elements and parties, nonetheless the apposite test enunciated therein became the leading formulation for all federal non conveniens dismissals, regardless of whether they were domestic, admiralty, or even international cases involving one or more parties from foreign countries. As previously adumbrated, the test was markedly skewed in favor of the plaintiff's choice of forum which was rarely to be disturbed unless abuse of process was evident. There was no discrimination applied in judicial treatment of foreign plaintiffs as opposed to domestic cases between U.S. citizens residing in different states. This halcyon state of affairs was to be abruptly ended by the Supreme Court some twenty-four years later in *Piper Aircraft v. Reyno*.

B. A Distinctive Foreign Non Conveniens Test for Foreign Plaintiffs in *Piper Aircraft v. Reyno*

The early forum non conveniens doctrine was an abuse of process version that did not permit dismissal unless the plaintiff's forum choice was so egregiously inappropriate as to appear motivated by a desire to vex and harass the defendant. In the mid-1970s the doctrine began to evolve into the current most suitable forum version, under which the judge's belief, for virtually any reason, that trial elsewhere would be more appropriate justifies a forum non conveniens dismissal.

A distinctive forum non conveniens test was adopted by the Supreme Court in *Piper Aircraft* which applied to cases involving foreign plaintiffs suing in

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see Henry Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 748-54 (1982); see also Carney, *supra* note 64, at 427-28 (the result of this deference is that even when similar cases result in divergent outcomes it is unlikely that the appellate court will be able to reverse a dismissal under forum non conveniens).

In international cases, challenges to the adequacy of the alternate forum included not only jurisdictional concerns, but also: (1) the plaintiff's ability to raise certain substantive causes of action in the alternate forum; (2) the adequacy of the procedural protections offered by the alternate forum's court system; and (3) the independence or fairness of the country's judicial system. See generally *Mobile Tankers Co., S.A. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir. 1966).

For a discussion on whether the claim ought to have been dismissed in *Gulf Oil* for lack of personal jurisdiction see Stewart, *supra* note 7, at 1288-89.

454 U.S. 235.

See Robertson & Speck, *supra* note 19, at 940.

As discussed in the text, two important issues were resolved by this case. First, the Court held that a foreign plaintiff's choice of forum deserves less deference than a domestic plaintiff's choice of a domestic forum. Secondly, it was determined that the possibility that dismissal would change the substantive law to be applied should ordinarily not be given conclusive or
U.S. courts. The representative of the estate of five Scottish citizens killed in an air crash in Scotland brought wrongful death actions in a California state court. The wrongful death action against Piper alleged that the airplane was defective. The plaintiffs sought recovery on the basis of negligence and strict liability. The plaintiffs named the American company that manufactured the plane, which was located in Pennsylvania, and the American company that manufactured the plane's propeller, which was located in Ohio, as the defendants in the action. Following removal of the suit to federal court in California and the subsequent transfer to a federal district court in Pennsylvania, the defendants moved to dismiss on the grounds of forum non conveniens. The defendants supported their motion by noting that numerous witnesses essential to the defense were located in Scotland and not subject to compulsory process in the United States, the decedents and their heirs were Scottish citizens, and the accident had transpired in Scotland. This, in their view, implicated Scotland as the convenient and appropriate forum. The plaintiffs countered by arguing that dismissal would be inequitable since Scottish law applicable to products liability was less favorable than the applicable U.S. law, and all the evidence concerning the manufacture of the plane was located in the United States. Although the Court had jurisdiction, it dismissed the case, in accordance with the forum non conveniens doctrine. Despite the fact that the specific

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Note that a domestic venue-transfer device took effect through statute in 1948. Through their familiarity with and frequent use of the device contained in 28 U.S.C. § 1404(a) the federal courts became inured to the drastic effects of dismissing a case for forum non conveniens. Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1994).

See Piper Aircraft, 454 U.S. at 239-40.

See id.

See id. at 242-44. The Court also noted 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. See id. at 239-40.

See Piper Aircraft, 454 U.S. at 244. Strict liability in tort, for example, is not recognized in Scottish law. Additionally, the damages available in Scotland in a wrongful death action are limited to "loss of support and society." Id. at 240.

See id. at 242.

In Piper Aircraft, the U.S. Supreme Court made several important findings expressing the Court's attitude towards the doctrine of forum non conveniens: (a) The Court applied the
factors test involving a balancing of private and public interests, as laid down in *Gulf Oil*, was still determinative, there was no longer to be a strong presumption in favor of a plaintiff's choice of forum when the plaintiff or real party in interest is foreign. In essence, the Supreme Court totally reformulated the parameters of a forum non conveniens inquiry in cases involving foreign plaintiffs that institute products liability lawsuits in the United States. First, diminished force is accorded to a foreign plaintiff's choice of a U.S. forum:

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.1

Second, the Supreme Court reasoned that since the substantive law in the alternative foreign forum was less reasonable to the plaintiff, there was not a sufficient basis to defeat dismissal on the premise of forum non conveniens.2 Substantial weight would not be given on the plaintiff's behalf to the attraction of U.S. strict liability theory for product liability compared with less advantageous Scottish perspectives on choice of law.

despite the doctrine of forum non conveniens for the first time in a case with a foreign plaintiff; (b) The Court stressed that central emphasis cannot be placed on any one factor, including domicile or residence; (c) The Court confirmed the shift from the "abuse of process" approach to the "most suitable forum" approach in the evaluation of the criteria. Nevertheless, the Court emphasized the difference between venue transfers under 28 U.S.C. § 1404(a) and dismissals on grounds of forum non conveniens; and (d) The Court issued guidelines to reduce the attractiveness of American courts to foreigners. See *id.* at 248-56.

1 *Id.* at 255-56.

2 *See id.* at 250. The essence of the Court's determination was that the possibility of an unfavorable change in law should not be given conclusive or even substantial weight in the forum non conveniens inquiry, unless the remedy in the alternative forum is so inadequate as to be no remedy at all. The Court stated:

In fact, if conclusive or substantial weight were to be given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice of law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the forum non conveniens inquiry, dismissal would rarely be proper.

*Id.* at 250.
The impact and effects of the *Gulf Oil & Piper Aircraft* decisions will be examined further in the next section. At this juncture, however, it is important to emphasize the shift in U.S. orthodoxy to the most appropriate forum end of the forum non conveniens spectrum. The analytical revolution provided by the *Piper Aircraft* case was to enunciate a most appropriate forum approach to forum non conveniens issues in all international disputes involving alien plaintiffs. In the United States, the pendulum has swung in the U.S. away from an abuse of process format towards the suitability of forum deliberation. Lower federal courts have been compelled thereafter to exercise far greater latitude in dismissing international litigation by submitting for consideration a plaintiff's citizenship and residence.  

Before the *Piper Aircraft* case, a strong presumption applied towards the plaintiff's chosen forum, be it a foreign or domestic litigant, and it could only be supplanted when the specific interest factors prescribed by *Gulf Oil* clearly recommended a trial in the alternative forum. This presumption is inoperative post-*Piper Aircraft* for alien plaintiffs. As a consequence, the U.S. forum non conveniens dismissal equation is now more predicated on the relative weight given to private and public factors and not whether these factors, when grouped together, implicate an alternative forum as substantially more appropriate than that chosen. Additionally, lower federal courts must, post-*Piper Aircraft*, consider in a transnational forum non conveniens action the very citizenship of the plaintiff. If the court fails to recognize or examine the citizenship of the plaintiff this constitutes an abuse of trial court discretion. This development marks a pronounced abdication from the original purpose underpinning the doctrine. Originally, this purpose was to protect the chosen forum and the defendant from the inconveniences of litigating a case brought by the plaintiff in a clearly inappropriate forum. The new policy, that of suitability, is inculcated by the desire to grant a court both greater discretion to decline to exercise its jurisdiction, and vastly enhanced flexibility, and the desire to grant the defendant greater affirmative power to determine the forum. The rigid autocracy of abuse of process has been replaced by the shifting meritocracy of the liberal specific factors myriad. This has led, some believe, to a prevailing judicial mindset that injuries done by

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83 See Robertson, supra note 1, at 405; see generally Abbott, supra note 4.
84 See *Piper Aircraft*, 454 U.S. at 255-61.
85 See id. at 260.
86 See *Gates Learjet Corp v. Jensen*, 743 F.2d 1325, 1334-35 (9th Cir. 1984).
87 See *Abbott*, supra note 4, at 143-47.
American businesses to foreign nationals abroad are not America's problem. Intertwined here is a climate of judicial opinion that believes that “retention of American jurisdiction and application of American law will sometimes smack of ‘social jingoism.’” This predilection for so-called international comity lay at the heart of the significant Union Carbide decision where the court followed the Gulf Oil/Piper Aircraft standard and dismissed the products liability case under forum non conveniens principles.

The Union Carbide case involved the most devastating industrial disaster of our time. 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 poisonous chemical caused the deaths of over 2,000 Indian citizens. More than 200,000 were injured as a result of this release. 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. The court, however, weighing the factors suggested by the Supreme Court in Gulf Oil/Piper Aircraft, granted conditional dismissal based on forum non conveniens.

See Robertson, supra note 1; Prince, supra note 18, Duval-Major, supra note 18; Robertson & Speck, supra note 19; Solen, supra note 4; Carter-Stein, supra note 43. But see Weintraub, supra note 2; Reynolds, supra note 17.

Robertson, supra note 1, at 407.

809 F.2d 195 (2nd Cir. 1987).


See Union Carbide, 809 F.2d at 197.


See Union Carbide, 809 F.2d at 198. The district court dismissed the case subject to Union Carbide agreeing to specified conditions in order to qualify India as an adequate alternative forum. Union Carbide was required to:

(1) consent to jurisdiction of the courts of India and continue to waive
Judge Keenan determined that "[n]o 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." In effect, international comity was elevated to the status of determinative of the outcome. The court also cited other relevant factors to the dismissal: the victim's medical records and the plant's records regarding management, safety and personnel were located in India; the majority of these 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 (i.e., higher) standards upon them. 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.

The Bhopal case is the most important illustration of the impact U.S. industry has upon less developed countries' infrastructures leading to serious defenses based on the statute of limitations, (2) agree to satisfy any judgment rendered by an Indian court against it and upheld on appeal, provided the judgment and affirmance "comport with the minimal requirements of due process," and (3) be subject to discovery under the Federal Rules of Civil Procedure of the United States.

Id. The Second Circuit, using the Piper Aircraft standard, held that the trial court had the discretion to dismiss the claim. Upon review of the conditions, the court affirmed the first condition, but reversed the last two. See id. at 203-05.

1998 Plant Disaster at Bhopal, 634 F. Supp. 867; see also Birnbaum & Dunham, supra note 92, at 242.

97 See David W. Robertson, The Federal Doctrine of Forum Non Conveniens: An Object Lesson in Uncontrolled Discretion, 29 Tex. Int'l L.J. 353, 372-73 (1994). Note when the Bhopal matter returned to the Indian legal system, Union Carbide agreed to pay $470 million in settlement. Robertson notes that on top of the number of dead (at least 2,660) there were around 40,000 serious injuries. Dividing the $470 million settlement figure among these victims on an equal basis would give them around $11,000 each with "nothing left over for less serious injury victims and those who may develop illness in the future." If less serious injury victims are included, the total number of victims rises to around 205,000. If this number of victims shared the settlement fund equally, they would receive less than $2,300 each, again with nothing left over for those who become ill in the future, not to mention future generations. There were, of course, those who argued that the Bhopal victims' allocation of between $12,000 and $10,000 each was perfectly adequate. One of these was Cummings, supra note 92, at 140 n.157, who suggested that, "The purpose of the Bhopal litigation should not be to make millionaires out of people who live in huts and tents."

98 See Duval-Major, supra note 18, at 669; Solen, supra note 4, at 346.

injury for foreign victims. The case involved Indian citizens as foreign plaintiffs bringing suit against a U.S. multinational parent for harm engendered by actions of the subsidiary company abroad. The decision is redolent with crucial issues that need to be addressed when alien plaintiffs attempt to bring mass tort claims in courts of the United States (and similarly the United Kingdom). These matters are explored in Section 2 of this article in a corroscating indictment of current Anglo-American principles.

C. State Courts and the Forum Non Conveniens Doctrine

The doctrine of forum non conveniens at the state level has historically been at variance with U.S. Supreme Court analysis. Over the course of the last fifteen years, however, there has been a significant movement towards adherence to the federal standard. A vignette of state divergence and shift towards compatibility is illustrated in California cases, with the dichotomy represented by appellate decisions in Holmes v. Syntex Lab., Inc. and Stangvik v. Shiley, Inc.

In Holmes, British plaintiffs brought suit in California against a United States drug company and certain of its American affiliates to cover damages allegedly caused by the ingestion of Norinyl, an oral contraceptive. Syntex moved to dismiss the complaint on forum non conveniens grounds and agreed both to submit to the jurisdiction of the British courts and waive any statute of limitations defense if the motion were granted. The California court, relying heavily on the U.S. Supreme Court decision in Piper Aircraft, granted the motion.

The California Court of Appeal overruled the dismissal, determin-

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100 See Cummings, supra note 92, at 111.
101 See Robertson & Speck, supra note 19, at 950. Thirty-two states and the District of Columbia have adopted the federal doctrine or something similar to it. Hawaii, Kentucky, Mississippi, and Oregon have given ambiguous indications of following the federal doctrine. Colorado, South Carolina and Vermont have adopted a more limited version that could be broad enough to lead to the dismissal of transnational personal injury cases. Georgia seems to reject the doctrine outright, while still five states have still left the existence of the doctrine a completely open question. See id. at 948-53. During the 1990s additional states recognized the doctrine. See, e.g., West Texas Utilities Co. v. Exxon Coal USA, Inc., 807 P.2d 932, 935 (Wyo. 1991); VA. CODE ANN. § 8.01-265 (Michie 2000) (readopting in 1991 a statute repealed in 1966). The positions in Texas, Louisiana, and Florida are considered separately below.
102 See Robertson & Speck, supra note 19, at 948-50.
105 See Holmes, 202 Cal. Rptr. at 774.
106 See id. at 775.
ing that the California forum was not convenient to the defendant.\textsuperscript{107} The fact that the defendants had performed premarketing research and clinical trials for Norinyl in California was sufficient to suggest a connection linking the defendants and the litigation with the forum selected by the plaintiff.\textsuperscript{108} It was held that the state’s forum non conveniens law differed from the federal standard in three key respects. First, California accorded far greater deference to a foreign plaintiff’s choice of forum; there was a strong presumption in favor of that selection.\textsuperscript{109} Second, California attached far greater weight to the likelihood that a forum non conveniens dismissal would lead to the application of a choice of law less favorable to the plaintiff.\textsuperscript{110} Finally, a prerequisite for dismissal in California was a suitable alternative forum; the Court of Appeal held that Britain was not suitable as it did not recognize a cause of action predicated simply upon strict liability.\textsuperscript{111}

Subsequently, in \textit{Stangvik}, the Holmes perspective was overruled, and California returned to the orthodox federal standard delineated by the Supreme Court.\textsuperscript{112} An action against an American manufacturer was dismissed on forum non conveniens grounds. Families of Norwegian and Swedish patients who died after heart-valve implants allegedly failed commenced proceedings in California against these manufacturers for product liability. The court, whilst accepting that California had a regulatory interest in the efficacy of sophisticated medical devices manufactured in the forum, nonetheless determined that the action should be stayed.\textsuperscript{113} The devices had been sold, implanted, and allegedly malfunctioned in Scandinavia, so the decedents’ home countries had the strongest interest in entertaining any litigation. The Supreme Court of California determined that, contrary to Holmes, the federal standard developed

\textsuperscript{107} See \textit{id.} at 785.

\textsuperscript{108} In the court’s view, this conduct tended to support the plaintiff’s claim that the defendants, through conduct in California, “caused and allowed” Norinyl to be distributed and marketed in the United Kingdom. \textit{Id.} at 775.

\textsuperscript{109} See \textit{id.} at 778.

\textsuperscript{110} See \textit{id.} at 778.

\textsuperscript{111} See\textit{ Holmes}, 202 Cal. Rptr. at 780. Miller, \textit{supra} note 42, at 1375-76. The key relevant factors were determined to be: the existence of a suitable alternative forum; defendant’s place of incorporation; the parties’ relationships to California; the burden on California courts; and the relative convenience to the parties. See also Harry Litman, Comment, \textit{Considerations of Choice of Law in the Doctrine of Forum Non Conveniens}, 74 CAL. L. REV. 565 (1986).

\textsuperscript{112} See \textit{Stangvik}, 819 P.2d at 18-19; Del Duca & Zaphirious, \textit{supra} note 64, at 406; Birnbaum & Dunham, \textit{supra} note 92, at 260-61.

\textsuperscript{113} See \textit{Stangvik}, 819 P.2d at 16-17.
Even state courts that have traditionally been imbued with an endemic disregard for forum non conveniens have recently demonstrated a shift in conceptual analysis. The Texas experience in this regard is particularly enlightening.

In *Dow Chemical Co. v. Castro Alfaro* the Court of Appeal’s finding seemed to reject the doctrine outright. The case, yet again, involved alleged abuse by a U.S. multinational organization operating in the economic climate of a less advantaged nation. Eighty-two Costa Rican plantation workers brought an action in Texas claiming that they had suffered personal injuries, including sterility, because of their exposure to a pesticide (dipromochloropropane) manufactured by Dow Chemical Co. and Shell Oil, both U.S.-based multinational companies. Despite the place of the harm the infliction of injuries occurred in Costa Rica—the plaintiffs maintained that many of the documents and witnesses relevant to the chemical in question were in Texas. Shell, whose world headquarters was a mere three blocks from the actual courthouse, and Dow, which operated the largest chemical manufacturing plant in the United States only sixty miles outside of Houston, argued that the one part of the equation that should not be decided under American law was the legal consequences of their actions. The Texas Supreme Court, in a controversial decision, held by a bare majority that forum non conveniens would not be a bar to wrongful death and personal injury actions arising in a foreign state. It seemed that in Texas the doctrine of forum non conveniens was to be abolished for personal injury and wrongful death actions arising in a foreign country. However, shortly after the decision, because of strong corporate lobbying the Texas legislature enacted a bill which effectively

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114 See *id.* at 17-18.
115 786 S.W.2d 674 (Tex. 1990).
116 See *id.* at 674-75. See generally *Duval-Major, supra* note 18.
117 See *id.* at 681 (Doggett, J., concurring).
118 See *id.*
119 See *id.* at 675-79.
120 Justice Doggett, in a concurring opinion, contended that the real issue at stake was whether to hold multinational corporations responsible at home for their conduct abroad. He stated that Texas’s abolition of forum non conveniens furthered important policy considerations by providing a check on the conduct of multinational corporations. Doggett also asserted that what is really involved is not convenience but connivance to avoid corporate accountability. He then counseled against having too much concern for the welfare of multinational corporations and derided the dissenters’ “xenophobic suggestion that foreigners will take over our courts.” *Id.* at 680-86 (Doggett, J., concurring). See also *Duval-Major, supra* note 18, at 660.
overruled *Alfaro*.\(^1\)\(^2\) The doctrine of forum non conveniens was re-established vis à vis the foreign plaintiff; an exception was made for personal injury or wrongful death actions resulting from violations of Texas or U.S. law.\(^3\)\(^2\) The Texas position has been replicated in Louisiana, another state which initially rejected forum non conveniens discretion altogether.\(^4\)\(^2\) This has been supplanted by legislative enactment; in Article 123 of the Louisiana Code, the *Gulf Oil/Piper Aircraft* standard is expressly articulated as applicable in limited situations to allow forum non conveniens dismissal.\(^5\)\(^2\) Florida in the past has permitted forum non conveniens dismissals in limited factual circumstances and precluded dismissal if either party resided in Florida.\(^6\)\(^2\) More recently, the Florida Supreme Court in *Kinney v. Continental Insurance Co.*\(^7\)\(^2\) has advocated the federal standard under which residency is a consideration, and is not necessarily conclusive regarding "whether a cause of action should be dismissed on the basis of forum non conveniens."\(^8\)\(^2\) Courts need to address, however, whether the *Gulf Oil/Piper Aircraft* principles are suitable to govern venue disputes. The imbued policy concerns that developed the federal principle must be evaluated in light of the essential callousness of the doctrine.

