

LIMITATIONS OF ACCESS AT THE NATIONAL LEVEL: *FORUM NON CONVENIENS*

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I. INTRODUCTION

National courts provide a possible venue to assess transnational corporate (“TNC”) liability for personal injuries and death to consumers, employees, and community members. The absence of diplomatic protection as a pre-requisite for forum accessibility allows standing to individuals and

companies as parties to legal actions.¹ Therefore, individuals serve as complainants, and defendant corporations may be held directly accountable for injuries caused by defective products (“product liability”²) and from the use of negative managerial policies, plant equipment, and technology (“process liability”).³

Limitations of access to the plaintiff may arise if the domestic forums of the plaintiff and the corporate defendant differ. This situation ensues where the plaintiff seeks to assert that a parent company is responsible for the injurious acts of a subsidiary corporation in a Host State. Framing TNC accountability entails the satisfaction of two criteria. First, the victim must establish that the subsidiary corporation is acting on behalf of the parent company and thus is not an independent entity in practice.⁴ This enables the complainant to pursue proceedings in the local courts with jurisdiction over the parent company. At this level, the court is required to assert jurisdiction under procedural rules of “court-access,” e.g. personal, legislative, and/or subject matter jurisdiction.⁵ Second, the plaintiff must refute a possible application of *forum non conveniens* by the defendant. *Forum non conveniens* is a discretionary doctrine common law courts apply when declining to exercise jurisdiction and dismissing judicial proceedings in favour of an alternative forum.⁶ For example, a parent company may plead that it would incur financial and administrative disadvantages from an action in the original forum, specifically if the jurisdiction is neither where the injury occurred nor where the factual and scientific evidence is located. If the court approves the removal of proceedings to a forum where the harm and evidence are located, then the subsidiary company—as the direct perpetrator of the plaintiff’s injury—has a closer nexus with the venue. In this way, the parent company can utilise the *forum non conveniens* principle to minimise its liability. Therefore, the defendant’s capacity to displace valid or existing jurisdiction with the flexible tactic of *forum non conveniens* demonstrates that in the transnational context the assessment of *forum non conveniens* assumes significance over the issue of jurisdiction—

* This article forms a chapter from the author’s upcoming book TRANSNATIONAL CORPORATE LIABILITY: ACCOUNTABILITY FOR HUMAN INJURY.

1. Diplomatic protection is conditional for private parties to have locus standi before international forums.

2. Richard Meeran, “Process” Liability of Multinationals: Overcoming the Forum Hurdle, J. PERS. INJ. LITIG., at 170 (1995).

3. *Id.*

4. This involves lifting the corporate veil.

5. Jeffrey A. Van Datta, *The Irony of Instrumentalism: Using Dworkin’s Principle-Rule Distinction to Reconceptualize Metaphorically a Substance Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product Injury Cases*, 87 MARQ. L. REV. 425, 433 (2004).

6. *See generally*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

or at the very least, the analysis of both doctrines is perceived as being interrelated. For example, “[t]he American federal courts often use *forum non conveniens* to virtually replace personal or legislative jurisdiction analyses when foreign plaintiffs seek redress for injury inflicted abroad.”⁷ This statement also applies to other national courts and is illustrated in the discussion of English, Australian, and Canadian cases in this article.

The development of *forum non conveniens* has not been uniform in all common law jurisdictions. Yet, the underlying aim of each approach has been to avoid “forum shopping,” the undue disadvantage placed on a defendant when a plaintiff “bypasses” his natural forum and brings an action in a foreign court to obtain further relief or benefits.⁸ In England, the test for determining stays of actions is set forth in *Spiliada Maritime Corporate v. Cansulex Limited*.⁹ The defendant must prove the availability of a forum that is “clearly or distinctly” more appropriate to hear the dispute than the English courts. The court will grant a stay unless the plaintiff identifies circumstances whereby justice requires the proceedings to continue in an English forum. In Australia, *Voth v. Manildra Flour Mills*¹⁰ identifies a “clearly inappropriate forum” for dismissal of a suit. In Canada, *Amchem Products, Inc. v. British Columbia (Worker’s Comp. Bd.)*¹¹ incorporates the “more appropriate forum” threshold. In the United States, the leading case is *Piper Aircraft Co. v. Reyno*,¹² which emphasises the convenience of the parties according to private and public policy interests.

These legal systems employ *forum non conveniens* in admiralty and commercial litigation, as well as personal injury actions. Therefore, it is necessary to consider the development of *forum non conveniens* from these perspectives to assess the doctrine’s applicability to TNC liability for human injury and death.

7. Van Detta, *supra* note 5, at 430 (citing Paula C. Johnson, *Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government*, 25 Suffolk U. L. REV. 1, 51-52 (1991) (criticizing FNC as “the most significant obstacle faced by foreign plaintiffs because it has become so pervasive in the international products liability landscape”)).

8. *Boys v. Chaplin*, [1971] A.C. 356, 401 (H.L.).

9. *Spiliada Maritime Corporate v. Cansulex Ltd.*, [1987] A.C. 460 (H.L.).

10. *Voth v. Manildra Flour Mills* (1990) 65 A.L.J.R. 83.

11. *Amchem Prods. Inc. v. British Columbia (Worker’s Comp. Bd.)*, [1993] 102 D.L.R. (4th) 96.

12. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), *reh’g denied*, 455 U.S. 928 (1982).

II. THE DEVELOPMENT OF *FORUM NON CONVENIENS* IN THE UNITED KINGDOM

A. Common Law Interpretation of the Doctrine

English courts are authorised to stay proceedings on the ground of *forum non conveniens* under section 49 of the Civil Jurisdiction and Judgments Act 1982, as amended by the Civil Jurisdiction and Judgments Act 1991, Sch. 2, para. 24.¹³ Section 49 states that: “[n]othing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention.”¹⁴

The judicial interpretation of *forum non conveniens* derives from Scottish and English case law. The current tenets of the doctrine are based upon Scottish principles. First, the term “*forum non conveniens*” refers to the “appropriate” rather than the “convenient” forum.¹⁵ The aim is to consider the interests of the parties objectively.¹⁶ Second, a court will approve a stay only if it “is satisfied that another tribunal with competent jurisdiction exists, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.”¹⁷ The House of Lords upheld these rationales in *Spiliada Maritime Corporate v. Cansulex Limited*.¹⁸

Prior to *Spiliada*, the plaintiff emphasised his or her interests in an application for a stay of proceedings. *Cohen v. Rothfield*¹⁹ instructed that the onus was on the defendant to satisfy the court that the plaintiff would not be deprived of an advantage in the foreign legal procedure that he would otherwise be entitled to use in the English courts. Lord Scott clarified this approach in *St. Pierre v. South American Stores (Gath & Chaves) Ltd.* He stated that:

The true rule about a stay under section 41 [of the Supreme Court of the Judicature (Consolidated) Act, 1925] ... may I think be

13. Civil Jurisdiction and Judgments Act 1991, c. 12, Sch. 2, ¶ 24 (U.K.).

14. Civil Jurisdiction and Judgments Act 1982, c. 27, Pt. V, § 49 (U.K.) (emphasis added).

15. *Société du Gaz de Paris v. La Société Anonyme de Navigation “Les Armateurs Français,”* [1926] S.C. 33, 35 (H.L.).

16. *Spiliada Maritime Corporate v. Cansulex Ltd.*, [1987] A.C. 460, 474 (H.L.); *The Atlantic Star v. Bona Spes*, [1974] A.C. 436, 442 (H.L.).

17. *Spiliada*, [1987] A.C. at 474 (citing *Sim v. Robinow*, [1892] Sess. Cas. (R.) 665, 668 (Scot. 1st Div.)).

18. *Id.* at 476.