III. THE RATIONALE AND POLICY IMPLICATIONS OF THE MOST SUITABLE FORUM DOCTRINE

In examining the validity of the transmogrification from abuse of process to most suitable forum, it is helpful to focus on the reasons behind the new doctrine in Anglo-American law, and on the practical consequences of the new approach that these countries have applied.\(^9\)\(^2\) Australia, significantly, has resiled from such a perspective, and in *Oceanic Sun Line Special Shipping Co. v. Fay*,\(^1\)\(^0\) the High Court refused to adopt a most suitable forum test. A stricter rule was subsequently affirmed in *Voth v. Manildra Flour Mills Proprietary*,

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\(^{121}\) The bill took effect in 1993 and applied to all actions filed on or after that date. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (West 1997 & Supp. 2000).

\(^{122}\) See Del Duca & Zaphirious, *supra* note 64, at 406.


\(^{125}\) See Miller, *supra* note 42, at 1373.

\(^{126}\) 674 So.2d 86 (Fla. 1996).


\(^{128}\) See generally Slater, *supra* note 23.

where the High Court declared that an Australian court would need to be "clearly inappropriate" before a stay of proceedings on forum non conveniens grounds could be granted. This explicitly raises the conundrum of why Australia, naturally predisposed to English common law, refused to straddle the line on forum non conveniens, and stigmatized the most suitable forum test as anathema to objective judicial preferences. The relevant arguments against an inherently flexible rule, and broad discretion to refuse to hear a case, can be anatomized in the following logical series, which also addresses ideological perspectives that inculcate our rule selection.

A. The U.S. Multinational and Discrimination Against Foreign Plaintiffs

The tacit concept behind the doctrine of forum non conveniens allows corporations to avoid legal responsibility because they operate multinationaly. It is ignorant to think that the citizens of the United States live in a glass bubble, and that the damages caused abroad by multinational corporations will not reach our clean soil. In a world of growing global markets, where scientists are viewing all the world's ecosystems as interconnected, there is room for rethinking this doctrine of forum non conveniens.\(^{131}\)

The U.S. federal standard of forum non conveniens has proved extremely controversial when invoked by U.S. multinational defendants against foreign plaintiffs.\(^{132}\) These defendants have engaged in a form of reverse forum-shopping to circumvent venue in their home forum. In general, where a defendant is sued at home, then under the old abuse of process perspective, focusing on inconvenience to the parties, "it should ordinarily be impossible for such a defendant to make a credible claim of vexation or harassment."\(^{133}\) As Robertson has stated, it would have been "quite implausible to contend that

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\(^{130}\) (1990) 171 C.L.R. 538.

\(^{131}\) Solen, \textit{supra} note 4, at 353.

\(^{132}\) A number of U.S. cases focusing on the conflicting policies involved within forum non conveniens decisions have proved enduringly controversial. \textit{See, e.g.}, Stewart v. Dow Chem. Co., 865 F.2d 103, 104 (6th Cir. 1989) (dismissing case after weighing public and private interests); \textit{Union Carbide}, 809 F.2d at 206 (affirming district court's dismissal on forum non conveniens grounds); Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1219 (11th Cir. 1985) (holding that relevant factors favored dismissal); \textit{Alfaro}, 786 S.W.2d at 679 (holding that Texas law precluded dismissal on forum non conveniens grounds). \textit{See generally Carney, supra} note 64.

\(^{133}\) Robertson, \textit{supra} note 1, at 405.
a defendant is being vexed and oppressed by being sued at home.”\textsuperscript{134} This position is inapposite to the rule under \textit{Gulf Oil/Piper Aircraft} where the vital component to examine is whether, under the balancing equation propounded therein, a presumption applies in favor of the foreign forum. Prejudicial weight is given to the fact that the plaintiff is not a home resident, which this severely curtails the likelihood of a hearing in the state where the U.S. multinational is incorporated.\textsuperscript{135} This impact is exacerbated in personal injury disputes where the preponderance of adjectival evidence is located abroad in the country which the harm took place. These fundamental facts will require a dismissal under the new doctrine. The disappointed plaintiff can be outmaneuvered by the selective defendant utilizing special-interest factors in their favor to escape the chosen forum.

The weighing of the most suitable forum approach, and adoption of it as a barrier to U.S. actions against multinational corporations, was exemplified by the \textit{Bhopal} case. 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.\textsuperscript{136} It was also determined that the U.S. parent company “supplied the Indian affiliate with the overall design for the plant,”\textsuperscript{137} and one of its engineers had responsibility for approving the design when the plant began operations.\textsuperscript{138} An orator of hard truths would demand that at the very least the parent Union Carbide company had a case to answer for their causal involvement in the Bhopal tragedy. Certainly, under traditional doctrine, it was virtually inconceivable that a defendant could be harassed if the litigation playing field was within the defendant’s home forum. In such circumstances it would be a rare individual defendant who could invoke the shield of undue inconvenience and disturb the equilibrium in favor of the original selection of the plaintiff. However, under the new federal standard, the lawyer acting on behalf of Union Carbide was so certain of dismissal on a forum non conveniens basis that reference was constantly made to the doctrine. Indeed the references were so numerous that at one pre-trial hearing Judge Keenan called him “Johnny one-note.”\textsuperscript{139} The attorney’s confidence was not misplaced as the New York court held that “[t]he

\textsuperscript{134} \textit{Id.} at 412.
\textsuperscript{135} \textit{See} Prince, \textit{supra} note 18, at 586.
\textsuperscript{136} \textit{See} Cummings, \textit{supra} note 92, at 111 n.8.
\textsuperscript{137} \textit{Id.} at 115 n.29.
\textsuperscript{138} \textit{See id.} at 115.
\textsuperscript{139} \textit{Id.} at 122 n.71.
Indian interests far outweigh the interests of citizens of the United States in the litigation." In Judge Keenan's opinion, "the presence in India of the overwhelming majority of the witnesses and evidence . . . would by itself suggest that India is the most convenient forum for this . . . case."  

Overt discrimination applies against foreign plaintiffs such as the Bhopal victims. It seems that this discrimination, and the consequential moral and economic hardship effected by the doctrine, does not unduly concern U.S. courts. The Supreme Court in *Piper Aircraft* articulated such a disregard in the most explicit (and chilling) terms: "The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified." 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 contumeliously rejected to foreign plaintiffs suing U.S. defendants, in that they are pejoratively relegated to the status of illegal immigrants before U.S. courts. This policy outcome is indefensible in economic, social, and moral terms, yet is so well-established that it now amounts to a piece of modern pageantry. The disappointed forum victim, who has suffered personal injury at the hands of a U.S. multinational conglomerate, is dismissed from the U.S. courtroom door with a cheerful wave goodbye and a one-way ticket back to their home forum. By dismissing such cases, the U.S. court is implicitly condoning corporate malpractice, negligence, and harmful conduct. A number of multinational corporations market to foreign countries, especially developing countries products that have been banned in the United States. The by-product of misconduct by corporations can involve untold harmful effects of a multifarious nature and on a worldwide scale.

For instance, American corporations exported approximately 2.4 million pieces of cancer-producing TRIS-treated children's sleepwear to Asia, Africa, and South America. United States regulation expressly prohibits the use of carcinogenic materials as a flame retardant. This pattern of distributing goods banned or restricted from the United States abroad was replicated in the relation to overseas suppling of baby pacifiers linked to choking deaths in

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140 *Union Carbide*, 634 F. Supp. at 867.
141 *Id.* at 866.
144 See generally Laird M. Street, Comment, *U.S. Exports Banned for Domestic Use but Exported to Third World Countries* 6 *Int'l Trade* L.J. 95, 97 (1981).
As Carter-Stein has identified, unsuccessful product liability suits brought by Australian women against U.S.-based silicone implant manufacturers provides another illustration of the effect a forum non conveniens "defense" can have on a plaintiff's ability to seek legitimate redress before the defendant's home court.

In effect, U.S. multinationals have abusively bypassed internal regulatory laws by obtaining a forum non conveniens dismissal of claims brought by alien plaintiffs. Defendants in transnational cases have vigorously resisted being sued in the United States, fought the venue battle with the utmost vigor, and invoked the federal standard as a defensive shield. The resonance, not subliminal but perfunctorily determinative, is that U.S. fora did not have a significant (or any) interest in regulating the sale of products beyond their borders. The very obverse of this rationale ought to be effected, as the United

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145 Id.
146 See Carter-Stein, supra note 43, at 178-87. A similar illustration under English law is provided by Ngcobo and Others v. Thor Chemical Holdings, Ltd., How Britain Can Stop Exploitation Overseas, TIMES (London), Nov. 10, 1995; Sithole and Others v. Thor Chemicals Holdings, Ltd. Protecting Position Until Appeal, TIMES (London), Feb. 15, 1999. During the 1980s, Thor manufactured mercury-based chemicals at Margate, in southeast England. Health and safety at the Margate factory came under considerable criticism over a prolonged period from the Health and Safety Executive (HSE) due to elevated levels of mercury in the blood and urine of the workers. In 1986 the company terminated mercury-based processes in Margate and shifted its Margate mercury operations (including key personnel and plant) to Cato Ridge, Natal, South Africa. At that factory, identical deficiencies to those identified by the HSE in England were effected abroad. In addition, the South African operation relied extensively on casual untrained labor. Workers with high levels of mercury were laid off and replaced by new casual laborers who queued at the factory gate for work each day. This "recycling of works," rather than a properly structured health and safety system, appears to have been how Thor attempted to control mercury exposures in its workforce. In February, 1992, mercury poisoning of South African workers came to light. Three workers died and many others were poisoned to varying degrees. An inquiry and a criminal prosecution in the local Pietermaritzburg Magistrates Court led to the equivalent of a £3,000 fine. Compensation claims against the parent company and its chairman were commenced in the English High Court on behalf of 20 workers. The claims alleged that the English parent holding company was liable because of its negligent design, transfer, set-up, operation, supervision, and monitoring of an intrinsically hazardous process. Thus, the claim was based on negligent acts and omissions in failure to take steps to protect the South African workers against the foreseeable risk of mercury poisoning. Thor applied to stay the action on forum non conveniens grounds. The application was dismissed by Deputy High Court Judge, Mr. James Stewart Q.C., who noted the connections of the claim with England and holding that English law would probably be applied to the case. The defendant's appeal was struck out by the Court of Appeal on the grounds that Thor had acceded to the jurisdiction, inter alia, by serving a defense. In 1997, Thor settled the original claim for £1.3 million. A additional 21 claims are now in progress, and a further attempt by Thor to stay these proceedings has been unsuccessful.
States has a very real interest in applying its own laws to U.S. corporations. There should be a strong United States interest in assuring the safe regulation of American industry on an international as well as a national level. Developing countries should not be used as the "industrial world's garbage can" and "as dumping grounds for products that had not been adequately tested." Their populations must not be "used as guinea pigs for determining the safety of chemicals."

There is a further exploitative forum non conveniens benefit for corporate entities in their manipulation of organizational structure as a bulwark against liability. The structure and sheer size of these key-player multinational conglomerates allows them to wield economic and political influence in many small countries economically dependent on their production facilities and resources. By sleight of hand, these companies, operating through a parent/subsidiary hierarchical infrastructure, can create corporate layers and a presence dispersed through numerous states. These layers can facilitate forum non conveniens dismissal based on the location of adjectival evidence abroad, indicative of venue in a distant forum away from the true U.S. seat of the parent. As a concomitant of this corporate power, developing countries are subjected to U.S. multinational influence, but these also corporations encourage a "race to the bottom" amongst developing nations soliciting investors. In this analysis, "the government that offers the lowest potential tort and environmental liability wins." The undercurrent here is that U.S. multinationals expressly avoid countries with stringent regulations, and

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147 See Robert C. Goodrich, Recent Decisions—Jurisdiction and Procedure Forum Non Conveniens, 15 VAND. J. TRANSNAT’L L. 583, 598 (1982). 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 United States has an interest in insuring that its citizens and residents are accountable as reflected by U.S. law. This accountability enhances the value of the products and services offered in export by these citizens and residents and also indicates that the United States does not promote or allow the dumping of inferior and dangerous products in other countries by its own citizens.

148 See Duval-Major, supra note 18, at 671.

149 Alfaro, 786 S.W.2d at 687 (Doggett, J., concurring).

150 Id.

151 Id. See generally Carney, supra note 64, at 452.

152 See Carney, supra note 64, at 453; Duval-Major, supra note 18, at 673.

153 See Matthew Lippman, Transnational Corporations and Repressive Regimes: The Ethical Dilemma, 15 CAL. W. INT’L L.J. 542 (1985). Lippman asserts that the annual sales of General Motors are greater in value than the entire annual economic activity of Belgium or Switzerland. See id. at 544.

154 See Duval-Major, supra note 18, at 675.

155 Id.
gravitate perspicaciously towards underdeveloped countries that lack any regulatory infrastructure to deal with the dumping of harmful products. The abuse of process format may be a catalyst for this egregious activity in that the tactical employment of reverse forum shopping may prevent venue in the United States. A lacuna exists in any effort to formulate an effective deterrent to corporate malpractice under United States law (e.g., injuries caused by irresponsible activities conducted through subsidiary organizations engaged abroad).

Duval-Major has cogently articulated 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 forty percent of their net profits, and much of these return to the United States and become part of the gross national profit. Profits before integrity, and chauvinism before the protection of certain inalienable rights, are arguably the policy outcomes of the federal standard applied to U.S. multinationals. The United States, to safeguard its reputation as supportive of human rights, ought to take a countervailing interest in the integrity of its leading business operatives. In order to protect inalienable rights of foreign plaintiffs, there is a need to recognize that the United States has a powerful interest in guaranteeing that corporate entities operating transnationally are responsible at home for any violations committed overseas: responsibility equiparated with domestic liability and court access for the wronged parties.

Weintraub and Reynolds are distinguished U.S. proponents of the current most appropriate forum standard and of the different treatment accorded to foreign plaintiffs. It is illuminating to examine their three main counter-arguments in favour of maintaining the status quo. First, Weintraub is concerned that the United States becomes a “magnet forum for the afflicted of the world” through the clear adventitious benefits to the litigant of lower costs and higher recovery. He worries that economic advantage and state jobs would

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156 Carney, supra note 64, at 453-54. Note that the U.S. Supreme Court has held that federal statutes do not apply extraterritorially in the absence of clear congressional intent to the contrary. The Supreme Court in EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), determined that Title VII does not apply extraterritorially to regulate the foreign conduct of U.S. employers vis à vis U.S. citizen employees.

157 See Duval-Major, supra note 18, at 675 (citing Lippman, supra note 153, at 545).

158 Interestingly the plaintiffs in Union Carbide noted that Union Carbide operated a plant in West Virginia of a similar design to the one in India.

159 See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

160 Supra note 2.

161 Supra note 17.

162 Weintraub, supra note 2, at 352.
would be lost by subjecting a U.S. multinational to U.S. regulatory standards when operating in Third World countries. "Subjecting United States defendants to suit here by foreigners injured abroad places our companies at a world-wide competitive disadvantage."\(^{163}\)

There is a concomitant desire on his part to safeguard jobs, and a concern that states rejecting the federal doctrine are at a comparative disadvantage:

Any company incorporated in or having its principal place of business in such a state becomes a target defendant in suits by foreign plaintiffs because that company cannot remove a diversity case to federal court. Moreover, any company that has sufficient contacts with such a state as to be subject to general jurisdiction there, runs the risk of being sued there and locked into state court by joinder of a defendant that is domiciled, incorporated, or headquartered there. Thus states that do not have a robust, federal-style forum non conveniens doctrine are saying to corporations "don't incorporate here or establish your headquarters here and make sure that your contacts with this state cannot be characterized as continuous and systematic." This is likely to translate into a net loss of jobs and economic activity in the state.\(^{164}\)

Second, Reynolds has argued that, as a practical matter, the threat of "massive damages" accruing from an accident in the United States already compels corporations to follow a high level of care at their U.S. facilities.\(^{165}\) In Reynolds' view, it would not further the U.S. interest of preventing domestic accidents to impose liability on corporations for acting abroad via venue selection. In his mindset, it is nugatory and a *brutum fulmen.*\(^{166}\) Moreover, a ban on the manufacture and sale of harmful products abroad is viewed as a

\(^{163}\) *Id.*

\(^{164}\) *Id.* at 338. But, in my view, concerns over economic advantage and state jobs can be adequately met by properly structured personal jurisdiction principles, operating in tandem with a more limited fail-safe forum non conveniens mechanism. *See also supra* note 147 for the argument that a U.S. defendant enjoying protections of U.S. law ought to bear corresponding limitations and accountability under U.S. law for dumping inadequate products abroad.

\(^{165}\) *See Reynolds,* supra note 17, at 1707-08.

\(^{166}\) *See id.* at 1707 (noting that it is implausible that the mere threat of massive damages arising out of an American incident does not deter bad conduct). Reynolds discusses the manner in which each company balances potential liability against the cost of prevention. He notes that while Union Carbide has a plant in West Virginia, it will independently decide what the cost of prevention for that plant should be, given the high liability it faces under U.S. law.
more effective remedy; in any event, Reynolds regards the abolition of forum non conveniens as having a de minimis impact as a panacea to cure the lucrative export of toxins banned in the United States.167

Third, both Weintraub168 and Reynolds169 are in agreement that indirectly regulating the conduct of U.S. multinationals through forum non conveniens would amount to inappropriate interference with foreign countries’ regulatory and legal infrastructures.170 They view it as inappropriate to export U.S. law, policies, and social mores and tacitly inflict them upon sovereign foreign countries. There is a paternalistic argument here (really social jingoism) derived from so-called international comity regarding respect to be given to individual nation states. The idea, according to the old adage, is: “Give a man a fish, and he has a meal; teach him to fish, and he never goes hungry.” Empowerment of foreign nations incorporates, in Weintraub’s view, an incremental development of inadequate foreign legal systems and remedies, but that improvement is achieved organically, without U.S. interference or assistance:

Forum non conveniens furthers efficient and fair use of our judicial resources. If other legal systems are, in our chauvinistic view, inadequate for just compensation of injuries suffered abroad, the remedy lies in reform of those systems. We do not hasten reform by using that perceived inadequacy as a reason to throw open the doors of our courts.171

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167 With respect, the number of multinational abuses set out supra notes 144-46 contradicts Reynold’s propositions; higher levels of awards through cases heard in a U.S. venue, and consequential publicity attached thereto, would cause a sharp shock to egregious business activity activated abroad. The legislative response proposed by Reynolds may be undercut by the Supreme Court decision in EEOC v. Arabian American Oil Co., discussed supra note 156.

168 See Weintraub, supra note 2, at 352.

169 See Reynolds supra note 17, at 1707-08.

170 Reynolds states:

[I]f 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 award 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 an acceptable price to pay for attracting an American company to build a plant there and stimulate a depressed economy.

Id. at 1708.

171 Weintraub, supra note 2, at 352.
International comity and its relevance to the forum non conveniens equation as an optimal policy divining-rod is explored further in the next sub-section and is conclusively rejected.\textsuperscript{172} It is submitted that the arguments that have been advanced by proponents of the U.S. federal standard do not outweigh the deleterious consequences implied by that standard for deserving victims of monolithic multinational corporation juggernauts. A properly structured denial of forum non conveniens dismissal would be beneficial in that it would prevent improper reverse forum-shopping by U.S. defendants. American regulatory standards ought to apply to corporations domiciled therein, but also be operative in developing nations through diverse strands of their hierarchical enterprise.\textsuperscript{173} State and federal courts both need to refocus their forum non conveniens inquiry in order to more closely approximate the doctrine's original intent. The equitable conscience behind 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. Courts on both sides of the Atlantic have arguably been blinded to the true essence of forum non conveniens doctrine. It is important to remember what Oliver Wendell Holmes set out in his memorable 1897 essay entitled \textit{The Path of The Law}:

\textit{[T]he social end which is aimed at by a rule of law is obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view.}\textsuperscript{174} Holmes told us that the social advantage underpinning the adduced rule needs to be carefully reviewed and explicitly justified.\textsuperscript{175} The social advantage behind the traditional forum non conveniens approach was to prevent harassment of a defendant by a perambulatory plaintiff commencing suit in a wholly inappropriate location, causing the defendant hardship. This aim has been retained by the High Court of Australia in a test based on "clearly inappropriate" forum-selection. Modern developments in the United States (and the United Kingdom) have obscured the need to establish injustice to the defendant, and allowed instead the myriad of ethereal specific—interest factors to be used to presumptively allow a defendant to obtain a stay of proceedings.

\textsuperscript{172} See \textit{infra} pp. 36-41.
\textsuperscript{173} See Carter-Stein, \textit{supra} note 43, at 188.
\textsuperscript{174} Oliver Wendell Holmes, \textit{The Path of The Law}, 10 HARV. L. REV. 457, 469 (1897).
\textsuperscript{175} See id. at 468.
As Prince has stated, forum non conveniens is now "such a straightforward mechanism for obtaining a dismissal—especially in the United States—that a defendant’s lawyers could rightly be accused of negligence if they did not seek to employ the doctrine, particularly against foreign plaintiffs." There needs to be a fundamental amendment of extant doctrine to correct the momentum back towards its original rationale and to breach the shield employed by corporate malfeasors.

B. International Comity

In the Court’s view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. The Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. 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 to revive a history of subservience and subjugation from which India has emerged.

This litigation offers a developing nation the opportunity to vindicate the suffering of its own people within the framework of a legitimate legal system. This interest is of paramount importance.

The above quotations passage from Judge Keenan of the New York District Court in the Bhopal case presents a classic illustration of the shift in the judicial mindset that altered Anglo-American forum non conveniens doctrine in the 1970s and 1980s. It was propounded that the decision of a court to...
hear an action that could legitimately be tried abroad interfered unduly with the interest of the foreign forum in deciding matters of local concern. This was considered to be derogatory of foreign legal systems and their substantive laws, and was mirrored by continual references to respect for judicial comity between nations and avoidance of anti-chauvinism. The old "abuse of process" test, which allowed foreigners access to local courts, was viewed as anachronistic and had to be supplanted by the more enlightened "most appropriate forum" perspective. There was a corresponding worry that the imposition of Anglo-American legal solutions on other nation states, irrespective of the overwhelming benefits from the viewpoint of the individual plaintiffs, deleteriously impeded the chance for a foreign court to craft local solutions to their citizens' legal difficulties. This articulation directly follows the Weintraub school of thought, set out above, whereby if the foreign forum is not a realistic alternative because the foreign legal system is hopelessly expensive or inefficient, we do citizens of that country no favor by alleviating internal pressures for reform by rewarding the lucky few who can obtain jurisdiction over defendants here. The doctrines of international comity and anti-chauvinism were themselves of venerable antiquity, originating in Holland in the seventeenth century as an explanation for the application of foreign law by sovereign nations within their own territorial areas. In the United States, it derived its judicial origins from *Hilton v. Guyot* when Justice Gray affirmed that, "'comity'... is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." On a number of different levels, however, the employment of this policy argument as a hugely significant factor in the operation of a flexible and discretionary forum non conveniens doctrine is seriously flawed.

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to the fact that the (foreign) plaintiff obtains an advantage from trial in England


180 See Miller, supra note 42, at 1483.

181 See Slater, supra note 23, at 562.

182 See Birnbaum & Dunham supra note 92, at 261-62.

183 See Weintraub, supra note 2, at 352.


185 159 U.S. 113 (1895).

186 Id. at 163-64; see Paul, supra note 184, at 9.

187 It may be a valuable concept in other spheres of private international law, for example, in the context of international divorce recognition involving split-proceedings that are common to religious decrees. Robertson has stressed that: "Continental legal systems have never had a forum non conveniens doctrine at all: clearly it is not a necessary adjunct of civilisation."
International comity has been equated with international respect towards foreign nation states by not interfering in the legal infrastructures of those countries. This sentiment was clearly implemented by the underlying proposition in the Bhopal case, namely "[t]o 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 to revive a history of subservience and subjugation from which India has emerged." The outcome, according due magnanimity to the benefit of hindsight, is that the very obverse of respectful international relations has been effected by an overly liberal forum non conveniens approach. The impact of the Anglo-American conceptual analysis has been to allow local defendants sued by alien plaintiffs to circumvent the legitimate jurisdiction of their home forum. In Piper Aircraft, for example, it transpired "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." The overt flaw here is that courts (U.S. or U.K.) refusing to dismiss international tort cases on forum non conveniens grounds do not thereby mandate solutions for other sovereign states. Instead, the consequent impact is for the court to impose forum standards on home based corporations engaged in business activities (negligently) overseas. These decisions have only direct impact and effect upon corporate litigants and provide remedies for harm brought about by such defendants. As Miller has stated: "At most, these decisions might hurt the U.S. forum in which a case was tried, for example, if corporations leave a state where they receive an unfavourable judgment." There is no lack of international respect or undue interference when multinational companies resident in the United States (or United Kingdom) are prevented from escaping the regulatory and tort standards of the forum; harm occurs abroad but is causally linked to actions commenced within their home borders. It is not chauvinistic or disrespectful to foreign legal processes to retain jurisdiction over such actions:

The strength of the appeal to judicial comity is . . . difficult to assess in circumstances where some leading western countries, particularly in relation to actions by their own residents, decline to observe even the judicial restraint shown by

Robertson, supra note 1, at 426.

See Prince, supra note 18, at 580; Miller, supra note 42, at 1383.


Miller, supra note 42, at 1384.
common law courts under the traditional doctrine . . . 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
defereence 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.\textsuperscript{192}

An uncanny semaphore exists between the international respect argument
above and the rhetoric of comity strategically adduced by the real world
players in the forum non conveniens arena.\textsuperscript{193} In the Bhopal case, in federal
district court, “Union Carbide unstintingly praised the Indian judicial
system.”\textsuperscript{194} A totally different story applied when the dispute was deposited on
the jurisdiction of the Supreme Court of India. At that juncture the lawyers for
Union Carbide apparently “wantonly assailed the dignity and authority of the
[Indian] Supreme Court.”\textsuperscript{195} There has, in all truth, been a disregard of the real
issue of whether U.S. multinational corporations should be held responsible for
negligent activities causing injury abroad. In reality, concerns over respect for
the feelings of foreign governments are tactically abused in U.S. courtrooms
as a makeweight behind the real forum non conveniens issues; Machiavellian
games are played to obfuscate genuine concerns. Ironically, the Indian
government entered an appearance in the Bhopal case as a party in New York
arguing that the action proceed and be determined not in India, but before the
designated U.S. court.\textsuperscript{196} The moral high ground of anti-chauvinism is
employed by litigants (home defendants) as a stalking horse, creating a
beguiling fog of uncertainty\textsuperscript{197} behind the real underlying policy concerns of
forum non conveniens:

\textsuperscript{192} Oceanic at 254 (Deane, J.).
\textsuperscript{193} See Robertson, supra note 97, at 373.
\textsuperscript{194} Prince, supra note 18, at 577 (quoting Robertson, supra note 97, at 373).
\textsuperscript{195} \textit{Id.} (quoting UPENDRA BAXI & AMIT DHANDA, VALIANT VICTIMS AND LETHAL
LITIGATION: THE BHOPAL CASE xxiii-xxiv (1990)); see also Stephen J. Darmody, \textit{An Economic
Approach to Fourm Non Conveniens Dismissals Requested by U.S. Multinational Corpora-
\textsuperscript{196} See Robertson, supra note 97, at 373.
\textsuperscript{197} It has been stated that the Bhopal settlement involved “lawyerly infantile forensic antics.”
BAXI & DHANDA, supra note 195, at xv.
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.\(^{198}\)

Additionally, the proposition that international relations are threatened by breach of international comity in this arena is deeply implausible.\(^{199}\) It is unrealistic to suggest that a foreign government would be affronted by their citizens being allowed to recover damages abroad against U.S. multinational corporations. The opposite perspective, in Miller’s view, is that the perception that the United States callously disregards the imposition of their internal regulations when a multinational operates abroad “could strain diplomatic relations and create an unflattering reputation for U.S. exports.”\(^{200}\) In any event, the decision of a U.S. court to hear an action does not bar the government of the foreign plaintiff from setting in place local remedies. Irrespective of U.S. judicial decisionmaking, foreign governments are empowered to independently fashion their own schematic regulations to govern multinational corporations carrying on trade within their borders. Ideally, foreign governments should be encouraged to lay down their own substantive tort law that allows their citizens to effectively sue U.S. based corporations (malfeasors) in that citizens’ have jurisdictions. This utopia is far away for many (probably most) developing countries. For a multiplicity of economic, social, and cultural reasons, it may be unachievable in the future. In the meantime, Anglo-American forum non conveniens principles should not be skewed on so-called international comity grounds towards an unnecessarily liberal doctrine in favor of home defendants. The subtle nuances of the anti-chauvinism debate are strategically employed and, it is argued, not based on genuine concerns in this arena. They should be disregarded in future debates on appropriate guidelines; they do not merit the *éminence grise* currently accorded.

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\(^{198}\) Paul, *supra* note 184, at 71.

\(^{199}\) But see Fawcett, *supra* note 179, at 208 (“A decision by an English court on the place of trial carries with it the risk of coming into conflict with other states and this in turn may affect English relations with those states”). In this author’s view, this is apposite for divorce recognition and state interests consequently implicated, but less so in the forum non conveniens arena.

\(^{200}\) Miller, *supra* note 42, at 1386.
C. Forum Shopping and Perception of Contingency Fee Lawyers

For most of the lawyers and judges who are on record as approving the federal doctrine of forum non conveniens in its current form and usage, it seems that "forum shopping" means efforts by American personal injury plaintiffs' lawyers to earn big fees by selecting generous courts. Many of these lawyers and judges see American personal injury plaintiffs' lawyers as a blight on decent society whose every effort should be thwarted.\(^{201}\)

As Robertson states, an important subtext behind the federal standard of forum non conveniens was trenchant judicial hostility to perceived forum shopping by plaintiffs' lawyers operating on a contingency basis.\(^{202}\) A host of scathing epithets were laid down by judges castigating the conduct of American attorneys, especially in relation to the Bhopal and Dow Chemical cases.\(^{203}\) Opprobrium attached to such behavior was an important factor towards the dismissal in Bhopal. The conduct of some attorneys, on any moral perspective, was indefensible. Such conduct included an exodus to India to sign up clients; it has been chronicled that one lawyer signed over 7,000 Bhopal victims at the rate of about one a minute, another claimed 40,000 clients, and a third 57,000.\(^{204}\) Judge Keenan explicitly stated that such conduct was deplorable, and it undoubtedly tainted his view on appropriate venue:

\(^{201}\) Robertson, supra note 97, at 356. Robertson further states that "[t]his sentiment is a highly significant subtext in the forum non conveniens uris prudence. Id. at 361. See generally Carney, supra note 64, at 488-89.

\(^{202}\) See Robertson, supra note 97, at 361-62.

\(^{203}\) By way of illustration consider the following two statements:

Like turn-of-the-century wildcatters, the plaintiffs in this case searched all across the nation for a place to make their claims. Through three courts they moved, filing their lawsuits on one coast and then on the other. By each of those courts the plaintiffs were rejected, and so they continued their search for a more willing forum. Their efforts are finally rewarded. Today they hit pay dirt in Texas.

Alfaro, 786 S.W.2d at 697 (Cook, J., dissenting).

"The plaintiffs in this case are doggedly determined to find some court in the United States—any court—in which to try their foreign based claims. Once again they fail." De Aguilar v. Boeing Co., 11 F.3d 55, 56 (5th Cir. 1993).

\(^{204}\) See, e.g., Cummings, supra note 92, at 116 n.37.
The behavior of many American lawyers who went to Bhopal, India during December 1984 and January 1985 is not before this Court on this motion. Suffice it to say that those members of the American bar who travelled the 8,200 miles to Bhopal in those months did little to better the American image in the Third World—or anywhere else.205

Forum shopping has been viewed in a pejorative sense as a “disparaging” term, a term of “reproach,” a “nasty phrase [that] suggests that those who represent their clients’ interests effectively commit a breach of professional etiquette.”206 Advocates of the extant Gulf Oil/Piper Aircraft doctrine employ the anti-forum shopping argument as a strong underlying basis for maintaining current form and usage.207 In their terminology, forum shopping is equated to perfidious litigation brought by American personal injury plaintiffs’ lawyers to recover huge fees on a contingency fee basis for actions better resolved elsewhere. Their behavior is viewed as legal chicanery and a blight on legitimate professional behavior that must be terminated. It is submitted, however, that the egregious actions of a few disreputable attorneys in Bhopal is atypical and has colored proper analysis of the forum non conveniens debate.208 It has been forgotten that personal injury lawyers are seeking to make a living by advocating the interests of the injured and aggrieved. Despite the justified asperity of some of the criticism launched at members of the American bar who decamped to India in the immediate aftermath of the Bhopal disaster to solicit clients, the extreme level of “international ambulance-chasing” at least, served to give notice to the Indian government of the necessity of rigorously pursing claims on behalf of the victims.209 The American foreplay, even though the litigation itself was dismissed from U.S. venue, may have promulgated a beneficial, reasonable framework for compensation. Juenger, among others, has intimated that forum shopping can operate in a positive sphere, as it may promote important substantive policies, such as the protection of those injured by transnational activities, and it may act as a catalyst towards facilitating the vindication of environmental concerns.210

205 Union Carbide, 634 F. Supp. at 844 n.1.
206 Juenger, supra note 2, at 553, 572.
207 See Weintraub, supra note 2; Reynolds, supra note 17.
209 See Juenger, supra note 2, at 571.
210 See id.
Forum non conveniens is not, intrinsically, a disparaging term. The negative connotation associated with the phraseology should be removed. A lawyer who tactically chooses the jurisdiction where there is an optimal chance of a positive outcome is effectively representing his or her client in the best possible way. Any necessity of controlling the practice of forum shopping accrues only in a scenario where the claimant's primary object is to vex or harass the defendant, or where the foreign forum, taking account of the relevant connecting factors, is clearly inappropriate. This mirrors the perspective of the High Court of Australia in *Oceanic* and *Voth*, where forum shopping is only offensive as set against this strictly delineated test. Forum shopping should generally be viewed in a neutral, not a hostile, sense. It is bizarre that the selection by a plaintiff of an alien forum should be held up as an overriding determinant in favor of dismissal from that very forum.

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

Hostility to forum shopping in the United States has been combined with antipathy towards the contingency fee lawyer. This attitude ignores the fact that many high-profile product liability disputes, where industrial accidents have transpired in less developed countries, could only be funded abroad (in the defendant's home forum) on a contingency fee basis. There is no real choice among alternative fora, and it is risible to suggest otherwise because of cost implications. In such circumstances, it is farcical to "take resentment against a lawyer's conduct out on the lawyer's client." The overt danger here, where trial judges are prejudiced in favor of dismissal on anti-forum shopping and dislike of contingency fee grounds, is that the plight of the unfortunate victim is left unremedied. Strangely, no commensurate wrath has been incurred by lawyers earning their crust by propagating the interests of the

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213 See Slater, supra note 128, at 561.
215 Robertson, supra note 193, at 360 n.58. He also asserts that: "In such a climate, judges with discretion to dismiss cases will be quite inclined to exercise it against personal injury victims. In such a climate, the situation of the victims themselves is in continual danger of being forgotten." Id. at 356.
U.S. corporate defendant. There has been the development, without Supreme Court demur, of reverse forum shopping, which has been tactically employed by substantial numbers of products liability defendants. This detumescence bulwark has successfully precluded foreign victims from their only hope of compensation via a U.S. court decision. There is a disparity in equality as alien plaintiffs do not enjoy the same level of protection from harmful products as that enjoyed by U.S. residents.

The overreaching device of anti-forum shopping is available to U.S. corporations not simply in product liability disputes, but can be dispositive in generic forms of litigation. Reverse forum shopping presents a more concrete problem under the federal standard of forum non conveniens than perceived difficulties of forum shopping under an abuse of process standard. While the latter can be accommodated by dismissal of cases brought to harass a home defendant in a clearly inappropriate forum, the former can be manipulated by home defendants to give undue protection to their exportation of shoddy merchandise.

D. Outcome Determination and Docket Congestion

[A] court in New York cannot transfer a case to India. It can only dismiss. . . . These astonishing references to 'transfer' in the international forum non conveniens context are part of a euphemistic vocabulary whereby the true effects of a forum non conveniens dismissal are masked. . . . [I]n the real world, everyone knows that international plaintiffs who suffer forum non conveniens dismissals in the United States are typically unable to go forward in the hypothesized foreign forum.

A U.S. defendant may circumvent the progress of proceedings against him at a very early stage through the mechanism of a forum non conveniens dismissal. In practical terms, a dismissal 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.

See Weinberg, supra note 208, at 316.
See Juenger, supra note 2, at 563; Carney, supra note 64, at 488-89.
See Juenger, supra note 2, at 563.
Robertson, supra note 193, at 370-71.
See Duval-Major, supra note 18, at 670-71.
Robertson states:
[T]hese cases hardly ever [made] it to trial in a foreign forum . . . substantial
In the United States, modern day judges have falsely referred to “transferring" the case to the appropriate foreign tribunal and imposed conditions on the U.S. defendant to waive procedural bars, accede to extensive discovery or other adjectival requirements; the dismissal has been equated with a § 1404(a) internal transfer of venue with attendant obligations. This has been rightly castigated by Robertson as taking refuge in “a euphemistic vocabulary," a “rather fantastic fiction," and “Kafkaesque." He conducted a study involving an informal mail survey of 180 transnational cases dismissed from U.S. courts on forum non conveniens grounds. Of the eighty-five responses returned, eighteen cases were not taken any further in the foreign forum, twenty-two of them were settled for less than half of their estimated value, and in twelve the U.S. attorney lost track of the outcome. Most importantly, none of the reported cases ended with a courtroom victory in the foreign forum. Multinational corporations expend considerable time and resources on obtaining a forum non conveniens dismissal, as they know that the threat of further proceedings abroad is a mere quaint irrelevance.