19. *Cohen v. Rothfield*, [1919] 1 K.B. 410, 413-414 (U.K.).

stated thus: (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. These propositions are, I think, consistent and supported by the following cases: *McHenry v. Lewis* (1882) 22 Ch. D. 397; *Peruvian Guano v. Bockwoldt* (1883) 23 Ch. D. 225; *Hyman v. Helm* (1883) 24 Ch. D. 531; *Thornton v. Thornton* (1886) 11 P.D. 176; and *Logan v. Bank of Scotland* (No. 2) [1906] 1 K.B. 141, 150-151.²⁰

The practicality of the “vexatious and oppressive” threshold was examined in *The Atlantic Star*.²¹ *The Atlantic Star* was a maritime dispute that arose when two Dutch owned vessels collided in Belgian waters, resulting in two deaths. The plaintiffs invoked the jurisdiction of the Admiralty Court in England to bring an action *in rem* against the defendants' vessels.²² The defendants sought a stay of action in favour of the Belgian forum.

The issue before the House of Lords was whether *forum non conveniens* could be granted if the sole connecting factor between the English forum and the dispute was jurisdiction as of right. The Court provided a stay of proceedings, observing that the words “vexatious” and “oppressive” could have a flexible construction to assess the plaintiff's conduct toward the defendant.²³ It was not necessary for the defendant to show that the plaintiff was wrongly motivated in selecting the forum.²⁴ The Court suggested that the terms be applied in the future with a liberal interpretation.²⁵

20. *St. Pierre v. South Am. Stores (Gath & Chaves) Ltd.*, [1936] 1 K.B. 382, 398.

21. *The Atlantic Star*, [1974] A.C. 436.

22. *Id.* at 463 (Lord Wilberforce) (stating that Section 3(3) of the Supreme Court of Judicature Act, 1925 (15 & 16 Geo. 5, c.49) confers jurisdiction on the Admiralty Court where there is a maritime lien on the ship; meaning the Admiralty Court may “entertain actions *in rem* in respect of damage done by a ship whether the defendant ship is British or not and wherever the residence or domicile of its owners may be”); *see also id.* at 461 (Lord Morris of Borth-y-Gest) (stating that the Admiralty Court “has a right to arrest a ship on the basis that after an event such as a collision a maritime lien attaches to the offending ship for the damage caused”).

23. *Id.* at 444.

24. *Id.*

25. *Id.* at 454.

Further modifications of the *St. Pierre* test were considered in *MacShannon v. Rockware Glass Ltd.*²⁶ The fact pattern and issues raised in *MacShannon* are akin to those concerning the liability of TNCs for human injury and death. *MacShannon* was an industrial action for personal injury claims. The defendant company was registered in England but situated in Scotland.²⁷ Four employees claimed damages for workplace accidents resulting from the employer's failure to provide a safe work environment.²⁸ The defendant attained a stay of action by pleading that litigation in English courts would include the extra expense and delay of transferring witnesses from Scotland.²⁹ The House of Lords granted the application on the basis that the terms "vexatious and oppressive" should be defined with more certainty.³⁰ Lord Diplock reformulated the second half of the *St. Pierre* test, stating that:

In order to justify a stay two conditions must be satisfied, one positive and the other negative, (a) the defendant must satisfy the court there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.³¹

While this statement was not expressly approved in *MacShannon*,³² it was endorsed in *The Abidin Daver*.³³

The above considerations were subsequently integrated into the *Spiliada* test for applying *forum non conveniens*. Lord Goff of Chieveley confirmed the dictum in *Sim v. Robinow* as the underlying determinant for a stay of proceedings. He held that a stay will be made only if the court is satisfied that there is some other available forum with competent jurisdiction.³⁴ It is the forum where the case may be tried more suitably for the interests of all the parties and the ends of justice.³⁵

26. *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795 (H.L.).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 817-818 (Lord Salmon), 823 (Lord Russell), and 826-827 (Lord Keith).

31. *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795, 812 (H.L.) (Lord Diplock).

32. A. G. Slater, *Forum Non Conveniens: A View from the Shop Floor*, 104 L. Q. REV. 554, 556 (1988).

33. *The Abidin Daver*, [1984] A.C. 398, 419 (H.L.).

34. *Spiliada Maritime Corporate v. Cansulex Ltd.*, [1987] A.C. 460 (H.L.).

35. *Id.* at 476 (Lord Goff).

The alternative forum must be “clearly or distinctly more appropriate than the English forum.”³⁶ It may be the “natural forum” since it has “the most real and substantial connection” with the action.³⁷ Connecting factors to consider include: convenience or expense (such as the availability of witnesses), the law governing the relevant transaction,³⁸ “and the places where the parties reside or conduct business.”³⁹ The judge has discretion to determine the weight of each factor.⁴⁰ If the defendant establishes the presence of a more appropriate forum, the plaintiff bears the burden of proving that the existence of extraordinary circumstances requires the trial to continue in England.⁴¹ For example, the alternative forum could present procedural disadvantages which prevent fair administration of justice. General examples of injustice may arise from administrative or judicial inefficiency, differing legal procedures or the absence of legal remedies.⁴² Lord Goff refrained from emphasising the “legitimate personal or juridical advantage” as stated by Lord Diplock in *MacShannon*. Lord Diplock had cautioned that a stay should not deprive the plaintiff of a legitimate personal or juridical advantage provided in the English court.⁴³ In *Spiliada*, Lord Goff stated that the benefits of remaining in an English jurisdiction include: “damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; [and] a more generous limitation period.”⁴⁴ He held that the denial of these benefits should not prevent the court from granting a stay of proceedings if the court determines that justice will prevail in the available forum.⁴⁵

B. Statutory Interpretation of the Doctrine

1. The English Courts

In addition to a common law analysis, interpretation of the Brussels Regulation assists in determining the applicability of *forum non*

36. *Id.* at 477.

37. *Id.* at 476; *see also* *The Abidin Daver*, [1984] A.C. 398, 415 (H.L.).

38. *Id.* at 477 (citing *Credit Chimique v. James Scott Eng'g Group Ltd.*, [1892] S.L.T. 131).

39. *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, 478.

40. *Id.* at 484.

41. *Id.* at 476; *see also* *The Abidin Daver*, [1984] A.C. at 411-412.

42. *Spiliada*, [1987] A.C. at 479-484.

43. *Id.* at 475 (quoting *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795, 812).

44. *Id.* at 482.

45. *Id.* Lord Goff acknowledges that “. . . the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice, and these considerations may lead to a different conclusion in other cases.”

conveniens.⁴⁶ Article 2(1) reads that: “Persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that Member State.”⁴⁷ Clarification of this article by the English judiciary and the ECJ remains inconclusive, leading to three types of discrepancies.

First, Article 60(1)(a)(b)(c) clarifies that the corporate domicile is the Contracting State where a corporation has “(a) a statutory seat, or (b) central administration, or (c) principal place of business.”⁴⁸ Article 60(2) provides that “[f]or the purposes of the U.K. or Ireland, ‘statutory seat’ means registered office . . . or the place of incorporation or . . . the place under the law of which the formation took place.”⁴⁹ These provisions offer access to victims of personal injuries by U.K. TNCs and assert liability against the parent company. To hold a parent corporation responsible for the injuries committed by the subsidiary company, a complainant could submit a claim under either ground. The complainant could establish that the parent company was incorporated in the U.K. and plead that the subsidiary had implemented policies on behalf of the parent company, the essential centre of management and control for foreign operations. In regards to the principal place of business, the Court has ruled that it is “not necessarily where most of the physical business is carried out,” but can be where the earnings are ultimately remitted and the most important decisions are made.⁵⁰ In addition, a company’s central administration can be the principal place of business if it is the location of persons with the most significant responsibilities.⁵¹

Second, the Court of Appeal formed an exception to the phrasing of Article 2 in *In re Harrods (Buenos Aires) Ltd.*⁵² It ruled that an English court could apply *forum non conveniens* if a more appropriate forum was not a Contracting State.⁵³ This reasoning was justified by the view that “[t]he Convention was intended to regulate jurisdiction *as between* Contracting States.”⁵⁴ Therefore, there was no inconsistency between the Court’s approach and the forum specification rules in the Brussels

46. See generally, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1 [hereinafter “Brussels Regulation”].

47. *Id.* at art. 2, ¶ 1.