In England the judiciary has been sensitive to the impact of the shift to a most appropriate forum test. There has been articulated a conscious awareness of the impact of staying English proceedings on dispute resolution; the new guidelines were cautiously embraced in Spiliada with eyes wide open to their harmful potentialities. It is hardly surprising that for a multiplicity of reasons the foreign plaintiff is unable to bring a further suit before the foreign tribunal. They may be unable to acquire effective legal representation abroad without a contingency fee basis and be unable to afford lawyers on retainer. Procedural and adjectival restrictions might apply in the alternative forum

number of plaintiffs gave up at some stage well short of significant satisfac-
tion of their claims... rather than embarking on an arduous journey through one or more foreign legal systems, many a plaintiff will simply surrender...

[M]any plaintiffs... run out of money, lawyers, stamina, courage or lifespan before completing the foreign voyage.

Robertson, supra note 1, at 418-20.

222 For discussion of § 1404 (a) internal transfer of venue, see supra note 74.

223 The quotations are from (in order): Robertson, supra note 97, at 370; Robertson, supra note 1, at 420 (quoting Miles v. Illinois Central R.R., 315 U.S. 698, 706 (1942) (Jackson, J., concurring)); Robertson, supra note 1, at 428 (quoting Irish Nat. Ins. Co. Ltd. v. Aer Lingus Teoranta, 739 F.2d 90, 91 (2d Cir. 1984)).

224 See Robertson, supra note 1, at 418-19. For further discussion and elaboration on this issue see Duval-Major, supra note 18, at 672; Solen, supra note 4, at 672.


226 See, e.g., Deshane v. Deere & Co., 726 F.2d 443, 444 (8th Cir. 1984) (Province of Ontario allowed no contingency fee, and plaintiff could not afford a retainer).
which restricts the chance of obtaining proper justice. Allied with these concerns, political implications may raise their head as U.S. multinational corporations can wield great economic strength in the United States, and contribute significantly in terms of overall employment and wealth. This can shield them from litigation, or coerce inadequate out-of-court settlements. Additionally, the frustrated claimant may not have the stamina or financial backing to commence fresh proceedings. It is hardly surprising in the light of this scenario that a U.S. defendant reacts with triumph when a U.S. action is dismissed on forum non conveniens grounds.²²⁷

Docket congestion implications have also played a significant role in this arena.²²⁸ Transnational business activity increased exponentially after the Second World War through improved means of transportation and communication. These reverberations affected the entire U.S. judiciary who, with uncommon frequency, had to deal with increasing numbers of international legal controversies. This resulted in delays of domestic trials, and the docket congestion problem reached epidemic proportions in the United States during the 1970s. This prognosis was a driving force towards the adoption of a more liberal forum non conveniens dismissal technique.²²⁹ An obvious remedy to promote expedited trials for U.S. residents was to exclude foreign plaintiffs seeking a U.S. hearing; recourse was sought through this mechanism rather than the reform of vague and overbroad in personam jurisdiction principles. A dichotomy emerged as the Supreme Court accepted docket congestion as a relevant consideration for forum non conveniens dismissals, but regarded it as a redundant factor in other contexts. Convenience and judges' unwillingness

²²⁷ Miller notes:
Because of severe monetary limitations on recovery in foreign forums, the absence of contingency fee arrangements, and the presence of restrictive discovery rules and products liability laws, dismissals in favor of foreign forums often constitute victory for the defendants. Few cases dismissed in the U.S. on forum non conveniens grounds ever reach trial abroad. Although courts and commentators routinely discuss forum non conveniens as if the issue at stake were a choice between two competing jurisdictions, in fact, the usual choice is between litigating in the United States or not at all.

²²⁸ See generally Reus, supra note 23, at 471.
²²⁹ See Miller, supra note 42, at 1380 (“Federal courts frequently raise docket congestion concerns to justify dismissing a foreign plaintiff's suit on the ground of forum non conveniens”); Litman, supra note 111, at 595 (stating that convenience to the court has been a vital part of the forum non conveniens doctrine); Ann Alexander, Note, Forum Non Conveniens in the Absence of an Alternative Forum, 86 COLUM. L. REV. 1000, 1019 (1986) (“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.”).
to hear disputes are wholly inappropriate considerations outside forum non
conveniens decisions.\textsuperscript{230} Administrative hyperbole has swayed legal principles
on choice of venue, with consequential inequality between litigants. It seems
inappropriate to presumptively favor an American claimant suing a foreign
defendant over an alien plaintiff seeking redress from a domestic defendant.
In the battle for court resources, set against an overcrowded court system, the
burden, if anything, ought to be reversed to charge U.S. plaintiffs with the onus
of explaining why the action cannot be determined in the jurisdiction of the
foreign defendant.

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.”\textsuperscript{231}

It is often forgotten that forum non conveniens requires a preliminary
hearing to resolve the venue dispute; parties are litigating to decide where to
litigate.\textsuperscript{232} At this hearing all relevant factors concerning the location of the
action need to be explored, and these hybrid considerations incorporate the
substantive merits of the dispute. Because of the outcome-determinative nature
of the inquiry, the respective litigants will be advised to expend vast amounts
of time, money, and resources in gathering extensive discovery documents to
aid their arguments. This expenditure seriously underscores the perceived
benefits of clearing docket congestion through liberal forum non conveniens
dismissals, a position held by proponents of the current federal standard.
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.”\textsuperscript{233}

\textsuperscript{230} See Reus, \textit{supra} note 23, at 471.
\textsuperscript{231} Robertson, \textit{supra} note 1, at 417.
\textsuperscript{232} See Duval-Major, \textit{supra} note 18, at 676.
\textsuperscript{233} \textit{Id.} Duval-Major also states:

In most cases, the length of a trial on the merits will greatly exceed the forum
non conveniens inquiry (e.g., the Bhopal case). However, in many cases,
when extensive discovery has taken place or a court has considered the merits
of the cause of action in some detail the imposition on the resources and time
of the court has already taken place to a large extent. The court should,
The overcrowding of court calendar problem has been less pervasive in England, and has engendered less anxiety than in the United States because of the significant lure of the U.S. judicial system to a litigant.\textsuperscript{234} The English system does not enjoy the same attractive features to the claimant in a transnational dispute. However, on occasions during the 1970s and 1980s, lip-service was paid by the English judiciary to the dangers of overburdening the court structure and resources with international personal injury actions.\textsuperscript{235} Docket congestion was, though, a less significant factor in the move towards the most appropriate forum test enunciated in Spiliada than was apparent in Piper Aircraft and highlighted in the Bhopal case.\textsuperscript{236} The transnational litigation attracted to England tends to be of high quality, and is valuable from an economic standpoint. In Scotland, their courts have expressly disapproved of court congestion as a basis for staying proceedings.\textsuperscript{237} In any event, there is still a pervading feeling of judicial self-esteem that foreign corporations rely on the English Commercial Court as the trial venue.\textsuperscript{238} For instance, in Sohio Supply Co. v. Gatoil (USA), Inc.,\textsuperscript{239} it was suggested that the parties come from overseas in twenty-eight percent of cases heard before the Commercial Court. Economic benefits attendant to such dispute resolution are significant:

\begin{quote}
London is a centre for international trade, foreign businessmen 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 hoped that persons who bring litigation to this country will also bring trade.\textsuperscript{240}
\end{quote}

It is submitted that the administrative concern of docket congestion has mistakenly affected on forum non conveniens equation in the United States.

\textit{Id.}

\textsuperscript{234} See supra notes 2-4 and accompanying text.


\textsuperscript{236} See generally Slater, supra note 23, at 562; see also Fawcett, supra note 27, at 145.


\textsuperscript{238} See Fawcett, supra note 27, at 217.


\textsuperscript{240} Fawcett, supra note 179, at 146.
The impact of this has been felt by alien plaintiffs excluded from U.S. courts. It has prevented vague in personam jurisdiction principles from being properly addressed. This has been combined with the outcome-determinative effect of dismissal which sends the action to the abyss of irredeemable failure; metaphorically it is a Bermuda triangle from which the action never resurfaces.

E. Trial Court Discretion and Lack of Appellate Review

The Reyno decision makes American plaintiffs subject to a type of "most suitable forum" approach, but the federal district courts appear to have failed to develop reliable standards with which to balance the conflicting public and private interest factors so as to make certain that the choice of forum was reasonable and even predictable.241

The adoption on both sides of the Atlantic of the most appropriate forum test has left the trial judge as the "emperor" of the forum non conveniens realm.242 This ubiquitous power includes the balancing of various factors to determine whether a more suitable forum exists abroad.243 In England all relevant factors need to be considered to properly locate the dispute, and similarly in the U.S., there is an onus to consider both public and private interest factors in the overall balancing process. No rigid rules have been codified to assist the discretion; the test is inherently flexible, and each case turns on its own facts.244 It is hardly surprising, with such amorphous principles, that diametrically opposite results have transpired from cases that

242 See Weintraub, supra note 2, at 330; see also Robertson, supra note 97, at 359.
243 Slater has drawn a marked contrast in this regard with the old abuse of process test by which 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 balancing 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 secondary trial but the expenditure of time and money involved in an additional trial is out of all proportion to the importance of the question under consideration.

Slater, supra note 23, at 569.
244 The U.S. Supreme Court opined that it "would not lay down a rigid rule to govern discretion, and that each case turns on its facts. If central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable." Piper Aircraft, 454 U.S. at 249-50.
are seemingly indistinguishable. The list of factors 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 twenty five factors that could be relevant to a forum non conveniens dismissal. The result is a doctrine that is no more than "a set of habitual practices and attitudes."

Difficulties are exacerbated by what is virtually unreviewable judicial discretion. The trial judge, as emperor, is insulated from effective appellate review. Reviewable error only occurs where there has been a clear abuse of discretion. In the U.S., a trial judge can generally immunize his or her decision simply by reciting the litany of factors established in Gulf Oil/Piper Aircraft; in England no clear guidance exists on how to weigh the competing factors, and reversal is a rare occurrence. The problems of predicting choice of venue, and consideration of the multifarious conflicting factors that may or may not be determinative, are explored further in Section Four. Suffice to conclude at this juncture that "judicial discretion is so broad and so vaguely circumscribed as to amount to an instinctive process." A forum non conveniens decision by the trial judge is necessarily so intuitive and subjective that successful prediction of the result by a litigant is unlikely.


247 Robertson & Speck, supra note 19, at 971 n.220. See generally Weintraub, supra note 2, at 329-30; Stein, supra note 16, at 785.

248 In The Abidin Daver, Lord Brandon stated that the fact that the Court of Appeal disagrees with the weight that the trial judge has given to the various relevant factors is not sufficient to justify intervention. It can only interfere in three cases: (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge in exercising his discretion has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) where his decision is plainly wrong. The Abidin Daver, [1984] A.C. at 420.

249 Robertson & Speck, supra note 19, at 971.

250 Except where an alien plaintiff sues a resident defendant in the United States. In this scenario it can generally be successfully predicted that the claimant loses the venue battle.
A. The Development of English Law

The conceptual doctrine of forum non conveniens has developed in English law over the course of the last two decades to allow a court discretion to decline jurisdiction in favor of a foreign court which it views as a more appropriate forum for the determination of the dispute.251 This general power to stay actions on the basis of forum non conveniens has existed, as previously identified, for a number of years in the United States.252 Essentially, there are two sides to the coin. Where a claim form is served on a defendant who is present within the jurisdiction, the defendant can apply for a stay of proceedings predicated on the argument that a more appropriate forum exists abroad. Alternatively, where leave is sought by a claimant to serve a claim form abroad under Order 11 of the Rules of the Supreme Court, it will be rejected unless the court is convinced that the forum conveniens is indeed in England.253 Of course a cost implication is presumptively involved in such a search for the putative proper or appropriate forum for trial. Ascertainment of such a forum has itself spawned litigation: parties to a dispute have chosen to litigate in order to determine where they shall litigate.254 Indubitably, the more flexible the principles, the more often one of the litigants will believe it to be worthwhile to contest their application in a particular case.255

Although it has been well-established under English principles that discretionary leave under RSC Order 11 leave to serve a claim form out of the jurisdiction will be denied on forum conveniens grounds,256 similar concepts were initially deemed inapplicable where English jurisdiction was invoked as of right. It would be a rare and wholly exceptional case where a litigant would

253 Service abroad under R.S.C. Ord. 11 is one of three traditional common law bases of jurisdiction; the other two are based on presence and submission.
255 See Slater, supra note 23, at 555.
be disallowed from pursuing an action in England. In *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*, the jurisprudence that had developed over the previous 50 years was summarized 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. (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 other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

The effect of the *St. Pierre* test, adumbrated above, was 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. A mere balance of convenience was not a sufficient ground for depriving a claimant of the advantages of prosecuting his action in England. The pithy comment of Lord Denning that “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,” reflected judicial attitudes focusing on the innate superiority of English justice and her court system. By way of contrast, forum non conveniens principles were developed

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257 Before 1906, discretionary dismissals were only granted under the *lis alibi pendens* doctrine, and then only if the same controversy was pending both in England and abroad and involved the same parties and subject matter. In 1906, a stay of proceedings on grounds resembling forum non conveniens criteria was granted for the first time. The decision in Logan v. Bank of Scotland, [1906] 1 K.B. 141 (C.A.) was based on the vexatious and oppressive motives of the claimant that amounted to an abuse of process.


259 *Id.* at 398 (emphasis added).


at an early stage under Scottish jurisprudence. However, a more liberal and relaxed English approach was eventually adopted by the House of Lords in the early 1970s in the Atlantic Star, developed further in MacShannon v. Rockware Glass, Ltd. and in The Abidin Daver, Lord Diplock was able to say that the time had come to frankly acknowledge that English law in this field had become "indistinguishable from the Scottish legal doctrine of forum non conveniens." Judicial chauvinism had apparently been replaced by judicial comity. The concept was developed further by Lord Goff in Spiliada Maritime Corporation v. Cansulex, Ltd. and his guidelines have been treated subsequently as having definitive effect.

The striking feature of the modern common law rules are the flexibility thereby engendered by using a wide range of pertinent factors in the forum non conveniens equation. A fundamental dichotomy exists here with a Brussels Convention analysis. It was clearly set out by the Schlosser Report that Title II of the 1968 Convention is based on the rationale that a properly seised court under the jurisdictional rules must determine the dispute to which the action

262 But see Sim v. Robinow, 19 R. 665 (1892).
263 [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 Belgian ship owners which arose out of a collision on the River Scheldt leading to the port of Antwerp, and this occurred in Belgian waters.
264 [1978] A.C. 795. According to the reformulated new dual test adopted by Lord Diplock for a defendant to justify a stay he must:
(a) satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience and expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.
Id. at 812.
265 [1984] A.C. 398. In this case a Cuban vessel collided with a Turkish vessel in the Bosphorus in Turkish waters. An action was started by the Turkish owners in Turkish court in Istanbul. The Cuban owners began an action in rem in the English Admiralty Court. The Turkish owners asked for a stay of this action, and this was eventually granted by the House of Lords. See generally Adrian Briggs, Forum Non Conveniens—Now We Are Ten?, 3 LEGAL STUD. 74 (1983); Adrian Briggs, The Staying of Actions on the Ground of Forum Non Conveniens, in England Today 1984 LLOYD'S MAR. & COM. L.Q. 227; Aarif Barma & David Elvin, Forum Non Conveniens: Where Do We Go From Here?, 101 LAWQ. REV. 48 (1985); J.J. Fawcett, Lis Alibi Pendens and the Discretion to Stay, 47 MOD. L. REV. 481 (1984); Rhona Schuz, Controlling Forum-Shopping: The Impact of MacShannon v. Rockware Glass, Ltd., 35 INT'L & COMP. L.Q. 374 (1986).
266 The Abidin Daver at 411.
relates. The concepts of discretionary and flexible forum non conveniens principles are anathema to the Convention, it is unique to England and Ireland, and unknown in the laws of the Continental European countries. The Contracting States not only have the option of exercising jurisdiction in accordance with Title II of the Convention; they also are obliged to do so. According to the Schlosser Report, “[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.” In particular, in accordance with the general spirit of the 1968 Convention, the fact that a foreign law has to be applied should not be considered a proper reason for declining jurisdiction.

Traditional principles, on the other hand, are intrinsically discretionary, and unique, the characteristics of each case will determine the outcome. Indeed, as Hogan has stated, “the very flexibility of this doctrine . . . is at once an advantage and a disadvantage.” On the merit scale, the courts, when applying the doctrine, may mitigate the seeming coldness of jurisdictional rules by directing cases to the more appropriate forum. However, on the demerit scale, the application of the doctrine creates confusion and has generated a much preliminary litigation concerned with identifying the correct forum. Such an inherent uncertainty conflicts with the basic premise of the Brussels Convention imposing a mandatory rule, to the effect that the plaintiff can sue in the place where the defendant is domiciled.

B. The Spiliada Principles

The key elements of the English appropriateness test were established in Spiliada Maritime Corporation v. Cansulex, Ltd. At issue was the requisite principles in relation to service of a writ out of the jurisdiction under Order 11

268 See Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and The Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on Its Interpretation by the Court of Justice, 1979 O.J. (C59) 71 [hereinafter Schlosser Report]. The Schlosser Report states that “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.” Id. at 97.

269 Id. at 97-98.

270 Id.

271 Id.

272 Hogan, supra note 48, at 473.

273 See id.

of the Rules of the Supreme Court. Cansulex was an exporter of sulphur from British Columbia; Spiliada was a Liberian ship owner whose ships were managed from Greece and England. The latter had chartered a ship to an Indian company under a voyage charter to carry sulphur from British Columbia to India. It was alleged that the sulphur was wet, and hence dangerously corrosive when loaded, and Spiliada argued that it had consequentially caused damage to the ship. English law was the governing law under the bill of lading, and Spiliada sought leave to serve Cansulex out of the jurisdiction under the contractual subsection of Order 11. Leave was obtained, and an application to set it aside was denied by Justice Staughton, on the basis that trial of the issue in England was apposite in the case. This decision was reversed by the Court of Appeal, but subsequently restored by the House of Lords. The leading judgment was delivered by Lord Goff, who adumbrated similar principles for stay applications as for applications under Order 11, with the exception that under the former the burden of proof rests on the defendant, whereas in the latter scenario it is the plaintiff who needs to suitably convince the court. The determinative principles, treated subsequently as of crucial significance, can be boiled down to the following effect:

(1) 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 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.

(2) The defendant has the burden of persuading the court to stay the proceedings; however the party that raises a particular issue must prove it.

(3) The burden resting on the defendant is not just to show that England is not the natural or appropriate forum, but it is 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. For instance,


in *European Asian Bank AG v. Punjab and Sind Bank*, a case involving a dispute regarding a letter of credit, including 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, and in the circumstances the defendant's application for a stay would be dismissed.

(4) The court's duty is to look for connecting factors such as inconvenience or expense of trial, including the availability of witnesses, the governing law and the parties' places of residence or business. These factors point to what Lord Keith called in *The Abidin Daver* 'the court with which the action has its closest and most real connection.'

(5) 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.

(6) 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. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.