48. *Id.* at art. 60, ¶ 1(a)-(c).

49. *Id.* at art. 60, ¶ 2.

50. *King v. Crown Energy Trading A.G. and Crown Res. A.G.*, [2003] Q.B. 163, 493 (Eng.) (quoting *The Rewia*, [1991] 2 Lloyd’s Rep. 325, 334 (internal quotation marks omitted)).

51. *Id.* at 494.

52. See *In re Harrods (Buenos Aires) Ltd.*, [1992] Ch. 72, 101-102.

53. *Id.* at 103; see also *Eli Lilly and Co. v. Novo Nordisk A/S*, [2000] I.L.Pr. 73, 74; *Ace Ins. S.A.-N.V. v. Zurich Ins. Co. & Zurich Am. Ins. Co.*, [2001] 1 Lloyd’s Rep. 618, 622.

54. *Harrods*, [1992] Ch. at 101-102.

Convention. The decision was referred to the ECJ by the House of Lords, but was settled prior to a court ruling.⁵⁵ Thus, a claim under Article 60 by a plaintiff from a non-Member State could be precluded on grounds of *forum non conveniens*.

Third, on an individual level, the *Harrods* ratio contributes to an uncertainty that a plaintiff associates with a court's discretionary assessment of a *forum non conveniens* application. On a general level, it promotes inconsistency by denying uniform, expeditious, and affordable jurisdictional rules within the European Union.⁵⁶ Both disadvantages are demonstrated in transnational suits such as the conflict in *Airbus Industrie GIE v. Patel*.⁵⁷

Patel concerned an air crash in India.⁵⁸ The aircraft had been assembled by Airbus Corporation, which was registered in France.⁵⁹ Therefore, plaintiffs from Contracting States of the Brussels Convention were required to bring proceedings in France; however, the *Harrods* judgment provided English claimants with a choice of alternative forums.⁶⁰ The English plaintiffs could consider initiating an action against the defendants in French, Indian, or U.S. courts (Texas being the home state of the defendant corporation's parent company).⁶¹ The legal process was complicated when Airbus Industrie persuaded the Court of Appeal to enforce an anti-suit injunction issued by the Indian courts.⁶² The injunction would confine the English victims to litigation in India, which if successful would probably result in a lower award of damages than the U.S. and French forums. In granting the injunction, the Court of Appeal made a *forum non conveniens* analysis.⁶³ This was an unnecessary measure that denied jurisdiction to a Texas court, since the U.S. was not a Contracting State to the Brussels Convention. Instead the Court observed that:

France would also be a convenient forum. It is where Airbus Industrie is registered and carries on business. In so far as its management practices are concerned and, to an extent, the training of the pilots, France is the relevant party. France is also the

55. Landenimor SA v. Intercomfinanz SA, 1992 O.J. (C 219) 4.

56. See Brussels Convention pmb.; see also Report on the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice, 1979 O.J. (C 59) 71 [hereinafter "Schlosser Report"]. The "Schlosser Report" is a non-binding document.

57. [1997] 2 Lloyd's Rep. 8 (Eng. C.A.).

58. *Id.* at 9.

59. *Id.* at 17.

60. *Id.* at 8.

61. *Id.*

62. Airbus Industrie GIE v. Patel and Others, [1997] 2 Lloyd's Rep. 8, 19 (Eng. C.A.).

63. *Id.* at 17-19.

Convention Country under which the English claimants are obliged to sue Airbus Industrie under the Brussels Convention.⁶⁴

The House of Lords reversed the ruling, endorsing its limited jurisdiction.⁶⁵ It clarified that England was not a natural forum for the proceedings and could not justify indirect interference with a foreign court.⁶⁶ English courts should grant anti-suit injunctions only if they had a connection or “sufficient interest in the matter” to intervene.⁶⁷ This approach returned to the plaintiffs the right to sue in Texas and/or France. It also highlighted the obstacles formed from the procedural interpretation of the Brussels Convention commencing in *Harrods* and continued by the Court of Appeal above. In contrast, the jurisdictional rules in the Brussels Convention and Regulation hold an element of definitiveness and logic for the fair and efficient resolution of transnational suits.

2. The European Court of Justice

Article 5(3) of the Brussels Convention states that: “A person domiciled in a Contracting State may, in another Contracting State, be sued . . . in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.”⁶⁸ Under the Brussels Convention, the ECJ formed a broad interpretation to offer plaintiffs a choice of forum. According to *Handelswekerij G.J. Bier BV v. Mines de Potasse d’Alsace SA*,⁶⁹ “the place where the harmful event occurred” refers to both the defendant’s act and the resulting injury. Therefore, the plaintiff may sue the defendant where the damage was caused (the place of acting) or manifested (the place of injury). The rationale for this “freedom of choice”⁷⁰ is that both connecting factors could have procedural or evidentiary relevance for the plaintiff.⁷¹ The significance of this reasoning is illustrated in view of forum accessibility to plaintiffs asserting corporate liability for transborder injuries. For example, an environmental claim could be sought in the State where a corporation emits pollution (i.e. the place from where the tort derives) or in the State where the pollution enters and harms the plaintiff. A products liability suit could be brought, similarly, in the State where the manufacturer is located or

64. *Id.* at 17.

65. *Id.* at 19.

66. *Id.*

67. *Airbus Industrie GIE v. Patel and Others*, [1997] 2 Lloyd’s Rep. 8, 19 (Eng. C.A.).

68. European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil Matters, Sept. 27, 1968, art. 5, ¶ 3, 8 I.L.M. 229, 232.

69. [1976] E.C.R. 1735 [hereinafter *Bier*].

70. *Id.* at 1735.

71. *Id.* at 1746.

where the product was sold to the plaintiff. Arguably, a distinction could be made regarding an injury's origin so as to deem the parent company liable as the principal tortfeasor. The connecting factor would be the forum where the offending policy was made and approved (if not implemented), and thus permit the victim to seek recourse there.

C. The Application of Forum Non Conveniens to TNC Proceedings in English Courts

The *Spiliada* guidelines continue to be further defined as foreign plaintiffs attempt to sustain proceedings in English courts against English TNCs for the harmful acts of overseas subsidiary companies. For example, the direct testimony of expert evidence and witnesses,⁷² conditional fee arrangements,⁷³ and legal aid for the plaintiffs⁷⁴ are identified as legitimate connecting factors that do not automatically dismiss proceedings in the defendant's favour.

1. The *Connelly* Case

In *Connelly v. RTZ Corp. PLC and RTZ Overseas Ltd.*, the plaintiff was a former employee of a subsidiary company in Namibia that operated uranium mines.⁷⁵ He alleged he acquired throat cancer as a result of working in a mine that the company had failed to maintain as a reasonably safe workplace. He attempted to bring proceedings against both the parent and subsidiary companies in England.

The Queen's Bench Division granted a stay of proceedings, surmising the case had the most real and substantial connection with Namibia.⁷⁶ The trial judge observed that Namibia was the jurisdiction where the injury had occurred and where the principal and expert witnesses resided.⁷⁷ Moreover, he determined that a site inspection of the mine was needed and the Namibian courts had the expertise and effectiveness to ensure a fair trial.⁷⁸ This last conclusion was made although the plaintiff was impecunious and could not obtain legal aid in Namibia to finance professional representation and witnesses. Conversely, legal aid might have been available in England

72. Ngcobo and Others v. Thor Chemical Holdings Ltd., No. 1994 N 1212 (11 April 1995), (Q.B.D.).

73. *Connelly v. R.T.Z. Corp. Plc.*, [1997] 8 Int'l Legal Prac. 643, 653 (C.A.).

74. *Connelly v. R.T.Z. Corp. Plc.*, [1998] A.C. 854, 869 (H.L.).

75. *Id.* at 854.

76. The stay of the proceedings was set forth in an unreported judgment. *Connelly (A.P.) v. R.T.Z. Corp. PLC and Others*, ¶¶ 4-5 (1999), available at <http://www.hrothgar.co.uk/WebCases/hol/reports/02/17.htm>, [hereinafter "Connelly Judgment"].

77. *Connelly v. R.T.Z. Corp. Plc.*, [1996] Q.B. 361 (C.A.).

78. *Id.*

for him to pursue the claim; however, the trial judge interpreted Section 31(1)(b) of the 1988 Legal Aid Act, however, as precluding the plaintiff from receiving assistance.⁷⁹ Section 31(1)(b) states that:

(1) Except as expressly provided by this Act or regulations under it... (b) the rights conferred by this Act on a person receiving advice, assistance or representation under it shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised.⁸⁰

Finally, the judge opined that a court could not take the availability of legal aid into consideration for a *forum non conveniens* application.⁸¹ Nonetheless, this ruling did not address the issue of a case that could be heard more suitably for the interests of all parties and for the ends of justice in a jurisdiction where a party lacked funding to conduct litigation, although the plaintiff potentially had access to financial assistance in another forum.

The Court of Appeals affirmed the decision of the trial judge,⁸² holding that Section 31(1)(b) required the judge to disregard the availability of legal aid in England and the unavailability of such aid in Namibia.⁸³ A justification for this approach was that the recipient would acquire advantages over other applicants for legal aid. This exception would transform the recipient into a “super first class citizen.”⁸⁴ The Court also considered the importance placed upon international comity by *Spiliada*,⁸⁵ which emphasised that the aim of comity was to attain a “broad consensus” among common law jurisdictions,⁸⁶ such consensus concerned *forum conveniens* and not *fiscus conveniens*.⁸⁷ Hence, a Court should consider whether the alternative forum has the juridical and forensic facilities to warrant a fair trial, while exempting financial comparisons such as the effectiveness of legal aid structures in individual states.⁸⁸

The House of Lords reversed this reasoning under the dictum in *Sim v. Robinow* and affirmed in *Spiliada*.⁸⁹ It ruled that the determination whether

79. *Id.*

80. Connelly Judgment, *supra* note 76, at ¶ 4.

81. Connelly v. R.T.Z. Corp. Plc., [1996] Q.B. at 361.

82. *Id.*

83. *Id.*

84. *Id.* at 371.

85. *Id.* at 370 (citing the opinion of Lord Goff in *Spiliada*, [1987] A.C. 460).

86. Connelly v. R.T.Z. Corp. Plc., [1996] Q.B. 361, 370.

87. *Id.*

88. *Id.*

89. Connelly v. R.T.Z. Corp. Plc., [1998] A.C. 854 (H.L.) (citing *Sim v Robinow*, 1892 Sess. Cas. (R.) 668 and *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, 474).

“the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice”⁹⁰ was contradicted by the reading of Section 31(1)(b) that “artificially curtailed” the legal aid qualification of the applicant as a factor to consider.⁹¹

Lord Goff stated the general rule for analyzing the plaintiff’s legal aid eligibility as a factor in a *forum non conveniens* application.⁹² He upheld the general principle set forth in *Spiliada*⁹³ that a plaintiff must accept a clearly more appropriate forum even if there are less procedural and financial advantages than in the English forum.⁹⁴

In *Connelly*, professional representation by lawyers and testimony of expert scientific witnesses was essential for the case to be tried in any jurisdiction.⁹⁵ The absence of financial resources would impede litigation from occurring in Namibia, whereas the benefits of legal aid or a conditional fee agreement were available to the plaintiff in England.⁹⁶ It was clear that substantial justice could not be guaranteed to the plaintiff in the natural forum.⁹⁷ Thus, Namibia was not, in the interests of both parties and the ends of justice, the most appropriate venue.⁹⁸ This reasoning, however, remains theoretical. The High Court dismissed the claim in 1998.⁹⁹ It found that the complaint had not met the applicable statute of limitations and refused further leave to appeal.¹⁰⁰

2. The *Lubbe* Case

In *Lubbe v. Cape Plc.*, a claim was brought against an English parent corporation for the subsidiary’s failure to provide a safe workplace in South Africa.¹⁰¹ The plaintiffs alleged that they had acquired mesothelioma and

90. *Connelly v. R.T.Z. Corp. Plc.*, [1998] A.C. at 868-869.

91. *Id.*

92. *Id.*

93. *Spiliada*, [1987] A.C. at 482.

94. *Connelly v. R.T.Z. Plc.*, [1998] A.C. at 872. Examples of shortcomings in another system could include differences in available remedies, discovery, and evidentiary systems. A forum also could lack the financial resources also to implement or maintain an effective legal aid system. Therefore, the denial of legal aid to a plaintiff in the alternative and more appropriate forum is not a reason for the Court to restrain a stay of proceedings, unless the plaintiff can establish that substantial justice cannot be done in that forum

95. *Id.* at 874.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Connelly v. R.T.Z. Corp. Plc.*, [1998] A.C. 854, 874 (H.L.).

100. Dropkin, Greg, *Door Slams Shut on Former Rossing Worker*, (Dec. 7, 1998), available at <http://www.namibian.com.na/>.

101. *Lubbe v. Cape Plc.*, [1999] I.L.Pr. 113, 118-119 (A.C.).

other diseases from exposure to high asbestos levels in the subsidiary company's mines.¹⁰²

The case was heard before two Courts of Appeal and the House of Lords.¹⁰³ The main issues before the courts were a clarification of when an alternative forum becomes available to the defendant and whether a group action could proceed in English courts.¹⁰⁴ The initial claim was brought on behalf of five claimants. The Court of Appeal dismissed a *forum non conveniens* application on technical grounds.¹⁰⁵ It held that a defendant must heed the availability of an alternative forum by consenting to jurisdiction in the courts of that State.¹⁰⁶ Submitting to jurisdiction must occur between the period of the summons being issued to the defendant and the hearing before the trial judge.¹⁰⁷ In the present case, the defendant had elected in favour of the foreign forum during the hearing before the trial judge. The rationale for the time limit is to prevent an undue advantage to the defendant, who otherwise could attain a forum that predominantly was more favourable to his interests.¹⁰⁸ This would counter the Court's disinterested approach for approving a forum that was in "the interests of both parties and for the ends of justice," as required by *Spiliada*.¹⁰⁹

The number of claimants eventually was extended to a group action of 1,538 additional individuals.¹¹⁰ The issue then arose before the Queen's Bench whether the change in standing was an abuse of the Court's process, since the plaintiff's solicitors first had obtained jurisdiction in U.K. courts as a tactical advantage before making the proposed amendment.¹¹¹

The Court disagreed that the group action was an abuse of process,¹¹² although the plaintiffs' solicitors had an initial obligation to disclose their intentions.¹¹³ However, *forum non conveniens* would be granted as the vast requirements for a group action identified the more appropriate forum as South Africa.¹¹⁴ A group action would entail a complete determination of the unsafe asbestos conditions in the mines and mills and the impact upon

102. *Id.*

103. *See* Lubbe v. Cape Plc., [1999] I.L.Pr. 113 (A.C.0; Lubbe v. Cape Plc., [2000] 1 Lloyd's Rep. 139, 150 (A.C.); and Lubbe v. Cape Plc., [2000] 1 W.L.R. 1545 (H.L.).