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278 Lord Goff did not define "justice," but he referred back to Lord Diplock's consideration of the word in *The Abidin Daver* where he stated:

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 suits whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts, or the unavailability of appropriate remedies.


279 *Spiliada* at 476-78 (Goff, L.J.).
Significantly, the importance of "legitimate personal or juridical advantage," applied in MacShannon by Lord Diplock, and presumptively embracing higher damage awards or wider discovery in favor of the plaintiff, has been downgraded. It is only one factor and cannot be decisive since, as Collier states, "the plaintiff's advantages are obviously, the defendant's disadvantages." 280

In accordance with the governing Spiliada test, the question is not one of convenience, but it is one of the suitability or appropriateness of the relevant jurisdiction. 281 The old jurisprudence, derived from the venerable St Pierre test, wherein would an English court stay proceedings only in exceptional cases commenced as of right, has been replaced by a more liberal approach, allowing a stay where England is an inappropriate forum. This liberalization remains circumscribed since, as Fawcett has cogently identified, the principles upon which English courts exercise their discretion do not operate in a wholly neutral way, but are still skewed in favor of trial in England. 282 It remains incumbent upon the defendant to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.

Under the first stage of the Spiliada inquiry, the burden of proof is on the defendant to show that there is another available forum which is clearly or distinctly more appropriate than the English forum. 283 Once it has been established that there is a clearly more appropriate forum for trial abroad then the burden of proof, under the second stage of the inquiry, shifts to the claimant to justify trial in England. 284 At this juncture the court is concerned with the issue of whether justice requires that a stay should not be granted. The "sceptre'd isle" employs a similar two-part analysis to the U.S. federal standard to determine whether the forum is appropriate. 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 is that English courts do not have an overt preference for home claimants over alien claimants.

280 See Collier, supra note 275, at 35.  
281 See Spiliada at 474.  
282 See Fawcett, supra note 179, at 217.  
283 See Spiliada at 476.  
284 See id.
V. RELEVANT FACTORS IN THE FORUM NON CONVENIENS DISCRETION: SOLIPSISTIC DEVELOPMENTS BY ANGLO-AMERICAN JUDICIARY

"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."  

If law is a seamless web, certainly one of its problematic strands is ascertainment of conditions determinative of the forum non conveniens equation. 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. A multiplicity of factors need to be evaluated. In a similar vein, the U.S. federal standard encompasses an ethereal myriad of private and public interest conditions. Whether the balance tips in favor 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, the court’s view of what forum ought to litigate the case from the perspective of judicial comity, or even the residence of the respective parties. Unfortunately, it is not possible to state with any certainty which factor in any particular case will be viewed as either relevant or decisive. In Spiliada, it was stated with great foresight by Lord Templeman 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."  

These relevant factors need to be evaluated to see if any pattern emerges through the expensive fog of uncertainty. Although the principles are loaded in favor of trial in England, such a presumption may be displaced by countervailing connecting factors with a foreign forum. In the United States, a range of epigenetic influences on venue selection can make prediction uncertain.

285 Robertson, supra note 97, at 359.
286 Spiliada at 465.
A. Impecuniosity and Cost Implications

The relevance of ability to pay costs recently arose before the English House of Lords in *Connelly v. RTZ Corp.*²⁸⁷ in the context of the availability of legal aid provision or a contingency fee arrangement. It was determined therein that where a claimant 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.

In *Connelly*, 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. Being wholly without means, the claimant 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 defendant applied for a stay of proceedings. Clearly Namibia, under the first stage of the *Spiliada* inquiry, was the country with which the dispute had its most real and substantial connection. The claimant, however, sought to restrict the grant of a stay on the ground that, through financial factors, substantial justice would not be done in Namibia. Did the impecuniosity of the claimant, who was eligible for legal aid as well as contingency fee arrangements in one jurisdiction (England), but ineligible in the other (Namibia), tip the scales in favour of a refusal to stay?²⁸⁸

Lord Goff, with whom the majority of the House of Lords concurred, determined that a stay should *not* be granted.²⁸⁹ Where the possibility of either


legal aid or a conditional fee arrangement was an issue, the general principle was that if a more appropriate forum had been identified, the stay would not be refused simply because the claimant would not have financial assistance available to him overseas which would be available in England. In exceptional cases, however, the question of the availability of financial assistance could be a relevant 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. This exception, apparently, was applicable to Connelly's situation since substantial justice could not be done in the appropriate forum, Namibia, but could be done in England where the necessary resources were available. Lord Goff elaborated upon a number of propositions which led him to overcome the presumption in favor of a stay. These were: (i) 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; (ii) that the trial could not take place without financial support; and (iii) 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.

The outcome of the majority in Connelly, in refusing to accede to a stay, is to be welcomed; 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 forum conveniens principles, flatly contradicts earlier cases not referred to in the judgment. By way of contrast to Connelly, in The Nile Rhapsody, involving a contractual dispute over an Egyptian charter-party, the inability to recover any costs in Egypt was treated as an insignificant factor.

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290 See id. at 872.
291 See id. at 873-74.
292 This argument ties in with reform of United States jurisdiction principles on the domicile model advocated by the Brussels Convention; see below p. xx. See infra pp.76-78.
293 See Connelly, [1998] A.C. at 874. Lord Hoffmann dissented on this point 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.

Id. at 875-76 (Hoffman, L.J., dissenting). See Briggs, supra note 287, at 359-60.
in the overall balancing exercise. This result was replicated in *The Polesk*\(^{295}\) where inability to recover of costs before the court system in St. Petersburg, Russia was disregarded.

These conflicting authorities, magnified by the recent vacillations in *Connelly*, serve only to illustrate the pervading uncertainties over attribution of legitimate factors. A complex web of exogenous influences needs to be extirpated. In the light of such conflict, *ex hypothesi*, it is extremely difficult to advise a commercial client as to the effect of differing cost systems within alternative fora.

**B. Delay**

Similar difficulties apply in determining the relevance of delays within the foreign forum, with dissonant outcomes presenting a beguiling Hobson's Choice for the interested parties. In *The Vishva Ajay*, 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.\(^{296}\) A substantial body of evidence existed that if the case were to proceed in the High Court at Bombay the trial would be delayed for many years. Apparently, many actions, according to the court, did "not reach trial in less than 10 years and it would be wholly exceptional for an action to come on for trial in less than six years."\(^{297}\) Delays of this magnitude were viewed as a denial of justice. By way of contrast, in *The Nile Rhapsody*, 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.\(^{298}\) A similar point was made by the Queen's Bench Division Court in *The Polesk*, a case involving loss of cargo when a Russian vessel sank in the South Atlantic. The court refused to

\(^{295}\) [1996] 2 Lloyd's Rep. 40 (Q.B.); *see also* *The Varna* (No. 2), [1994] 2 Lloyd's Rep. 41 (Q.B.). In *Roneleigh, Ltd. v. MII Exports, Inc.*, [1989] 1 W.L.R. 619 (C.A.), the Court of Appeal upheld the first instance judgment permitting service of a writ out of the jurisdiction, although the factual matrix overwhelmingly identified New Jersey as the forum conveniens. Since the law of New Jersey operated to prevent a successful plaintiff from recovering costs, it was enunciated that substantial justice would be denied in the foreign forum. Similarly, in *The Vishva Ajay*, [1989] 2 Lloyd's Rep. 558 (Q.B.), where the alternative court was Indian, the denial of costs before the Indian judiciary system was a substantial factor in refusing the stay of English proceedings with *fiscus conveniens* thus trumping forum conveniens; *see also* *S.W. Berisford Plc. v. New Hampshire Ins. Co.*, [1990] 2 Q.B. 631.


\(^{297}\) *Id.* at 560 (Sheen J.).

\(^{298}\) *See The Nile Rhapsody* at 414 (Hirst, J.).
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.\footnote{See The Polessk at 51.} Nor in The Varna (No.2) were delays before the Bulgarian court, self-evidently the forum conveniens for resolution of a dispute focused on a Bulgarian charter-party, treated as a significant circumstance making it unjust to grant a stay of the action.\footnote{See The Varna (No. 2) at 47-48.} Extreme delays can be a decisive factor in the balancing equation, but it is unclear what constitutes such a circumstance.\footnote{See generally NORTH & FAWCETT, supra note 251, at 346-47.}

C. Witness Protection

An important factor, with attendant cost implications, may be the necessity of protecting essential 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 caused to others by the absence of witnesses from their work place.”\footnote{Fawcett, supra note 179, at 208 (quoting The Sidi Bishr, [1987] 1 Lloyd’s Rep. at 43).} Such a factor was crucial in The Rothnie.\footnote{See, HILL, supra note 44, at 269. Note the advantage to the claimant may incorporate issues relevant to the aftermath of the trial, for example, ease of enforcement of an English judgment circulating throughout Europe. See International Credit & Inv. Co. (Overseas) v. Shaikh Kamal Adham, [1999] I.L. Pr. 302 (C.A.); Dubai Bank, Ltd. v. Abbas, [1998] I.L. Pr. 391, 404 (Q.B.). See generally NORTH & FAWCETT, supra note 251, at 346-47.} The plaintiff was an English company doing business in England, owned the vessel at issue pursuant to a bareboat charter. The defendant, also an English company carried on business repairing ships in Gibraltar. The plaintiff contracted with the defendant to repair and maintain the Rothnie in the defendant’s Gibraltar dry-dock; the dispute centered on the quality of this repair work.\footnote{See, The Wellamo, [1980] 2 Lloyd’s Rep. 229, 232 (Q.B.).} 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 here [in England].”\footnote{See The Rothnie at 207.} The concern in this situation 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 will be interrupted by attendance in Court to give evidence.”\footnote{Id. at 211.} Similar principles

\footnote{\(2000\)}
underpinned the decision in *MacShannon v. Rockware Glass Ltd.*\(^{307}\) where all the witnesses were in Scotland, a vital factor in identifying Scotland rather than England as the appropriate forum. Lord Diplock stated that:

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\ldots \text{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 others which would otherwise be spent on activities that are more directly productive of national wealth or well-being.}\(^{308}\)
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Similarly, in the United States, private interest concerns have focused upon matters such as: the location of the witnesses and documents;\(^ {309}\) the cost of translating documents and testimony;\(^ {310}\) the cost of producing the evidence at trial;\(^ {311}\) and the location of the physical evidence.\(^ {312}\) These factors may prove less relevant in future years because technological innovations and ease of travel have diminished the practical impact and judicial significance of these considerations.\(^ {313}\)

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\(^{308}\) Id. at 813-14 (emphasis in original).

\(^{309}\) See *Piper Aircraft*, 454 U.S. at 258.

\(^{310}\) See *Union Carbide*, 634 F. Supp. at 858-59 (stating that it would be easier to review documents in India because translation problems would be avoided); in relation to *Bhopal* relevant factors see also Cummings, supra note 92, at 156-59; Liossatos v. Clio 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); Constructora Ordaz, N.V. v. Orinoco Mining Co., 262 F. Supp. 90, 92 (D. Del. 1966) (concluding that litigation in U.S. court would obviate the need for translation into Spanish of every documentary piece of testimony).

\(^{311}\) *Union Carbide*, 634 F. Supp. at 858 n.20 (noting that victims and their medical records were located in India). See generally Birnbaum & Dunham, supra note 92, at 251-52 (discussing *Bhopal* relevant factors).

\(^{312}\) See *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n.4 (11th Cir. 1985) (noting that accessibility to sources of proof is an important factor in forum non conveniens determinations); *Calavo Growers v. Belgium*, 632 F.2d 963, 967 (2d Cir. 1980) (acknowledging that relevant documents were located in Belgium); *Harrison v. Wyeth Lab.*, 510 F. Supp. 1, (E.D. Pa. 1980) (comparing quantity of corporate records in Pennsylvania with quantity of subsidiary records in United Kingdom).

\(^{313}\) In *Picketts v. International Playtex*, 576 A.2d 518 (Conn. 1990), Canadian family member claimants sued a Canadian tampon manufacturer and its U.S. parent 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
An interesting feature of U.S. jurisprudence has been the importance attached to the attempt to identify the focal epicenter of the cause of action.\textsuperscript{314} There has been a litany of product liability cases involving products designed, tested and manufactured by U.S. companies without adequate warning of their potential risks causing serious, debilitating injuries to foreign claimants.\textsuperscript{315} The outcomes in these instances have been conflicting and inconsistent; the adjudicative and interpretative process has been deeply flawed.\textsuperscript{316} In general, application of the \textit{Piper Aircraft} doctrine has meant that a foreign claimant's forum choice has faced a presumption of inconvenience in suits against United States-based multinationals. Product liability actions have failed on the premise that U.S. fora do not have a significant interest in regulating the sale of products beyond their borders. By way of contrast, some courts focused on the true essence of the tortious conduct by identifying the locus of the primary feature of negligent conduct, and that consequentially refused to dismiss where the U.S. defendant had substantial involvement in the alleged wrongdoing.\textsuperscript{317}

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 United States; the focal gravity of the cause of action is determinative of venue resolution.\textsuperscript{318} 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.\textsuperscript{319} The courts have simply pointed out that a defendant's inability to compel foreign witnesses to testify in a trial in the United States can be ameliorated by procuring their

inconvenient for evidence purposes. Given modern technological innovations, such as videotaped depositions, the court found the absence of certain witnesses during trial of limited weight. \textit{See Picketts,} 576 A.2d at 529.\textsuperscript{314} \textit{See Carter-Stein,} supra note 43, at 172-74; \textit{Litman,} supra note 111, at 578, 596-98; Bimbaum & Dunham, \textit{supra} note 92, at 253-60.\textsuperscript{315} \textit{See, e.g.,} \textit{Holmes,} 202 Cal. Rptr. 773; \textit{Stangvik,} 819 P.2d 14; \textit{Harrison,} 510 F. Supp. 1; \textit{Picketts,} 576 A.2d 518; Dowling v. Richardson-Merrell, Inc., 727 F.2d 608 (6th Cir. 1984); Carlenstolpe v. Merck & Co., 638 F. Supp. 901 (S.D.N.Y. 1986) (allowing Swedish manufacturer to sue New Jersey producer of hepatitis vaccine for injuries); Chan Tse Ming v. Cordis Corp., 704 F. Supp. 217 (S.D. Fla. 1989) (stating Florida has interest in litigation where the manufacture and testing of pacemaker injured a Hong Kong plaintiff).\textsuperscript{316} \textit{See Litman,} supra note 111 at 581.\textsuperscript{317} \textit{See, e.g.,} \textit{Holmes,} 202 Cal. Rptr. 773; \textit{Carlenstolpe,} 638 F. Supp. 901; \textit{Chan Tse Ming,} 704 F. Supp. 217.\textsuperscript{318} \textit{See Carter-Stein,} supra note 43, at 174 nn.30-34.\textsuperscript{319} \textit{See Carlenstolpe,} 638 F. Supp. at 907. In conflict with \textit{Piper Aircraft}, the courts on occasion have placed great emphasis on the private interest factor concerning liability evidence without initially balancing other relevant factors such as the location of causation, damages evidence, availability of witnesses and subsidiary adjectival evidence.
testimony in deposition or documentary form.\textsuperscript{320} Whatever the merits of venue resolution, the contextualized approach in these authorities is flagrantly contradictory to the federal standard enunciated in \textit{Gulf Oil/Piper Aircraft}.

\textbf{D. The Applicable Law}

When evaluating the appropriate forum for trials an important factor to consider is the applicable law.\textsuperscript{321} Beneficial consequences ensue from the fusion of applicable law and natural forum as "it contributes towards an efficient administration of justice if trial is held in the country whose law is to be applied."\textsuperscript{322} For instance, if an English court has to apply a foreign law, then it will have to struggle to determine the relevant principles of the foreign legal system; it will have to decide on many occasions between competing foreign expert witnesses, relating to the extent position all with a consequential waste of judicial time and resources.\textsuperscript{323} Alternatively, where English law is the applicable law, this factor amounts to significant logical support for the trial to be held in England. If the trial occurs abroad, then the foreign court will face similar problems concerning the efficient administration of justice, as well as in necessitating the proof of English law. This factor was decisive in \textit{E.I. du Pont de Nemours & Co. v. Agnew},\textsuperscript{324} a case involving product liability insurance contracts, where the proper law controlling the Lloyd's policy, the lead policy, was English. The notice of potential claims was to be given to

\textsuperscript{320} See Picketts, 576 A.2d at 529.

\textsuperscript{321} In evaluating public interests the Supreme Court stated that the choice of law inquiry should be accorded substantial weight. See \textit{Piper Aircraft}, 454 U.S. at 260. If the district court heard the case the jury could 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 likewise militated in favor of dismissal. See id. at 259-60.

\textsuperscript{322} Fawcett, \textit{supra} note 179, at 221.

\textsuperscript{323} In \textit{Banco Atlantico S.A. v. British Bank of the Middle East}, [1990] 2 Lloyd's Rep. 504 (C.A.), the Court of Appeal overturned a stay of proceedings in favor of the case being heard in the United Arab Emirates. The court was mindful therein of the application of UAE law resulting in no prospect of the plaintiff succeeding, whereas Spanish law was determinative within the English forum. See \textit{Banco Atlantico}, [1990] 2 Lloyd's Rep. at 508. Similarly in \textit{Charm Maritime Inc. v. Kyriakou}, [1987] 1 Lloyd's Rep. 433 (C.A.), it was significant to the stay equation before the English Court of Appeal that the Greek court would apply its own law to a complicated trust dispute, whereas the English court would apply English law. See \textit{Charm Maritime}, [1987] 1 Lloyd's Rep. at 447.

\textsuperscript{324} [1987] 2 Lloyd's Rep. 585 (C.A.). For disregard of applicable law as a relevant factor see \textit{The Varna (No. 2)}, 2 Lloyd's Rep. at 48-49 (Clarke, J.).
Lloyd’s brokers, and thus it was established that England was clearly the more appropriate forum for trial of the action.

In Cleveland Museum of Art v. Capricorn Art International S.A., a very valuable reliquary was not returned under a loan agreement governed by the law of Ohio. What law would be applicable was an important factor asserted by Judge Hirst in staying English proceedings in favor of the Ohio court, as the latter was clearly the more appropriate forum for the trial of the action.

Similarly, in The Lakhta, where all documents were in Russian and all witnesses would have to come from Russia, the expense of the trial would be increased, and would cause great personal inconvenience to the court, parties and witnesses. Hence all these factors were indicative that a Russian forum, rather than an English forum would be clearly and distinctly more appropriate. It is clear that considerable weight is attached to the applicable law in the discretionary balancing exercise.

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 its substantive policies. Although substantive concerns should not be conclusive, factoring them into the forum non conveniens calculus may be consistent with the doctrine’s role as an equitable, discretionary, and unique litigation-allocation device; their relevance is examined as part of the sub-section below.