104. Lubbe, [2000] 1 Lloyd's Rep. at 146-154.

105. Lubbe, [1999] I.L.Pr. at 132.

106. *Id.*

107. Mohammed v. Bank of Kuwait, [1996] 1 W.L.R. 1483.

108. Lubbe, [1999] I.L.Pr. at 129.

109. *Id.* The Court observed that this was almost a case of "forum shopping in reverse."

110. Lubbe v. Cape Plc., [2000] 1 Lloyd's Rep. 139, 142.

111. Lubbe, [1999] I.L.Pr. at 129.

112. Lubbe, [2000] 1 Lloyd's Rep. at 154.

113. *Id.*

114. *Id.* at 153.

employees and residents.¹¹⁵ The mass presence of witnesses in South Africa was vital.¹¹⁶

The fact that a group action would be a test case in South African courts was not a disadvantage to the plaintiff.¹¹⁷ The Court suggested that the South African legal system could rely upon the past experience of U.K. courts in conducting such proceedings.¹¹⁸ Similarly, the possibility that legal aid would not be available to the claimant due to financial and administrative obstacles in South African was not a matter of general consideration for the Court.¹¹⁹

The Court of Appeal¹²⁰ confirmed that a group action did not form an abuse of court process but that, nonetheless, legal representation and accessibility to scientific, technical, and medical evidence could be made available in South African courts.¹²¹

The House of Lords reversed the stay of proceedings by emphasizing the principles contained in case precedents rather than relying merely on the *Spiliada* connecting factors test.¹²² Lord Bingham restated the general rule that a plaintiff must accept an alternative and more appropriate venue even if less advantageous to him than the English forum.¹²³ As held in *Connelly*,¹²⁴ the onus is not discharged by showing that legal aid is available in the U.K. and not in the competing forum. A possible exception to this premise is if the plaintiff can establish that the nature and complexity of the case requires the use of legal representation and expert scientific assistance that is available only in the present forum.¹²⁵ If the *Lubbe* proceedings had been stayed in favor of the more appropriate forum in South Africa, it was improbable that the plaintiffs would have had access to obtain the professional representation and expert evidence essential to justly decide the claims.¹²⁶ This would result in a denial of justice.¹²⁷ Furthermore, the lack of established procedures in South Africa to handle group actions was an

115. *Id.* at 147.

116. *Id.* at 148.

117. *Lubbe v. Cape Plc.*, [2000] 1 Lloyd's Rep. 139, 150 (A.C.).

118. *Id.*

119. *Id.*

120. *Id.* at 164, 167 (Lord Pill, 164; Lord Alduous, 167).

121. *Id.* at 164 (Lord Pill).

122. *Lubbe v. Cape Plc.*, [2000] 2 Lloyd's Rep. 383, 390 (H.L.).

123. *Id.* (citing *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, 428; *Connelly v. R.T.Z. Corp. Plc.*, [1998] A.C. 854, 873).

124. *Connelly*, [1998] A.C. at 873.

125. *Lubbe*, [2000] 2 Lloyd's Rep. at 390.

126. *Id.* at 393.

127. *Id.*

obstacle for the plaintiff.¹²⁸ Even if the South African judiciary applied the examples of other jurisdictions, such as the U.K., an experimental stage would still arise from which further delay, uncertainty, and expense could incur.¹²⁹ Lastly, the Court observed that public interest considerations were not a factor in the *Spiliada* test in view of *Sim v. Robinow*.¹³⁰ The more appropriate jurisdiction would provide “for the interests of all the parties and for the ends of justice,”¹³¹ regardless of which forum was more “desirable” on public interest grounds for the litigation to proceed.¹³²

However, litigation failed to materialize since the parties entered settlement negotiations in 2001. A final settlement was approved in 2003 for the allocation of £7.5 million among the existing 7,500 claimants.¹³³

D. Summing Up *Connelly* and *Lubbe*

The *Connelly* and *Lubbe* judgments did not resolve the uncertainty in English law arising from the analysis of Article 2 of the Brussels Convention in *In re Harrods*. In *Lubbe*, the House of Lords did not decide the issue nor seek a ruling from the ECJ. Its view was that the decision not to grant a stay of proceedings made it unnecessary for the Court to apply either option.¹³⁴

Following the recent ECJ judgment in *Owusu v. Jackson*,¹³⁵ a reconsideration of *Harrods* should confirm the following points to interpret the Brussels Regulation:

128. *Id.* In *Steel & Morris v. U.K.*, the European Court of Human Rights held that the denial of legal aid could lead to a violation of Article 6(1) of the European Human Rights Convention (¶ 64). The Court found:

[t]he right of access to a court is not absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate . . . [.] It may therefore be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his prospects of success in the proceedings. Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary.

Steel & Morris v. United Kingdom, 41 E.H.R.R. 22, 2005 WL 290985 (ECHR).

129. *Lubbe*, [2000] 2 Lloyd’s Rep. at 393.

130. *Id.* at 394.

131. *Id.* at 398 (quoting *Sim v. Robinow*, 1892 Sess. Cas. (R.) 665, 668 (Scot. 1st Div.).

132. *Id.* at 398.

133. Richard Meeran, *Cape Plc: South African Mineworkers’ Quest for Justice*, INT’L J. OCCUP. ENV’T. HEALTH, 226 (July 2003), available at http://www.iioeh.com/pfds/0903_Meeran/pdf.

134. *Lubbe*, [2000] 2 Lloyd’s Rep. 383.

135. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383.

Article 2 refers only to the defendant against which a claim is brought. Consequently, there is no qualification of the nationality or domicile of the potential plaintiff. By implication, Article 2 does not exclude a plaintiff who is a national of, or is domiciled in, a non-Contracting State.¹³⁶

Article 2 states that persons domiciled in a Contracting State “shall” be sued in that forum. This is a mandatory stipulation. *Forum non conveniens* provides a discretionary power to English courts and contradicts Article 2. It can be exercised against non-Civil law Contracting States only by the express authorisation of the Brussels Convention¹³⁷ or Regulation.

If the Regulation subsequently does authorise the *forum non conveniens* principle, then there must be a significant factor in the *Spiliada* test to justify dismissing the forum that is considered to be appropriate under the Regulation.¹³⁸ The court should invoke a “relevant discretion.”¹³⁹ This approach would avoid the results of the *Harrods* ratio.

Pending an assessment of *Harrods*, the doctrine of *forum non conveniens* remains a partially defined instrument of English Courts.

III. THE DEVELOPMENT OF *FORUM NON CONVENIENS* IN AUSTRALIA AND CANADA

The development of *forum non conveniens* in England has directed the interpretation in other jurisdictions that provide a stay of proceedings. For example, the *Spiliada* test has been adopted with modification in Australia and Canada.¹⁴⁰

In Australia, the leading case for a *forum non conveniens* assessment is *Voth v. Manildra Flour Mills*.¹⁴¹ It is an adaptation of the *St. Pierre* test¹⁴² that retains harassment as a standard for considering inconvenience to the defendant. “[A] defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him.”¹⁴³ The “clearly inappropriate forum” test avoids a comparison with

136. *S & W Berisford Plc v. New Hampshire Ins. Co.*, [1990] 2 Q.B. 631, 641 (concluding that Article 2 of the Brussels Convention “clearly applies to actions brought by persons who are not domiciled in any contracting state”).

137. *Arkwright Mutual Ins. Co. v. Bryanston Ins. Co.*, [1990] 2 Q.B. 649, 654.

138. *S & W Berisford*, [1990] 2 Q.B. at 645.

139. *Id.*

140. *See, e.g. Voth v. Manildra Flour Mills* (1990) 171 C.L.R. 538.

141. *Henry v. Henry* (1996) 185 C.L.R. 571, 587 (confirming that *Voth v. Manildra Flour Mills* is the leading case on this issue).