E. Multiplicity of Proceedings and Substantive Merits Analysis

Multi-party litigation in different forums raises the danger of inconsistent decisions being rendered by different courts. Unwelcome cost implications

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326 [1992] 2 Lloyd’s Rep. 269 (Q.B.). The language of witnesses and documents has also been significant in U.S. jurisprudence. See, e.g., Union Carbide, 634 F. Supp. at 862 (because of the large number of Indian language-speaking witnesses, the jurors would be required to endure continual translations that would double the length of trial); Barrantes Cabalceta v. Standard Fruit Co., 667 F. Supp. 833, 838-39 (S.D. Fla. 1987) (retaining jurisdiction over a foreign plaintiff’s products liability suit would force the court to conduct a complex exercise in comparative law and consider foreign law with which the court is not familiar and which is in a foreign language). See generally Miller, supra note 42, at 1390 n.111; Robertson & Speck, supra note 19, at 941 n.22.
327 See Richard Fentiman, Foreign Law in English Courts, 108 LAW Q. REV. 142 (1992). Note 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; see also Akai Pty, Ltd. v. People’s Ins. Co., [1998] 1 Lloyd’s Rep. 90, 105-06 (Q.B.).
328 In du Pont v. Agnew it was stated, with regard to concurrent proceedings between the
are also involved where a plaintiff has to bring actions against each of the defendants in different fora.\textsuperscript{329} To prevent such additional inconvenience and expense to the parties involved in the litigation process, related actions may be consolidated within a single forum. This factor can be crucial to the overall stay discretion adopted by an English court. The best example of such a perspective was provided by the decision in \textit{The Oinoussin Pride}.\textsuperscript{330} The action involved multi-party litigation respecting loss of timber and damage to the vessel ensuing from a time-charter. Proceedings were commenced in Alabama against the owners of the vessel, who brought a cross-claim against the stevedores, and commenced third party proceedings against the shippers. The third-party suit alleged negligent supervision of stowage and wrongful issue of the substitute bill of lading. Concurrent proceedings were subsequently initiated in London. However, the latter proceedings were stayed even though the bills of lading were governed by English law. Alabama was the natural forum for the determination of issues between the plaintiffs, the defendants, and the stevedores. The proceedings in Alabama were already well advanced; they had reached the stage of discovery, extensive depositions had been taken and, when the application for a stay was originally heard, the taking of further depositions had been scheduled. Of crucial significance was the fact that it was unlikely that the claim by the plaintiffs against the stevedores could be heard in England. This claim was so closely connected to the issues arising between the plaintiffs and defendants, that it was appropriate for them to be heard by the same court as the original suit in order to avoid the possibility of

\textit{same parties on the same issues in different jurisdictions that, “[T]he policy of the law must... be to favour the litigation of issues only once, in the most appropriate forum.” du Pont v. Agnew, [1987] 2 Lloyd’s Rep. at 589. Similarly, in \textit{The Abidin Daver}, the rationale behind court’s disapproval of concurrent proceedings was affirmed by Lord Brandon:}

\begin{quote}
[O]ne or other of two undesirable consequences may follow: first, there may be two conflicting judgments of the two Courts concerned; or, secondly, there may be an ugly rush to get one action decided ahead of the other, in order to create a situation of \textit{res judicata} or issue estoppel in the latter.
\end{quote}

\textit{The Abidin Daver [1984] A.C. at 423-24.}

\textsuperscript{329} \textit{See generally Smyth v. Behbehani, [1999] I.L. Pr. 584 (C.A.)} (determining that it was in the interest of justice that proceedings in relation to comparable transactions should all be tried at one and the same time); New Hampshire Ins. Co. v. Aerospace Finance, Ltd., [1998] 2 Lloyd’s Rep. 539 (Q.B.).

inconsistent decisions. Matters of efficiency, economy, and expedition demanded a single consolidated action. Similarly, the ability of a single forum to assert jurisdiction over third parties was a vital factor in Piper. The underlying concern was that if the case was heard in the United States, it would force the defendant to file an indemnity action in the alternative forum of Scotland. The potential for inconsistent outcomes weighed in favor of dismissing the action so that it could be heard in its entirety in Scotland.

On rare occasions the English courts have also shown a willingness to consider the substantive merits of the dispute, even at the jurisdiction stage, and have specifically shown a pre-disposition to apply the choice of law rules of the forum in preference to the foreign court. A leading example of such an approach is provided by the Court of Appeal decision in The Magnum. In this case, a Spanish company insured a ship with the defendants, a Spanish insurance company. This insurance contract contained an express choice of English law. The ship sustained damage as a result of a collision, and the plaintiffs claimed recovery for this damage. The Spanish court, however, would have totally disregarded the choice of law clause, and the plaintiff's claim would have failed on Spanish public policy grounds. The English Court of Appeal found in favor of the plaintiff. As Carter cogently stated, "[t]he reasoning in The Magnum could be seen as marking a shift away from notions of forum non conveniens, the appropriate forum, and the natural forum, [331] See Piper Aircraft, 454 U.S. at 259 ("[F]orcing petitioners to rely on actions for indemnity or contributions would be 'burdensome' but not 'unfair'. . . . [B]urdensome, however, is sufficient to support dismissal on grounds of forum non conveniens."). The Court in Piper Aircraft also opined that it would be far more convenient to resolve all claims in one trial. See id. at 259. See generally Pain v. United Technologies Corp., 637 F.2d 775, 790 (D.C. Cir. 1980) (making a similar argument in approving dismissal of an action arising out of a helicopter crash in Norway).

[332] HILL, supra note 44, at 271-72. In Piper Aircraft, it was determined that the unfavourableness of the alternative forum's law alone does not prevent dismissal for forum non conveniens. See Piper Aircraft, 454 U.S. at 247. Enforceability, however, has become important in the consideration of dismissals on forum non conveniens grounds. See Contact Lumber Co v. P.T. Moges Shipping Co., 918 F.2d 1446, 1450 (9th Cir. 1990) (upholding district court's dismissal, conditioned on defendant's guarantee that any Philippine judgment would be honored).

[333] [1989] 1 Lloyd's Rep. 47 (C.A.). At issue here were principles of forum conveniens applicable to service of a writ out of the jurisdiction under R.S.C., Ord. 11. The principles applied therein are also apposite to the forum non conveniens discretion; see above p. xx.

[334] Note that some of the initial damage had been repaired, but a considerable amount of damage remained unrepaired when the vessel was hit by a missile and became a constructive total loss. Separate ware risk insurers had settled the plaintiff's claim in respect of that latter loss. See id.
and to evaluation of the likely outcome in one *forum* (foreign) as compared with another (English)—such evaluation leading to an operative preference for the latter."  

Recall that the U.S. Supreme Court decision in *Piper Aircraft* stands for the proposition that the possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry. Hence, the Court rejected the Court of Appeals' conclusion that forum non conveniens should be denied on the grounds that Scottish law did not recognize the more pro-plaintiff strict liability law of Pennsylvania. Lower courts have traditionally been more prepared to evaluate the substantive merits of the dispute, but the trend is moving away from individualistic approaches towards the uniform federal standard.  

**F. A Minimum Standard of Justice Abroad**

In *Spiliada*, Lord Goff clearly established that the initial burden rests upon the defendant to establish that a stay ought to be granted because there is another available forum which is clearly more appropriate than the English forum. Even where a defendant establishes such a presumption, palpably quite distinct from that initial balancing exercise, the burden then shifts to the plaintiff to assert that a minimum standard of justice cannot be obtained in the foreign forum. A clear dichotomy prevails within the overall balancing equation. However, the Court of Appeal, in *Mohammed v. Bank of Kuwait and the Middle East K.S.C.* has, it seems, subverted such a distinct approach by importing standard of justice requirements into the first branch of the *Spiliada* text, where the burden rests on the defendant; the effect is an obfuscation of the

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335 P.B. Carter, *Decisions of British Courts During 1989 Involving Questions of Public or Private International Law: Private International Law*, 60 BRIT. Y.B. INT’L L. 482, 485 (1990). Similar principles underpin the decision in *Banco Atlantico*, where under the law of Sharjah (the emirate where the case would be tried) the plaintiff's claim was rendered nugatory, but not under the applicable English law. See *Banco Atlantico*, [1990] 2 Lloyd's Rep. at 508-09.

336 See, e.g., Stangvik, 819 P.2d 14 (overruling *Holmes*, 202 Cal. Rptr. 273, where the California Court of Appeals analyzed the plaintiff's claim under foreign law). See discussion supra at pp. 26-27.


338 See id.

burden of proof for the respective parties. It is suggested that this approach reflects a mistaken perspective on the guidelines laid down by Lord Goff.\textsuperscript{340}

The facts in \textit{Mohammed} present an intriguing picture. The claimant was a citizen of Iraq employed by the defendant bank in Kuwait from 1982 to 1991. He remained in Kuwait during the Iraqi occupation from August 1990 until January 1991, when he returned to Iraq on leave. Thus, he was away from Kuwait when the allied forces invaded and subsequently drove the Iraqis out of Kuwait. The plaintiff never returned to Kuwait since Iraqi nationals were barred from returning to Kuwait, and because the Iraqi government forbade its nationals to leave Iraq without permission, the plaintiff was unable to return. He had come to London as part of an officially authorized delegation in July 1992, and had instructed solicitors regarding payments which he said were due to him under his service contract. In August 1994 the master had dismissed the defendant's application for a stay, but on appeal the judge granted it on the basis that the dispute should be decided before the Kuwaiti courts, the appropriate and available forum at the time of the hearing itself (\textit{i.e.}, May 1995). At issue before the Court of Appeal was whether the trial judge was correct to define the test as whether Kuwait was "available in practice to this plaintiff to have his dispute resolved," and most importantly, whether the question of whether or not "substantial justice" was likely to be achieved was vital to this first limb.\textsuperscript{341}

\begin{flushright}
\textsuperscript{340} North and Fawcett state:

The difficulty with this definition of 'availability' is that it requires the court to distinguish between different types of injustice. One type goes to availability of the alternative forum and is considered at the first stage of the Spiliada inquiry: consequently the onus is on the defendant to show that there is no such injustice. The other type does not go to availability and is raised at the second stage of the inquiry; consequently the onus is on the claimant to show circumstances by reason of which justice demands that a stay should not be granted. [I]n the \textit{Mohammed Case}, Evans L.J. clearly regarded the evidence . . . as going to availability, whereas allegations that the plaintiff would not get a fair trial in Kuwait because of hostility to Iraqis following the Iraqi invasion of Kuwait were not so regarded and were said to be a matter to be raised at the second stage of the enquiry. It would have been best if 'availability' had been confined to the issue of whether the alternative forum abroad had jurisdiction to try the case on the merits and that substantial justice had been regarded as irrelevant at this stage of the inquiry.

NORTH \& FAWCETT, supra note 251, at 336-37.
\end{flushright}

\begin{flushright}
\textsuperscript{341} See \textit{Mohammed}, [1996] 1 W.L.R. at 1483.
\end{flushright}
Their Lordships, with Lord Justice Evans authoring the leading judgment, affirmed that “substantial justice” was a vital and relevant factor to the test of “appropriate and available forum,” thus importing it into the first limb criterion. Apparently, Lord Goff had stated in Spiliada that the first stage of the inquiry was concerned with practical justice. In Mohammed, the Court viewed disregarding questions of practical or substantial justice as quite inimical to the exercise which has to be carried out when determining whether to grant a stay, that is, when considering the court is the overall exercise of the court’s discretion as to whether the defendants have established that there is an available and more appropriate forum for the resolution of the dispute. The plaintiff could neither visit Kuwait, nor instruct his lawyers; nor could he obtain assistance through diplomatic channels or execute the necessary power of attorney. It seems an eminently sound and logical decision that the stay application by the defendants be refused. However, it was rather perverse that the court failed to apply relevant substantial justice factors to the second limb of the Spiliada test, where the burden lies on the plaintiff, as was clearly intended by Lord Goff. The plaintiff self-evidently demonstrated that he was palpably denied substantial justice in the foreign forum, and met the incumbent burden of proof laid down by the Spiliada principles.

A more logical approach to the prejudice issue was applied by the English court in Oppenheimer v. Louis Rosenthal Co. A.G. For reasons of substantial prejudice abroad, an English court was treated as forum conveniens for resolution of an action between a German citizen working in England and a German company, his employers. As in Mohammed, the plaintiff would have

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342 Lord Justice Evans (Saville, L.J. & Morrill, L.J. concurring) affirmed that the defendant must show that there is another “available” forum abroad. He stated that this meant available in practice to this plaintiff to have his dispute resolved, and that the question of whether substantial justice is likely to be achieved is relevant to this issue. See Mohammed, [1996] 1 W.L.R at 1495.

343 Note that it was also determined in Mohammed that where a stay was applied for the court should also have regarded the situation at the date of the hearing, if only to avoid the absurdity of ordering a stay which was patently unjust through a change of circumstances. Id. at 1496.

344 See id. at 1495.

345 More recently, a differently constituted Court of Appeal in Askin v. Absa Bank, Ltd., [1999] I.L. Pr. 471 (C.A.), accepted that there was substance in the above criticism of Mohammed and that onus of proof needs to be interpreted in the light of Spiliada principles. See also BMG Trading, Ltd. v. AS McKay [1998] I.L. Pr. 691 (C.A.); Connelly v. RTZ Corporation Plc., [1998] A.C. 854 (inability to try case abroad through lack of financial assistance fell within second stage of the forum non conveniens inquiry).

346 [1937] 1 All E.R. 23 (C.A.). Note that it was not an injustice in Herceg Novi v. Ming Galaxy [1998] 4 All E.R. 238 (C.A.) that the alternative forum imposed a lower limitation of liability in respect of maritime claims than England.
been unable, at the time, to obtain legal representation and could not visit the foreign forum to pursue the case. Although, as previously mentioned, an English court is very reluctant to embark on a comparative analysis of the expertise or quality of justice available within the foreign legal system, a minimum standard must, nevertheless, be prevalent. This reasoning formed the rationale for rejecting Saudi Arabian jurisdiction in *Islamic Arab Insurance Co. v. Saudi Egyptian American Reinsurance Co.*,\(^{347}\) where the Saudi Arabian courts lacked expertise in insurance law disputes and where no specialist courts or legal representation was available.

In the United States, consideration of the availability of an adequate remedy is beset with problems that go to the very heart of the forum non conveniens doctrine.\(^{348}\) *Piper* determined that if "the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative."\(^{349}\) This sweeping statement was tempered by the Supreme Court's admonishment that a finding of inadequacy occurs only in "rare circumstances," such as when the alternative forum "does not permit litigation" on the subject matter of the dispute.\(^{350}\)

A classic illustration of rare circumstances was provided by *Perkins v. Benguet Consolidated Mining Co.*,\(^{351}\) where the Supreme Court found no constitutional impediment to Ohio's assertion of jurisdiction. The defendant, a Philippine corporation, could not have been sued at home since, at the time the suit was filed, the United States was at war with Japan, and the Japanese occupied the Philippines. In order to provide the claimant with a forum, the litigation had to proceed in Ohio.

Occasionally, U.S. courts have been prepared to deny forum non conveniens dismissals when the claimant would be excluded from legitimate access to the alternative forum because of action or regulation by the government of that forum.\(^{352}\) A coercive political atmosphere may also render


\(^{348}\) An interesting perspective was provided by the New York Court of Appeals in *Iran v. Pahlavi*, 467 N.E.2d 245 (N.Y. 1984) which held that, although existence of a suitable alternative forum was an important factor to be considered in the application of the doctrine, its alleged absence did not bar a dismissal if the plaintiff failed to establish that there was no alternative forum available. See *Iran v. Pahlavi*, 467 N.E.2d 250; *Carney, supra* note 64, at 43-34 n.105.

\(^{349}\) See *Piper*, 454 U.S. at 254 n.22.

\(^{350}\) *Id.*

\(^{351}\) 342 U.S. 437 (1952).

a forum inadequate to provide an effective remedy. In general, however, most alternative fora, post-\textit{Piper Aircraft}, will be treated as adequate. By way of illustration, the following factors have been held insufficient grounds to deny dismissal for lack of an alternative forum: lack of access to a jury in the alternative forum; distinct procedures; extensive delays in litigation abroad; and vastly reduced compensation levels. As the primary focus of the courts is on the legal capability of the foreign system rather than benefits to the claimant, most foreign venues are presumptively deemed to be adequate. More evidence of inadequacy is needed than simply the imposition of a financial burden on the disappointed claimant.

In summary, it seems that the factors that are relevant to an Anglo-American court in deciding whether to stay or dismiss an action are irreducibly and irrevocably amorphous. The pedagogic principles, as deconstructed in this section, have been incrementally developed on a solipsistic basis by the judiciary. The adjudicative and interpretative process is not unmediated and content-neutral, but is inherently policy oriented. It is hardly surprising that we are left with a vague doctrine. The likelihood of predicting the determinative factor in the overall equation, certainly in relation to the English balancing test, is as likely as precisely delineating how many angels can dance upon the head of a pin. The result of this ambiguity has been an arbitrary and over-liberal interpretation of criteria with consequential problems for litigants.

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353 See \textit{Lehman v. Humphrey Cayman, Ltd.}, 713 F.2d 339, 346 (8th Cir. 1983) (stating that alternative forum’s limitation on damages was a factor weighing against dismissal). Therefore, in the extreme, if preclusion of a remedy is very likely, then the alternative forum should not be considered an adequate forum. This limitation on recovery, however, was considered as a private factor. \textit{See id. But see} \textit{Wolf v. Boeing Co.}, 810 P.2d 943, 948 (Wash. Ct. App. 1991) (concluding that Mexico’s $10,000 limit on recovery in wrongful death action did not render forum inadequate). Note, however, that \textit{Wolf} was abrogated in 1999, when the Washington Court of Appeals instituted a rule whereby the defendant must prove that an adequate alternative forum exists, contrary to the rule in \textit{Wolf}. \textit{See Hill v. Jaramada Transp. Ltd.}, 983 P.2d 666, 669 n.4 (Wash. Ct. App. 1999).

354 \textit{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.

355 \textit{id.} at 848.

356 \textit{id.} at 848-49.
VI. REFORM

A. The Adoption of a New Approach to U.S. Personal Jurisdiction Principles

As the above section serves to exemplify, the unfettered judicial discretion that applies to Anglo-American forum non conveniens doctrine has produced a "crazy quilt of ad hoc, capricious and inconsistent decisions." It is deeply unsatisfactory that judges are handling matters instinctively and haphazardly; the outcome is that the dyspeptic litigants have no real guidance at all. These frustrations are exacerbated by the flawed policy rationales that underpin current doctrine, as previously adumbrated in section two. It is presumptively a valid objective to try a case in the most appropriate forum to resolve the dispute, considering both the respective cause of action and the parties. In practical terms, however, the conceptual attractions of the doctrine are supplanted by the unwelcome attendant consequences of delay, vagueness, and higher costs for litigants; it has been submitted that "it [the doctrine] clearly costs more than it's worth."