142. *See supra* note 20; *see also Renault v. Zhang* (2002) 210 C.L.R. 491, 504.

143. *Voth*, 171 C.L.R. at 555 (confirming *Oceanic Sun Line v. Fay* (1988) 165 C.L.R. 197, 248).

the competing forums that is inherent in the “clearly more appropriate forum” approach.¹⁴⁴ Instead the focus is upon the advantages and disadvantages of continuing proceedings in the plaintiff’s choice of forum.¹⁴⁵ Public policy interests are not considered, and administrative delays and insufficient judicial resources cannot be claimed in the defendant’s defense.¹⁴⁶

The exemption of the “most suitable forum” principle serves in favour of the plaintiff.¹⁴⁷ The onus upon the defendant to establish strong inconvenience to its interests is significant if the claim is against a company.¹⁴⁸ Accordingly, parent companies that are based in Australia could be made accountable in local courts for injuries arising abroad to individuals.¹⁴⁹ This would deter corporations from applying different safety and environmental standards in the foreign operations of subsidiary companies.¹⁵⁰

In Canada, the leading case for a *forum non conveniens* determination is *Amchem Products Incorporated v. British Columbia (Worker’s Comp. Bd.)*.¹⁵¹ It confirms the *Spiliada* threshold of a more appropriate forum.¹⁵² A court must first determine if the domestic forum is the natural forum that has the closest connection with the action and the parties.¹⁵³ Alternatively, it will dismiss proceedings to the clearly more appropriate forum.¹⁵⁴

However, personal and juridical advantages should be considered and weighed with the other connecting factors when identifying the more appropriate forum.¹⁵⁵ The loss of juridical advantage should not be treated as a separate and distinct condition.¹⁵⁶

144. *Id.* at 558.

145. *Id.*

146. *Id.* at 561 (confirming the proposition set forth in *Oceanic Sun Line*, 165 C.L.R. at 254).

147. Peter Prince, *Bhopal, Bougainville and OK Tedi: Why Australia’s Forum Non Conveniens Approach is Better*, 47 INT’L & COMP. L.Q. 573, 597 (1998); *see also*, Peter Prince, *Bhopal 20 Years On: Forum Non Conveniens and Corporate Responsibility*, Research Note No. 26 2004-05, Parliament of Australia, Parliamentary Library, available at <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn26.htm>.

148. *See* Voth, 171 C.L.R. at 587.

149. Prince, *supra* note 151, at 574; *see also*, *Goliath Portland Cement Co. v. Bengtell* (1994) 1994 NSW LEXIS 14309, at *54.

150. Prince, *supra* note 151, at 574; *see also*, *James Hardie & Co. v. Grigor*, 1998 NSW LEXIS 1867, at *48.

151. *Amchem Prods. Inc. v. British Columbia (Worker’s Comp. Board)*, [1993] 1 S.C.R. 897.

152. *Id.*

153. *Id.*

154. *Id.* (citing *Avenue Props. Ltd. v. First City Dev. Corp.*, [1986] 7 B.C.L.R.2d 45).

155. *Amchem*, [1993] 1 S.C.R. 897.

156. *Id.*

The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, it is ordinarily condemned as "forum shopping." On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that the forum provides. The legitimacy of this claim is based on "a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available."¹⁵⁷

This "reasonable expectation" is subject to the court's interpretation, and the possibility exists that the court could regard a plaintiff's legitimate actions as "forum shopping." For instance, a judicial approach that could apply in favour of a defendant TNC is stated in the Dissent of Lord Hoffmann in the *Connelly* judgment (H.L.).¹⁵⁸ In the opinion of Lord Hoffmann:

[t]he plaintiff while employed in Namibia had no legitimate expectation that litigation arising out of the circumstances of his employment would take place in England. He had abandoned his Scottish domicile of origin and emigrated to South Africa. He then moved to Namibia. His position was therefore no different from that of a native Namibian. Apart from the fact that his employer formed part of a multinational group of companies with its headquarters in England, the transaction had no connection with England.¹⁵⁹

This reasoning places a narrow obligation upon corporations to compensate victims. It is a strict interpretation of facts that limits geographical considerations over justice and fairness. In this sense it is contrary to the dicta in *Sim v. Robinow*.

The *Amchem* case was perceived in the defendant's interest in *Recherchés Internationales Quebec v. Cambior*.¹⁶⁰ The defendant was a Canadian subsidiary that had caused mass pollution in Guyana by failing to maintain a dam.¹⁶¹ The Superior Court in Quebec held that it would grant *forum non conveniens* if the remedy sought by the plaintiffs was available

157. *Id.*

158. *Connelly v. R.T.Z. Corp. Plc. And R.T.Z. Overseas Ltd.*, [1998] A.C. 854, 867 (H.L.) (Lord Hoffman, dissenting).

159. *Id.* at 876. This view contrasts with the observation in *Goliath Portland Cement Co. Ltd. v. Bengtell* (1994) 33 N.S.W.L.R. 414, 419-420. There, an Australian court stated that the forum where a large corporation has its headquarters is a reasonable place to file suit.

160. *Recherchés Internationales Quebec v. Cambior Inc.*, [1998] CarswellQue 4511.

161. *Id.*

also in the foreign jurisdiction.¹⁶² This test is subjective since it allows the court to be satisfied with comparable rather than identical legal standards. Here, the Superior Court recognized that the company's decision making had occurred in Canada but considered that the High Court of Guyana was capable of handling issues of proof and discovery procedures.¹⁶³ Its approach aligns with the U.S. courts below.

IV. THE DEVELOPMENT OF *FORUM NON CONVENIENS* IN THE UNITED STATES

A. United States Supreme Court

The United States Supreme Court initially allowed Admiralty Courts to invoke *forum non conveniens* in disputes between foreign litigants.¹⁶⁴ It held that declining jurisdiction was not an abuse of a court's discretion.¹⁶⁵ Presently, any court may dismiss an action even if a general venue statute authorises jurisdiction¹⁶⁶ and a local party is involved.

In *Koster v. American Lumbermens Mutual Casualty Co.*¹⁶⁷ a court's forum of choice was identified as that which best served "the convenience of the parties and the ends of justice."¹⁶⁸ There were two assumptions within this definition. First, the Supreme Court assumed that a plaintiff generally would be a U.S. national and would claim against a non-resident defendant in American courts.¹⁶⁹ Second, the choice of local forum suggested that there were factors of convenience to the plaintiff.¹⁷⁰ Therefore, the plaintiff's choice of forum was entitled to great deference and would exceed the inconvenience to the defendant.¹⁷¹ It was rarely to be disturbed.¹⁷²

Piper Aircraft Co. v. Reyno addresses the issue of determining a *forum non conveniens* application against an American defendant by a national from another country.¹⁷³ The Court's objective of ensuring that the trial is

162. *Id.*

163. *Id.*

164. *Canada Malting Co. Ltd. v. Paterson Steamship*, 285 U.S. 413, 421 (1932).

165. *Id.*

166. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

167. *Koster v. Am. Lumbermens Mut. Cas. Co.*, 380 U.S. 518 (1947).

168. *Id.* at 527.

169. *Id.* at 524.

170. *Gulf Oil Corp.*, 330 U.S. at 508.