In light of this state of affairs, it is important to re-examine the distant litigation problem to ascertain reliable rules for venue resolution. To the outsider, a major problem with the U.S. model relates to existing personal jurisdiction principles that are too uncertain and overbroad. This problem has consequentially led to forum non conveniens being adopted too extensively, as a judicial divining rod to resolve jurisdictional questions that ought to have been settled through properly structured jurisdiction analyses. In any event, the reasonableness test prescribed by the Asahi court and the modern International Shoe minimum contacts doctrine duplicate the forum non conveniens inquiry to a certain extent. The U.S. constitutionalism of personal jurisdiction principles through almost exclusive judicial development

357 Stein, supra note 16, at 785.
358 See Robertson & Speck, supra note 19, at 975.
359 See HILL, supra note 44, at 274.
360 Robertson, supra note 1, at 426.
361 For a directly contrary perspective see Alex W. Albright, In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens, 71 TEX. L. REV. 351 (1992). In her view, the court's burden would be significantly increased, and by too great an extent, by using the law of personal jurisdiction to deal with forum non conveniens concerns. Albright suggests that the shift necessitates full appellate review, would eliminate the conditional dismissal technique, prevent courts from taking docket congestion concerns into account, and inevitably entail fewer dismissals. See id. at 394-97. For a proposed residual role for forum non conveniens see infra at p. 83.
362 See Stewart, supra note 17, at 1293.
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has produced an amorphous doctrine, unduly impressionistic and vague, and has left an unacceptable framework.\(^3\) There is a "morass of results that often turn on hyperfine factual distinctions",\(^3\) the outcome is the encouragement of costly litigation without any countervailing benefit over equitable outcomes.\(^3\) It is time to reconsider the panacea of a new federal statute on jurisdiction—the enactment by Congress of a comprehensive code applicable to state and federal courts, in order to offer more predictable standards to litigants at the outset of the jurisdictional inquiry. This solution would give relief from the vagaries of the constitutional standard. If this legislative code were to be adopted, and utilized by the courts, then forum non conveniens would no longer need to be so vital to the assurance of a convenient forum. A carefully structured jurisdictional inquiry would guarantee due process to litigants by constraining the trial court’s unbridled discretionary power unrestricted by effective appellate review.

The Brussels Convention perspective represents a pragmatic approach to the ascertainment of jurisdiction within E.C. Contracting States. Its main features, with certain reservations,\(^3\) should be examined again as a general

\(^{363}\) See Borchers, supra note 7, at 122.

\(^{364}\) Id. at 153.

\(^{365}\) See generally Borchers, supra note 7; Silberman, supra note 2, at 513; Robertson, supra note 1, at 426-29.

\(^{366}\) A striking feature of the Convention rules is that they apply to all judgments that comport to the civil and commercial criteria of Title I. They do not depend at the enforcement stage upon the domicile or nationality of the plaintiff or defendant. The Title III provisions on recognition and enforcement are not expressly linked to the jurisdictional grounds of Title II. This has caused great concern among American commentators as it arguably operates in a parochial and self-serving manner against non-Contracting States. See generally Borchers, supra note 7; Juenger, supra note 27; Bruce M. Landay, Another Look at the EEC Judgments Convention: Should Outsiders be Worried?, 6 DICK. J. INT’L L. 25 (1987); Arthur Taylor von Mehren, Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the EEC and the U.S., 81 COLUM. L. REV. 1044 (1981).

In essence, the principle of largely unquestioning judgment recognition includes judgments against persons not domiciled in the Community, and thus not protected by the Convention, even if the judgment is entered on an admittedly exorbitant jurisdictional basis under Art. 3 (e.g., U.K. jurisdiction predicated on presence alone or French jurisdiction in accordance with Art. 14 of the French Civil Code based on plaintiff’s nationality). Consider by way of illustration a German court in a civil and commercial matter that takes jurisdiction under Art. 23 of the German Code of Civil Procedure over a U.S. domiciliary who leaves his umbrella behind in a hotel room in Germany. The German judgment can be freely circulated, under the Convention principles, throughout the E.C. Contracting States for recognition and enforcement purposes. Pursuant to Art. 59 of the Convention, a Contracting State can give an undertaking to a third country, by means of a bilateral convention, that it will not recognize or enforce judgments given in other Contracting States where jurisdiction is only assumed on an exorbitant
template for reform of U.S. personal jurisdiction rules.\textsuperscript{367} The wide "appropriate forum" discretion does not apply to the Brussels Convention. 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."\textsuperscript{368} In the United Kingdom, the Civil Jurisdiction and Judgments Act of 1982, which came into force on 1 January 1987, implemented the Brussels Convention on Civil Jurisdiction and Judgments, and applies to litigation in U.K. courts involving domiciliaries of E.C. countries.\textsuperscript{369} The jurisdictional scheme is embodied by Title II of the Convention, specifically Article 2 and the \textit{lis pendens} provisions of Article 21. In broad outline the following mechanism is provided: \textsuperscript{370}

1. The primary rule (Article 2), apart from special jurisdiction in certain cases such as contract and tort, is that the defendant is sued before the courts of their domicile, irrespective of the fact that a foreign law has to be applied by that court.\textsuperscript{371} It is similarly irrelevant that where special jurisdiction does apply, the plaintiff may have chosen another apparently inappropriate court from among the competent courts in order to obtain a judgment in the State in which he also wishes to enforce it.\textsuperscript{372} As the Schlosser Report asserts, "where the

\textsuperscript{367} Borchers concludes that urgent reform is needed of U.S. jurisdictional principles through consideration of the following alternatives: (i) the United States becoming a party to the Lugano Convention; (ii) entering into bilateral treaties on jurisdiction with Contracting States to the Brussels Convention; or (iii) a new legislative code promulgated by Congress. \textit{See} Borchers, \textit{supra} note 7, at 156-57.

\textsuperscript{368} Schlosser Report, \textit{supra} note 268, at 97.

\textsuperscript{369} \textit{See} \textit{supra} note 6.

\textsuperscript{370} \textit{See generally} Juenger \textit{supra} note 27, at 1206; Robertson, \textit{supra} note 1, at 426; Stickley, \textit{supra} note 25, at 32.

\textsuperscript{371} "The personal jurisdiction rules are fairly liberal but they do not permit assertions of jurisdiction on the basis of the plaintiff’s domicile, service of process on the defendant whilst temporarily in the country, or (except in certain Admiralty cases) the existence or seizure of the defendant’s property in the country." Stickley, \textit{supra} note 25, at 32.

\textsuperscript{372} The question of whether an individual is domiciled in the United Kingdom, for the purposes of the Brussels Convention, is to be determined in accordance with \textsection{} 41 of the Civil Jurisdiction and Judgments Act 1982. He is so domiciled if and only if:

(a) he is resident in the UK; and (b) the nature and circumstances of his residence indicate that he has a substantial connection with the UK.

As far as the United Kingdom is concerned, \textsection{} 42(3) of the 1982 Act provides that a corporation or association has its seat in the United Kingdom if and only if:

(a) it was incorporated or formed under the law of a part of the UK and has
courts of several states have jurisdiction, the plaintiff has deliberately been given a right of choice which should not be weakened by application of the doctrine of *forum conveniens*."\(^{373}\) Moreover, the general rule of jurisdiction in favor of the defendant's domicile, which corresponds to the rule followed under the laws of many Contracting States,\(^{374}\) is based on the maxim *actor sequitur forum rei*.\(^{375}\) This general rule draws its rationale from the presupposition that the defendant, as the party being pursued by the plaintiff, should be able to fight on "home ground" where he can most easily conduct his defense.\(^{376}\) The maxim is particularly important in the international sphere,\(^{377}\) notably where, for example, a person receives a court summons to appear in the courts of a foreign country, but has no knowledge of the foreign system of law involved or the foreign language. Evidently, that person must either go to

its registered office or some other official address in the UK; or (b) its central management and control is exercised in the UK.

The defendant's domicile, although ascribed a central role in the application of the rules of jurisdiction in the Convention, is left undefined. In view of the varied interpretations of domicile in Member States, it was concluded that this concept should be qualified by incorporating a provision specifying the national law to be applied in determining domicile. This provision would facilitate the implementation of the Convention and avoid the problem of claims and disclaimers of jurisdiction that might have arisen. The key is Art. 52 which reads as follows:

In order to determine whether a party is domiciled in the Contracting State whose courts are seised of a matter, the Court shall apply its internal law.

If a party is not domiciled in the State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Contracting State, the court shall apply the law of that State.

\(^{373}\) Schlosser Report, *supra* note 268, at 97-98.

\(^{374}\) *See* Art. 126 of the Dutch Code of Civil Procedure; Art. 59 of the Luxembourg Code of Civil Procedure; Art. 18 of the Italian Code of Civil Procedure; Art 59 of the French Code of Civil Procedure; and Art. 13 of the German Code of Civil Procedure. All of these provisions employ the defendant's domicile, either as the only basis of jurisdiction, or as an alternative to the criterion of habitual residence.

\(^{375}\) Weintraub rejects the view that it cannot be inconvenient for a defendant to be sued at home. This conclusion is based on the premise of location abroad of relevant adjectival evidence to the dispute and necessity of a U.S. court having to struggle with the application of unfamiliar law. *See* Weintraub, *supra* note 2, at 335-36; *see also* Panama Processes v. Cities Serv. Corp., 650 F.2d 408, 420 (2d Cir. 1981) (Maletz, J., dissenting) ("It is almost 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 home in the plaintiff's chosen forum."); *cf.* Carney, *supra* note 64, at 486.

\(^{376}\) *Peter Kaye, Civil Jurisdiction & Enforcement of Foreign Judgments* 255 (1987).

\(^{377}\) *See* Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil & Commercial Matters, 1979 O.J. (C 59) 1, 18 (comments on Title II, art. 2 of the Convention).
a great deal of trouble and expense to defend himself, or run the risk of incurring an unfair judgment in default.\textsuperscript{378} Hence, the primary basis of jurisdiction (\textit{i.e.}, the defendant’s domicile) must be the norm and should only be derogated from in limited situations.\textsuperscript{379} The preference for defendants over plaintiffs, which is deeply embedded in historical traditions,\textsuperscript{380} was also echoed in \textit{Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA},\textsuperscript{381} where the European Court of Justice observed that “jurisdictional rules which derogate from the provision of Article 2 should be interpreted in a way which would enable a normally well-informed defendant reasonably to predict before which courts, other than those of the State in which he is domiciled, he may be sued.”\textsuperscript{382} The Court also stated that

The rules on special and exclusive jurisdiction and those relating to prorogation of jurisdiction thus derogate from the general principle, set out in the first paragraph of Article 2 of the Convention, that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction. That jurisdictional rule is a general principle because it makes it easier, in principle, for a defendant to defend himself. Consequently, the jurisdictional rules which derogate from that general principle must not lead to an interpretation going beyond the situations envisaged by the Convention.\textsuperscript{383}

\textsuperscript{378} See KAYE, supra note 376, at 254-55; see also Litman, supra note 111, at 577, 580.

\textsuperscript{379} See generally PETER STONE, THE CONFLICT OF LAWS 129 (1995). Stone states: [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.

\textit{Id.}

\textsuperscript{380} For an interesting discussion in the U.S. context see Stewart, supra note 7, at 1284-86.

\textsuperscript{381} Case 26/91, 1992 E.C.R. I-3967.

\textsuperscript{382} \textit{Id.} at I-3995.

\textsuperscript{383} \textit{Id.} at I-3994.
2. The Convention aims to avoid conflicting decisions and to simplify recognition and enforcement of judgments. Pursuant to Article 21 of the Convention, when the proceedings before two or more courts involve the same cause of action and the same parties, any court other than the court first seised must decline jurisdiction;\(^{384}\) the principle known as \textit{iudex tenetur impertiri indicium suum} is operative.\(^{385}\) The European Court of Justice in \textit{Overseas Union Insurance Ltd. v. New Hampshire Insurance Co.}\(^{386}\) has determined that Article 21 must be applied irrespective of the domicile of the parties, and regardless of whether the jurisdiction of the courts is determined by Title II or is derived from the law of the Contracting State in question in accordance with Article 4.\(^{387}\) In accordance with Article 22, a very restricted discretionary element applies, but only in the scenario where related actions are brought before two differing Contracting States. It is provided that where there are related actions pending in two or more Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.\(^{388}\)

It is noteworthy that again priority is vested in the court that is first seised. The limited discretion is only applicable to a decision by any court that is seised later as to whether to await the outcome of the proceedings in the first court, to ensure that its own judgment is consistent with the judgment of the first court, or whether to continue with the case and risk the chance of irreconcilable judgments being rendered.

The other important tenets of the Convention may be stated more succinctly:

\(^{384}\) Art. 21 reads as follows: "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."


\(^{387}\) See id. at I-3348.

\(^{388}\) See id. at I-3349-50.
3. Corporations that maintain a branch or other establishment in a Member State may, in accordance with Article 5(5), be sued there on causes of action arising out of these local operations. Additionally, there is limited personal jurisdiction provided for contract (Article 5(1)) and tort actions (Article 5(3)); the English courts have jurisdiction if the lawsuit relates to a contract contemplating performance in England; there is special jurisdiction if the action is based upon tortious conduct committed, or tortious consequences occurring in England.

4. There is exclusive local jurisdiction, in accordance with Article 16, for actions concerning real property, the internal affairs of corporations and other associations, and rights recorded in public registers. Express jurisdictional preference is given to consumers (Articles 13-15) and insurance policy holders (Articles 7 to 12A) on the pragmatic ground that these groups are in need of special protection. They are accorded the jurisdictional privilege to litigate in the Member State in which they are domiciled.

5. Specific rules have been promulgated to liberally authorize joining and impleading parties not otherwise subject to the jurisdiction of the court in which the principle action is pending. Article 6(1) provides that multiple

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defendants may be sued in a Contracting State where any one of them is domiciled. Article 6(2)\textsuperscript{396} allows a court seised of an original proceeding to hear any third party proceedings. Finally, Article 6(3)\textsuperscript{397} allows jurisdiction for a counter claim arising out of the same facts as the original claim.

6. The Brussels Convention allows in Article 17,\textsuperscript{398} through the process of forum selection clauses, the ability of the parties to stipulate to the jurisdiction of Member State courts.\textsuperscript{399}

The striking feature of the Brussels Convention jurisdiction principles is that they exclude a duly seised forum from assessing the comparative appropriateness of jurisdiction in another Contracting State. An English court that is duly seised under Convention principles cannot stay proceedings because it believes that the relationship between the cause of action and the parties indicated Germany, for example, would be a more appropriate forum.\textsuperscript{400} A litigant under the Convention does not suffer the uncertainty, delay, or consequential expense inherent to forum non conveniens discretion. Considering factors of predictability, clarity, simplification, harmonization, and avoidance of preliminary litigation, it appears that the Convention scores extremely highly. Inherent vagaries and inconsistencies concerning attribution of relevant discretionary factors are consequentially avoided altogether. The overt price of an inappropriate forum, which may occur on occasions under the Convention through application of the primary domicile rule, should generally be viewed as a price worth paying. Litigation is expensive and avoidance of preliminary litigation, in which the litigator decides where to actually litigate a scenario under the common law, is best negated. In Robertson's view,\textsuperscript{401} both English and American legal systems should do without broad discretion to


\textsuperscript{399} Note the Protocol, signed on June 3, 1971, has the effect of conferring the power to interpret the Convention's provisions upon the European Court of Justice.

\textsuperscript{400} See Wendy Kennett, Forum Non Conveniens in Europe, 54 CAMBRIDGE L.J. 552, 553 (1995).

\textsuperscript{401} See Robertson, supra note 1, at 426-27.
decline jurisdiction and should uniformly apply the better approach adopted by
the Civil Jurisdiction and Judgments Act of 1982.

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 unfet-
tered 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 discre-
tion to decline jurisdiction in abuse of process and similar
situations.\footnote{\textit{Id.} at 426. Robertson further asserts that:
[T]oo much judicial discretion is bad because it leave the lawyers in the dark,
causing us to give poor advice and to file expensively wasteful law suits and
jurisdiction challenges; because it tends to prevent justice being seen to be
done . . . [w]hat has happened in the American jurisprudence is a form of
‘buck passing’ whereby the vague and amorphous forum non conveniens
doctrine has come to accommodate the collective shortcomings and excesses
of modern rules governing jurisdiction, venue and choice of law. As long as
a broad most suitable forum version of forum non conveniens is around to do
the lion’s share of the work, the jurisdictional and choice of law rules never
will get straightened out.}

The Civil Jurisdiction and Judgments Act of 1982 provides reasonably clear
rules of personal jurisdiction. The carefully structured and detailed jurisdic-
tional rules “reflect a decent but not hyper-sensitive regard for both comity and
defendants’ rights.”\footnote{\textit{Id.} at 427.} They obviate the need for broad discretion to decline
jurisdiction, and operate quite well without such a mechanism. The European
perspective on transnational jurisdiction ascription has drawn scholarly praise
from American commentators as “a functional and pragmatic demonstration
that multi-state jurisdictional problems are amenable to rational solutions.”\footnote{Juenger, \textit{supra} note 27, at 1212; \textit{see also} Weser, \textit{supra} note 27, at 323.}
The schematic pragmatism of the Convention is quite favorable when
compared with the constitutional potpourri of rules enunciated by the Supreme
Court. The time is ripe for a fresh reconsideration of the formulation of federal doctrine.

B. The Proper Rôle of Forum Non Conveniens in Venue Resolution

[A] specially narrow area of discretion can be circumscribed to protect foreign defendants in cases of great hardship. These [sic] 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 [sic] suit here was to harass defendant into an unfavourable settlement.405

It is submitted, in accordance with the above statement by Alexander Bickel, that a more limited role for forum non conveniens needs to be fashioned. The bulk of jurisdictional venue resolution ought to be dealt with by effectively structured personal jurisdiction principles. This, however, may not legitimately safeguard all defendants from the undue hardship of wholly inappropriate actions brought against them in their home forum through the domicile criterion. 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 him—actions where it is unduly inconvenient to allow them to proceed in the seised forum. The syntax of this narrower supererogatory model of forum non conveniens heralds a need to return to the old abuse of process standard-bearer as the appropriate 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. It should be recalled that in 1947, the Supreme Court in Koster v. Lumbermens Mutual Casualty Co.406 stated the purpose of forum non conveniens is to best serve the convenience of the parties and the ends of justice.407

405 Alexander M. Bickel, The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion, 35 CORNELL L.Q. 12, 45 (1949) (referring to the undesirability of treating the technique of discretionary dismissal as a matter of the court’s power to regulate its calendar).
407 See id. at 527-30; Picketts, 576 A.2d at 524 (stating appellate review of doctrine must proceed from established principles of law; the purpose of the doctrine being to serve the ends of justice).
In essence, unless the chosen forum is truly inconvenient for a defendant, then the court should not dismiss on forum non conveniens grounds. Multinational corporations ought not to be able to raise the defense of forum non conveniens by claiming it would be inconvenient for them to hold a trial, even when the corporation’s world headquarters is located in the state where suit is brought and within three blocks of the courthouse.\(^\text{408}\) The simple fact is that prohibitive litigation costs in foreign jurisdictions, operating in tandem with pro-defendant tort liability principles, supplant the practicability of effective redress for foreign plaintiffs in their own jurisdiction.\(^\text{409}\) In many instances, because of inadequate, ineffective or non-existent compensation offered in their own countries, foreign plaintiffs do not have any feasible election to opt out of unfavorable settlement offers. 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 available in these countries, and prescribe forum non conveniens dismissals only in abuse of process cases as subsequently modified by the Australian model.

The abuse of process standard has been retained in Australia despite the hostile academic criticism it has engendered.\(^\text{410}\) It is instructive to evaluate the policy rationales advocated within the majority judgments in *Oceanic Sun/Voth*, where the High Court refused to embrace the Anglo-American liberalization; the most suitable forum test was contumeliously rejected. By a three to two majority in *Oceanic Sun Line Special Shipping Co., Inc. v. Fay*\(^\text{411}\)

\(^{408}\) See, e.g., *Alfaro*, 786 S.W.2d at 681. Additionally, it is important not to lose sight of “modern technological innovations” such as jet travel, satellite communications, and videotaped depositions. See *Picketts*, 576 A.2d at 529.

\(^{409}\) See supra notes 144-59.