171. *Id.*

172. *Id.*

173. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 238 (1981), *reh'g denied*, 455 U.S. 928 (1982).

convenient entails the converse application of the *Koster* principles.¹⁷⁴ As a result, an alien plaintiff's choice of a U.S. forum receives less deference than a local complainant's.¹⁷⁵ The *Piper* case provides the federal test for assessing stays of action. The Court first must determine whether an alternative forum exists and to which the defendant is amenable to process.¹⁷⁶ If so, it must evaluate whether the forum is "appropriate" by weighing the private and public interests of the parties.¹⁷⁷

The Court upheld the private and public interest factors cited in *Gulf Oil*, although these had been intended to apply in interstate rather than transnational disputes.¹⁷⁸ Private interest factors of the litigants include: (1) the "relative ease of access to sources of proof;" (2) the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;" (3) the "possibility of a view of the premises, if the view would be appropriate to the action;" and (4) "all other practical problems that make trial of a case easy, expeditious and inexpensive."¹⁷⁹ The public interest factors include: (1) the administrative difficulties flowing from court congestion; (2) the "local interest in having localized controversies decided at home;" (3) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; (4) the avoidance of unnecessary problems in conflict of law, or in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty.¹⁸⁰

These considerations resulted in a stay of proceedings against the foreign respondent in *Piper Aircraft Co. v. Reyno*.¹⁸¹ The dispute arose from an air crash in Scotland.¹⁸² The decedents were Scottish residents, while the respective companies that had manufactured the airplane and propellers were located in the U.S.¹⁸³ The respondents claimed liability against the companies in Pennsylvania.¹⁸⁴ In deliberating whether an alternative forum existed, the Supreme Court refused to prevent an

174. *Id.* at 241-242.

175. *Id.* at 243-244.

176. *Pain v. United Techs. Corp.*, 637 F.2d 775, 784-785 (D.C. Cir. 1980); *see also* *Gulf Oil Corp.*, 330 U.S. at 506-507 (1947); *Piper Aircraft Co.*, 454 U.S. at 241.

177. *Id.*

178. *Piper Aircraft Co.*, 454 U.S. at 241.

179. *Gulf Oil Corp.*, 330 U.S. at 508.

180. *Id.* at 508-509.

181. The foreign respondents first initiated the wrongful death action against the U.S. defendants in the Superior Court of California. *Piper Aircraft Co.*, 454 U.S. at 239-240. In the present action, the U.S. parties are the petitioners of a forum non conveniens application. *Id.* at 241.

182. *Piper Aircraft Co.*, 454 U.S. at 238.

183. *Id.* at 239.

184. *Id.* at 241.

automatic dismissal if a change in forum could result in applying a law that was less favorable to the plaintiff.¹⁸⁵ The exception to this rule was if the alternative forum offered a remedy that was so inadequate that it was not effective.¹⁸⁶ The Court provided three reasons for a minimum consideration of a possible change in the law.¹⁸⁷ It would be required to compare the conflicts and substantive laws of both forums.¹⁸⁸ A construction in favour of a U.S. forum would increase the access of foreign plaintiffs to the home courts of American manufacturers.¹⁸⁹ Third, preventing an action's dismissal, especially if the chosen forum was inconvenient, would nullify or lessen the flexibility of the *forum non conveniens* doctrine.¹⁹⁰

The Court concluded that private interest factors indicated Scotland was the appropriate forum.¹⁹¹ Although the documents concerning the design, manufacture, and testing of the airplane and propeller were situated in the United States, most of the relevant evidence was in Scotland and England.¹⁹² Witnesses who could testify to the maintenance of the aircraft, the training of the pilot, and the investigation of the accident resided in England,¹⁹³ and witnesses to the damage were located in Scotland. A local trial would also be facilitated by familiarity with Scottish topography and access to the wreckage.¹⁹⁴

Further, the public interest favored trial in Scotland.¹⁹⁵ The accident had occurred in Scottish airspace, the decedents were Scottish nationals, and the remaining potential plaintiffs and defendants were either Scottish or English. Furthermore, there was "a local interest in having localized controversies decided at home."¹⁹⁶ The Court was "not convinced that American citizens had an interest in ensuring that American manufacturers were deterred from producing defective products, or that additional deterrence would be obtained if the suit were in the U.S. where the rules of both negligence and strict liability could be applied."¹⁹⁷ Its view was that

185. *Id.* at 250.

186. *Id.* at 254.

187. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251 (1981), *reh'g denied*, 455 U.S. 928 (1982).

188. *Id.*

189. *Id.* at 251-252.

190. *Id.* at 251.

191. *Id.* at 260.

192. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257-258 (1981), *reh'g denied*, 455 U.S. 928 (1982).

193. *Id.* at 242.

194. *Id.*

195. *Id.* at 260.

196. *Id.* at 238-239, 242.

197. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 (1981), *reh'g denied*, 455 U.S. 928 (1982).

any incremental deterrence acquired from a trial in an American forum was likely to be insignificant.¹⁹⁸ In addition, the large commitment of judicial time and resources outweighed the U.S. interest in the dispute.¹⁹⁹ Such reasoning restricts the access of non-resident complainants to the home courts of corporate defendants that commit transnational injuries.

B. United States District Courts

Generally, federal district courts have applied *forum non conveniens* in conformity with the *Piper* test; resulting in the preclusion of claims brought by foreign plaintiffs who allege claims against U.S. parent companies. The inflexibility of the approach set forth in *Piper Aircraft Co. v. Reyno* was illustrated *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*.²⁰⁰ The tort arose in India by the discharge of lethal gas (methyl isocyanate) from a subsidiary plant of an American corporation.²⁰¹ Over 200,000 residents of Bhopal suffered injuries ranging from mild and temporary to serious and permanent.²⁰² One hundred forty five actions were commenced in United States federal courts and the actions were joined and assigned to the Southern District of New York.²⁰³

The United States District Court for the Southern District of New York based its holding on the premise that a foreign plaintiff's choice of forum "deserves less deference" than a local applicant would have.²⁰⁴

First, the Court stated that it did not have to determine whether a change in law brought about in an alternative forum would be unfavourable to the plaintiff.²⁰⁵ It did, however, consider whether the procedural and discovery limitations of the Indian legal system would deprive the plaintiffs of all remedies.²⁰⁶ The Court held that administrative delays and case backlogs in Indian courts would not necessarily impede the Bhopal action from proceeding.²⁰⁷ The Court inferred that the Indian judiciary would assume special measures to expedite the litigation "through special judicial

198. *Id.* at 260-261.

199. *Id.* at 261.

200. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986).

201. *Id.* at 844.

202. *Id.*

203. *Id.*

204. *Id.* at 845 (stating that because the plaintiffs were foreign "and share a home forum which is not the instant forum, the assumption that this forum (the Southern District of New York) is convenient is not completely reasonable (citing *Piper Aircraft Co.*, 545 U.S. at 261)).

205. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842, 846 (S.D.N.Y. 1986).

206. *Id.* at 846-847.

207. *Id.* at 852.

accommodation.²⁰⁸ It then dismissed concerns that the tort law of India was insufficiently developed, specifically regarding high technology or complex manufacturing processes.²⁰⁹ The Court observed that the Indian tort system was based upon common law principles and could consult English case precedents.²¹⁰ To this end, most tort law applied in American cases involving complex technology evolved from English legal principles.²¹¹

The U.S. forum did concede the inadequacies of Indian pre-trial discovery.²¹² Only parties, and not third-party witnesses, are subject to discovery.²¹³ They are not made to disclose the actual proof at trial during this period.²¹⁴ Unlike U.S. courts, discovery is confined to admissible evidence rather than material likely to lead to relevant or admissible material.²¹⁵ However, the Court did not perceive that these disadvantages rendered India an inadequate forum.²¹⁶ To rectify the victims' availability to sources of proof, it imposed a choice of law order for the proceedings in the alternative venue.²¹⁷ The defendant was required to submit to discovery rules under the United States Federal Rules of Civil Procedure during litigation or pre-trial proceedings.²¹⁸

Second, the Court held that the private interests strongly favoured the suit's dismissal.²¹⁹ It examined three factors. First, access to most sources of proof relating to liability was based in India. The relevant documentary evidence for the design, training, safety, and start-up of the subsidiary company was in India.²²⁰ Records stating the role of the Indian government in safety, licensing and other matters were also located in India.²²¹ It was significant that some documents would have to be translated in English for use in American courts. Second, access to most witnesses was in India and would include hundreds of engineers and other subcontractors, shift

208. *Id.* at 848.