\(^{411}\) (1988) 165 C.L.R. 197. In the case, Fay, the claimant, was seriously injured in a trap-shooting incident on board a ship owned by the defendant, Oceanic Sun Lines, during a cruise in Greek territorial waters. Dr. Fay, alleging that he had sought and obtained hospital treatment
the Court decided that it would reject U.K. developments. In what has become the leading judgment, Justice Deane held that the Australian position was dictated by policy, precedent, and legal principle. In relation to the latter issue he stated: "It is a basic tenet of our jurisprudence that, where jurisdiction exists, access to the courts is a right." He endorsed the antediluvian perspective of an "oppressive and vexatious" test, a viewpoint derived from Lord Justice Scott in *St. Pierre*. Oppressive should, in this context, be understood as meaning "seriously and unfairly burdensome, prejudicial, or damaging"; vexatious should be understood as meaning "productive of serious and unjustified trouble and harassment." The other members of the majority were not united on a determinative test to apply, there was no authoritative statement of principles to be applied in dealing with an application to stay within New South Wales, invoked the jurisdiction of the court by reason of damage having been suffered within the jurisdiction as a result of a tort committed elsewhere. The primary issue for the High Court was whether the Australian courts were to adopt the doctrine of forum non conveniens which prevailed in the United Kingdom and was similarly followed throughout the Commonwealth. See id. at 197.

412 Id. at 252.

413 Id.

414 See id. at 247. Deane asserted his disapproval with the manner in which the more liberal forum non conveniens approach in the United Kingdom and United States facilitated local defendants being sued by alien plaintiffs to escape the jurisdiction of the defendants' own countries:

> The strength of the appeal to judicial comity is... difficult to assess in circumstances where some leading western countries, particularly in relation to actions by their own residents, decline to observe even the judicial restraint shown by common law courts under traditional doctrine. ... [I]f 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.' At least, any judicial chauvinism which might, in earlier times, have been implicit in traditional principle was well intentioned towards the foreign plaintiffs.

Id. at 254 (quoting *Piper Aircraft*, 454 U.S. at 256).

415 Justice Brennan determined that the modern Anglo-American forum non conveniens doctrine was too arbitrary and capricious in its outcome; his preference was for the old *St. Pierre* test whereby the words "oppressive" and "vexatious" should be understood according to their ordinary meaning. Justice Gaudron, the third majority member, drew a distinction between cases where foreign law applied and those where the substantive rights were governed by the law of the forum. Where local law applied, the slightly more liberal view of Justice Deane was acceptable; otherwise the full orthodoxy of Justice Brennan should apply. For caustic criticism of the majority judgment, see Pryles, *supra* note 410.
proceedings. Definitive rules were subsequently forthcoming in *Voth v. Manildra Flour Mills Pty, Ltd.*

In *Voth*, the High 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 Code 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 appropriate foreign tribunal which had jurisdiction and which would exercise it.

It needs to be addressed why Australia has employed an individualistic test for forum non conveniens that is out of kilter with Anglo-American common law. It is an approach that is unique in the Commonwealth. What has occurred is that Australia has reaffirmed her adherence to the basic tenet that a plaintiff’s choice of forum is not lightly to be dismissed. In effect, the Australian doctrine is practically intended to minimize the need to evaluate the quality of justice promulgated in a competing foreign legal system, nor does the necessity exist to engage in a burdensome comparative law search. 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

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416 171 C.L.R. 538 (1990). The majority judgment was that of Mason, C.J., Deane, Dawson, and Gaudron, JJ.

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

418 Lawrence Collins has stated, “the effect in *Voth* is to shift the balance in favour of plaintiffs suing defendants outside the jurisdiction further than in any other Commonwealth country.” Lawrence Collins, *The High Court of Australia and Forum Conveniens: The Last Word?*, 107 LAW Q. REV. 182, 187 (1991).

conscience of the doctrine. Suppose a plaintiff chooses a forum purely for higher damages (the moth to the U.S. flame) or more extensive discovery, but the selected forum had no focal epicenter to the litigation (i.e., the forum was clearly inappropriate), then under the Australian model the defendant can obtain dismissal even where the plaintiff did not behave in a vexatious or oppressive manner in bringing suit. The delicate balance between litigants is respected, albeit legitimately skewed in favor of a plaintiff's selection of appropriate venue. This beneficial relationship test was explained 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 a 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.  

It is interesting to assimilate the ascription of the Australian test (i.e., a modified abuse of process format) as an optimal rule—selection doctrine to current mass tort litigation before the English courts in *Lubbe and Others v. Cape Plc.* The actions brought by five individuals are test cases for two thousand South African victims of asbestos—related disease. The scale of the action, and suffering of the unfortunate victims, mirrors the Bhopal tragedy which has entered global consciousness. It is submitted that the current

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420 *Voth*, 171 C.L.R. at 556-57; cited in PRYLES ET AL., INTERNATIONAL TRADE LAW 573 (1996). The effect is that under the "clearly appropriate 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.

421 [2000] 1 Lloyd's Rep. 139 (C.A.); see also now the House of Lords judgment, [2000] 1 WLR 1545, discussed in the postscript. The author is indebted to Mr. Richard Meeran, partner at Leigh Day & Co., Solicitors, which represents the claimants, and Chair of the Solicitors Human Rights Group, for discussing the case and forwarding a copy of his article on the matters arising therein (on file with the author); see also Richard Meeran & David McIntosh, *When is There a Duty of Care*, THE TIMES, Jan. 11, 2000.
English *Spiliada* principles—the liberal most appropriate forum doctrine of forum non conveniens—allied to the corporate shield of group structure (i.e., the delineation between parent & subsidiary\textsuperscript{422}, has thus far inequitably blocked legal accountability and appropriate redress. Negative responses have been elicited from the English High Court and Court of Appeal which may signal a shift towards the U.S. federal standard in relation to foreign plaintiffs generally. The endorsement of the decision of the New York District Court in the *Bhopal* jurisdiction dispute is a worrying development. By way of contrast, the Australian model, if accepted by the House of Lords, would be a panacea to this lacuna, and would allow fresh examination of whether a parent company of a multinational owes a legal duty of care (based on negligence and causation principles) to those affected by its subsidiary operations.

The history behind these proceedings, like *Bhopal*, presents an extremely disturbing picture. The claimant’s action is against Cape Plc. (England) which orchestrated asbestos operations in South Africa for nearly 100 years. The separation of legal identity, between different limited companies, as Meeran states,\textsuperscript{423} is used to avoid liability. At issue is whether a duty of care can be imposed on parent companies, although Cape operated directly and through wholly owned subsidiaries. South African legislation precludes legislation against an employer, and Cape’s former subsidiaries are valueless or uninsured; effective compensation is only viable in England. The asbestos mined in South Africa has caused a chain of injuries on a world-wide scale to workers engaged either in mining or transporting the product, but whereas Anglo-American victims have been compensated, those from South Africa

\textsuperscript{422} Meeran States:

Using complex and confusing corporate structures, MNCs have been able to distance and separate the parent, headquarters, company from the local operating subsidiaries, thereby protecting the MNC from legal liability. One only needs to glance at the RTZ corporate tree to appreciate this. At the same time in order to retain control, MNC organisations invariably include extensive cross-directorships between parent and subsidiaries, formulation of policy, technological control and financial control. Notwithstanding those control mechanisms, there was no significant fear of legal accountability on the part of MNCs until fairly recently. As far as overseas corporations are concerned, this corporate structure and relationship has a dual purpose. First, it enables the control of the business from the centre to be ensured. Secondly, it protects MNC the group as a whole since legal obstacles and difficulties in obtaining access to justice in local courts against local subsidiaries (which are often insolvent and uninsured), means that the MNC escapes responsibility altogether and victims go without redress.

Meeran, *supra* note 421.

\textsuperscript{423} See Meeran, *supra* note 421.
remain without redress. Cape Plc., formerly "The Cape Asbestos Company Limited," was involved in mining blue and brown asbestos in the Northern Cape and Northern Provinces respectively from 1890 until 1979. Until 1948 the operations in the Northwestern Cape were carried out directly by the parent company but through wholly-owned subsidiaries for the remainder of the period. The Prieska mill (North Cape) was situated in the middle of the town and in close proximity to the school. It was Prieska and its immediate vicinity that was the primary location for blue asbestos mining and milling operations. As a consequence, the incidence of asbestos-related disease was extremely high; whole families were afflicted by the effects. In 1962, the Chief Medical Officer of Cape based in London visited South Africa and reported: "At Prieska the condition around and about the mill are not good. The crusher is out of doors—it was obvious that quite a cloud of dust was being produced and blown away by a fairly strong wind towards the town." At Cape's Penge mine in the Northern Province, the conditions were just as bad, with asbestos dust levels during the 1970s being many times higher than the U.K. limit during the corresponding period. Laws regulating the use of asbestos existed in the United Kingdom from 1931, but the conditions at Cape’s operations were appalling and inhumane. A government health inspector, Dr. Gerritt Schepers, observed:

Exposures were crude and unchecked. I found young children completely included within large shipping 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.

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424 See id.
425 Meeran, supra note 421.
426 Id.; see Meeran, supra note 421. Meeran asserts:

The plain truth of the matter is that claimants want to sue in England because they cannot get justice overseas and MNCs want to stay the claims for precisely the same reason. Claims against English-based MNCs should be able to proceed in their home bases precisely because the defendant is domiciled in England, a strong connecting factor with this jurisdiction and indeed the single most important connecting factor given the unqualified application of Art. 2 of the Brussels Convention by other European countries; but in relation to non-Contracting States see § 49 Civil Jurisdiction and Judgments Act 1982; Re Harrods (Buenos Aires), Ltd., [1992] Ch. 72.
In February 1997, compensation claims were commenced in the English High Court on behalf of three Penge workers who had lived near the mine and two Prieska residents who had lived in the vicinity of Cape’s operations. These claims were based principally on the negligent control of the company’s worldwide asbestos business from England and failure to take measures to reduce asbestos exposures to a safe level. The subsequent litigation has been hard-fought on all sides. Most recently, subject to leave to appear to the House of Lords being granted, a reconstituted Court of Appeal has held that the five original actions (and a further 2,000 brought later) should be stayed on *Spiliada* principles. Impressionistically, the court’s reasoning has a resonance which echoes the ideological policy basis and the inculcated federal standard enunciated in *Bhopal*: deference to international comity in according jurisdiction to the South African courts; anti-chauvinism in refusing to countenance that English principles on duty of care or causation are superior; concern over docket congestion in that litigating 2,000 cases in England was viewed as contrary to the public interest; antipathy towards contingency fee lawyers referring to the “stalking horse” of five actions for thousands of potential claimants waiting in the wings; and pejorative forum shopping by seeking trial in England rather than from South Africa.

The imbued significance of these policy concerns were evaluated in Section 2 of the article. It is submitted that they tend to obfuscate the genuine concerns at issue within the forum non conveniens equation. A very different outcome will apply if the United Kingdom can be persuaded to follow the optimal rule-selection of a modified abuse of process format, as followed in Australia. Even where there is an overwhelming connection with another forum, the clearly inappropriate forum test makes it extremely problematic for a local defendant (Cape Plc) to obtain a forum non conveniens dismissal. This test contradicts the liberal ease of dismissal under *Spiliada*, applying a most suitable forum test, and a hotchpot of relevant factors upon which a court can elect to grant a stay. If an English court were to apply the Australian test to the South African asbestosis group actions, it is extremely difficult to assert that they are convinced that England is a “clearly inappropriate forum” to decide whether an English parent company of overseas subsidiaries (Cape Plc. (England)) should bear responsibility, full or part, for the ensuing personal injury tragedy. In a similar vein, if such a standard had been determinative in

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428 In *Spiliada*, [1987] A.C. at 478, Lord Goff asserted that “where the parties respectively reside or carry on business” was important in providing assistance with the relevant connecting factors. By the Australian model test there is an argument that certain U.S. courts, given the
Bhopal, it would have been burdensome for Union Carbide to deny jurisdiction to the New York court.

If the litigation contained within Lubbe and Others v. Cape Plc is to remain in England, which hopefully is the outcome under the revised standard propounded herein, complex issues remain to be evaluated before liability can properly be established.\textsuperscript{429} The trial court would have to consider whether the parent company of a multinational corporation owed a legal duty to those affected by its subsidiary operations. Within this analysis it would be vital to identify sufficient involvement in, control over, and knowledge of the subsidiary operation by the parent. If only a semblance of control is established then parent liability would be precluded,\textsuperscript{430} the corporate veil and corporate structure theory would prevent a duty of care accruing. Where no real evidence is forthcoming against the parent company then the claim, quite correctly, will be struck out. The action will also fail, even where the parent company is in breach of duty of care, where causation cannot properly be established. A causal link must be identified between corporate negligence and personal injury—a seamless transition between the two. A surfeit of the former, but dearth of the latter, will preclude liability. These issues, establishment of breach of duty of care and causation, will be endemic to all international mass tort group actions beyond the forum non conveniens equation.

There is a corollary between the hypothetical application herein of the Australian model (a clearly inappropriate forum test) to the Lubbe and Bhopal cases, and the jurisdictional outcome advanced by the U.S. federal standard in Piper Aircraft. It is suggested that, similarly, a more adventitious result would have occurred through the modified abuse of process format. In Piper Aircraft it will be recalled, that an aircraft, manufactured in Pennsylvania and incorporating propellers made in Ohio was sold by Piper to an Ohio purchaser for use in the United States and ended up as part of a Scottish air-taxi service.\textsuperscript{431} The plane crashed in Scotland, killing the pilot and five passengers,
all Scots. Personal jurisdiction in Pennsylvania was not an issue as Piper was a Pennsylvanian corporation and the claim arose out of its continuous activities in the forum. The Supreme Court, however, dismissed proceedings on two premises. First, the possibility that a less favorable body of substantive law would govern was not a controlling, or even substantial, factor in the analysis. Second, that the strong presumption in favor of the plaintiff's choice of forum was less forceful when the real parties in interest are foreign, since the absence of those parties from the forum weakens the presumption that the chosen forum is a convenient one.

The Piper Aircraft case, with respect, seems to have been incorrectly decided. 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. This replicates Article 2 primary jurisdiction under the Brussels Convention with the promotion of *actor sequitur forum rei*. A state has an undoubted interest in regulating manufacturing within its borders. A concomitant of this is that defendants must justify their activities in the United States as these actions, activities in which corporations are intentionally engaged and to which they could reasonably have foreseen forum law being applied. A more aesthetically pleasing and efficacious result would have been adopted under the optimal rule-selection technique advanced by the Australian standard. 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 therein. Health and safety regulations for manufactured products should be applicable to home residents regardless of domestic or international sales destinations.

VII. CONCLUSIONS

A decision by a United States court concerning minimum safety measures required for international subsidiary plants of American corporations, or a ruling on the level of control which would subject a parent company to liability for accidents occurring at affiliate plants abroad, would probably have more of an impact on United States corporations than would similar rulings coming from an Indian court.\textsuperscript{432}

Forum non conveniens has been employed as a judicial divining-rod for venue resolution. This rôle has developed, especially in the United States, because of the failure of overbroad personal jurisdiction rules to prescribe effective principles for distant litigation. A panacea to this anachronistic state of affairs would be a legislative code, promulgated by Congress, adopting selective features of the pragmatic and harmonised scheme of the Brussels Convention On Civil Jurisdiction And Judgments of 1968. This legislation would allow a more subservient, albeit still important, residual conceptual mechanism for forum non conveniens. The current federal standard of \textit{Gulf Oil/Piper Aircraft} and the U.K. test in \textit{Spiliada} both enunciate a "most appropriate forum" perspective. These guidelines, as exemplified by their adoption in the \textit{Lubbe} case before English courts, in tandem with the earlier \textit{Bhopal} litigation, reveal serious flaws in presenting an undue avenue for a monolithic multinational corporation to avoid liability for harm suffered by foreign claimants through the operation of their transnational businesses. The legal system of the country from which the multinational orchestrates its worldwide operations, and which receives the economic benefits of those engagements, ought to have a significant interest in regulating the conduct of the home corporate entity. There is a beguiling irony in that the "most appropriate forum" doctrine, advanced in \textit{Bhopal, Spiliada,} and \textit{Lubbe}, is predicated on inculcated policy notions of international respect and comity, anti-chauvinism, and avoidance of "pejorative" forum shopping. The antithesis of these concerns has been the discernible effect on claims as the liberal adoption of "most appropriate forum" has allowed Anglo-American courts to subvert responsibility for the transnational impact of their home multinational corporations. International respect for the legal systems and processes of foreign countries has been denigrated by allowing double standards to apply domestically and internationally to corporate bodies. In the real world, forum

\textsuperscript{432} Cummings, supra note 92, at 135 n.132.
non conveniens has become a tactical device, a mere practical tool for multinationals, who, on occasion, have played Machiavellian games to reverse forum shop.

It is time to return to the social and equitable conscience of forum non conveniens, utilized as a fail-safe mechanism designed to protect a defendant being unduly inconvenienced by a vexatious or oppressive claim. In this respect the much criticised Australian standard, a modified "abuse of process" test, more effectively complies with international responsibilities concerning appropriate venue for distant litigation. It avoids the multifarious private and public interest balancing factors under Anglo-American "most appropriate forum" doctrine, by which a foreign plaintiff is instantly placed at a disadvantage. These arcane factors are so inherently discretionary they equate to deliberating on how many angels can dance on the head of a pin. A home defendant, under the Australian test of "clearly inappropriate forum," is legitimately subjected to a harder analysis in seeking dismissal on forum non conveniens grounds. There is a definite prevailing standard. It fulfills the delicate balance of equitable rights between litigants; skewed in the claimant's favor, but meeting reasonable expectations of the defendant in relation to undue convenience. It operates as a detumescent bulwark against the parent of a multinational corporation, shielded behind corporate structure, capriciously escaping the legal and jurisdictional standards of the place where they are domiciled or resident. Thus, it prevents the danger of corporate abuse through exploitation of developing countries and downtrodden work forces via the dumping of shoddy merchandise, and through the establishment of unsafe working conditions. The Australian solution, as applied by way of illustration to the factual synthesis in Bhopal, Lubbe, and Piper Aircraft, represents a more efficacious approach to Anglo-American venue resolution.

POSTSCRIPT

An interesting addendum now applies to the mass tort litigation before the English courts in Lubbe. The House of Lords delivered their judgment immediately prior to publication of this article. Their unanimous decision to refuse to accede to a stay is to be welcomed; 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 forum conveniens principles 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
so intuitive and subjective that successful prediction is as likely as tattooing
soap bubbles. Lord Bingham, who delivered the leading judgment,\textsuperscript{434} was quite
explicit that South Africa, the focal epicenter of relevant adjectival evidence,
was the most appropriate forum to hear the action. However, interests of
justice persuaded him that the plaintiffs had no effective means of obtaining
essential professional representation and vital expert evidence to justify
proceedings. 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. The stay application
was refused. This outcome is to be applauded. It is entirely apposite that an
English parent company, a local defendant, should fail to obtain a forum non
conveniens dismissal for activity instigated from this jurisdiction. The basis
of the stay discretion, however, should not be the inherently discretionary
“interests of justice” formula, purveyed solipsistically by judges, but rather
under an alternative template for staying of actions. In this regard the
Australian model, now as distinct in common law systems as Ned Kelly, should
arguably become supererogatory. Unless the chosen forum is truly inconve-
nient for a defendant, the court should not dismiss on forum non conveniens
grounds.

\textsuperscript{434} See id. at 1559-60.