209. *Id.* at 849.

210. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842, 849 (S.D.N.Y. 1986).

211. *Id.* (citing *Rylands v. Fletcher*, [1868] 1 L.R.-Ex. 265).

212. *Id.* at 850.

213. *Id.*

214. *Id.*

215. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842, 850 (S.D.N.Y. 1986).

216. *Id.*

217. *Id.*

218. *Id.* at 850 n. 7 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 n. 25 (1981), *reh'g denied*, 455 U.S. 928 (1982)).

219. *Id.* at 852-853.

220. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842, 853-859 (S.D.N.Y. 1986).

221. *Id.*

employees, safety monitoring personnel, and employees responsible for training, safety auditing, procurement, and compliance with regulations and other operations.²²² Removing the witnesses from a local forum would cause higher transportation and translation costs for a U.S. court.²²³ Finally, the Court observed that the possible viewing of the subsidiary plant was a minor factor in its decision, but since the disaster site had been sealed after the gas leak a recent assessment of the plant might be relevant.²²⁴ However, an Indian court would be in a more appropriate position than a U.S. court to organize a viewing.²²⁵

Finally, the District Court considered public interest factors in the final stage of the *forum non conveniens* analysis.²²⁶ It acknowledged that the connection of the lawsuit with New York was “slightly less tenuous” than a corporation that had merely conducted business in the State.²²⁷ The defendant had been involved in the process and design of the subsidiary company and hence may be related directly to policies implemented in Bhopal.²²⁸ Still, the Court minimized the relevance of this nexus.²²⁹ It emphasized instead that the main events before and after the commission of the torts had occurred mainly in India.²³⁰ Additionally, the primary witnesses and claimants involved in the case were Indian citizens. This approach shifted the administrative responsibility onto the Indian forum as the court with the most significant contacts with the event.²³¹ The District Court seemed particularly concerned with the negative effects of litigation upon an American jury. It ruled that trial in New York would form a financial and time disadvantage to taxpayers and jurors respectively.²³² It is significant that the Court speculated that a suit would extend by requiring jurors to “endure continual translations” and that the burden on the jurors and their families, employers, and communities would be considerable.²³³ These are personal theories of a judge rather than judicial considerations of

222. *Id.* at 859-860.

223. *Id.*

224. *Id.* at 860.

225. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842, 860 (S.D.N.Y. 1986).

226. *Id.* at 860-861.

227. *Id.* at 861.

228. *Id.*

229. *Id.*

230. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842, 861 (S.D.N.Y. 1986).

231. *Id.*

232. *Id.* (citing *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert. denied*, 469 U.S. 1108 (1985)).

233. *Id.* at 862.

the Court. As a sociological comment they would appear irrelevant in a legal assessment of *forum non conveniens*.

The Second Circuit Court of Appeals affirmed the District Court's stay of proceedings.²³⁴ It held that the condition imposing federal rules of discovery only upon the defendant was unfair.²³⁵ Basic justice would require reciprocal discovery so that both litigants could have equal access to the evidence.²³⁶ The Court of Appeals proposed that the Indian authorities could permit mutual discovery under the Federal Rules.²³⁷ Thus, it adhered to the practice initiated by the District Court of imposing choice of law rules in an alternative forum. This intervention could be justified as redressing disadvantages to the foreign party in its Home Courts (as intended by the District Court), but it could also be interpreted as protecting the American defendant's rights. The latter intent could be regarded as a further advantage for the defendant—rather than an “equal access” of rights to both parties—in view of the protective bias towards U.S. litigants in the federal cases.²³⁸ The insertion of legal conditions into the procedures of the alternative forum suggests that the Court of Appeals is not merely considering the forum that best serves “the convenience of the parties and the ends of justice.”²³⁹ The Court could ensure, conversely, that the “adequate” alternative forum is clearly the most convenient venue for the interests of the American defendant.

V. CONCLUSION

The principle of *forum non conveniens* limits victims from redressing injuries in the national courts of offending companies. The accountability of parent companies for human injury and death could be made more viable by: (1) the abolition of *forum non conveniens* or (2) the application of a transnational doctrine of *forum non conveniens*.

The rejection of *forum non conveniens* would have four results. First, it would regulate TNCs from employing a double standard of employment practices in the Home and Host States.²⁴⁰ The use of identical, or comparable, health and safety standards would protect employees, residents, and consumers in the foreign jurisdiction. Second, a stay of proceedings

234. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 809 F.2d 195, 205-206 (2d Cir. 1987).

235. *Id.* at 205.

236. *Id.*

237. *Id.* at 205-206.

238. See *Koster v. Am. Lumbermens Mut. Cas. Co.*, 380 U.S. 518 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

239. *Koster*, 380 U.S. at 518.

240. *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 688 (1990) (Doggett, J., concurring).

does not ensure that a trial will occur in the other forum. An inadequate system of tort law or compensation in the country where the injury was caused may have been the reason for the victim's initial choice of forum.²⁴¹ The victim may discontinue his or her claim if the choice is not acquired. Third, trial in a foreign court does not necessarily provide an effective deterrent to TNCs that are found liable. Tort and compensatory deficiencies in the foreign legal system may permit a lesser remedy than the parent company's Home Courts would have provided. Fourth, the Home Courts of a parent company could discourage double standards of liability for TNCs. A trial would provide the same legal considerations for foreign plaintiffs as it would for local victims harmed by domestic companies.

A transnational doctrine of *forum non conveniens* would require a standard application of specific factors. The interpretation of *forum non conveniens* in England, Australia, Canada and the United States is not uniform. The adoption of the rules from one of these jurisdictions could offer a possible transnational model. For instance, the "clearly inappropriate forum" in the *Voth* case generally defends the foreign plaintiff's interests. The *Amchem* judgment allows a more objective deliberation, but it is uncertain how the "loss of a juridical or personal advantage" will be construed. The *Reyno* decision discounts either approach by emphasising a bias for the U.S. defendant. Depending upon its interpretation, the *Spiliada* test has the potential to be applied subjectively or objectively. The result could be similar to the *Voth* or *Reyno* aims, or, could converge on a more balanced assessment—as defined presently by the English judiciary. Therefore, a transnational application of the *Spiliada* factors could have conflicting results among different legal systems.

The jurisdictional rules in the Brussels Regulation could replace a transnational doctrine of *forum non conveniens* if they were followed by national courts. The Preamble to the Regulation urges defining the domicile of legal persons autonomously to clarify common law rules and avoid conflict of jurisdiction.²⁴² The mandate for a defendant to be sued in the state of its domicile (Article 2(1)) is a concrete factor. Consequently, a

241. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1359-1360 (S.D.Tex. 1995); *Delgado v. Shell Oil Co.* 890 F. Supp. 1324, 1359-1360 (S.D. Texas) (1995); *see also* Aguinda et. al. v. Texaco Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 370 (2d Cir. 2002).

242. Paragraph Eleven of the Preamble of the Brussels Regulation provides that:

The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common law rules more transparent and avoid conflict of jurisdiction.

Council Regulation 44/2001, pmb. ¶ 11, 2000 O.J. (L 012).

parent company can be made accountable in its Home Courts. The flexible construction of Article 5(3) in the *Bier* case allows the plaintiff an additional choice of forum,²⁴³ that also may correspond with the criteria in Article 60. Article 60 supplements the definition for a company's domicile. A company may be domiciled where it has its statutory seat, central administration, or place of business. Thus a plaintiff has access to more connecting factors to establish a claim against a TNC and withstand a *forum non conveniens* interpretation.

243. *Supra* note 69.