

**THE DOCTRINE OF FORUM NON CONVENIENS AND THE DISCRETIONARY
LIMITATION OF JURISDICTION OF THE SOUTH AFRICAN
ADMIRALTY COURT IN TERMS OF SECTION 7(1) OF
THE ADMIRALTY JURISDICTION REGULATION
ACT, 105 OF 1983, AS AMENDED.**

BY

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BIBLIOGRAPHY
TABLE OF WORKS CONSIDERED AND REFERRED TO

- Anton **Private International Law** 2nd ed. (1990)
pp 209-218
- Bamford **The Law of Shipping and Carriage in South Africa** 3rd ed. (Juta,
1983)
Benedict on Admiralty 7th ed. (Matthew Bender 1989)
- Booyesen, H "South African's new Admiralty Act: A Maritime Disaster?" 1986
Vol.6 No.2, **Modern Business Law**.
- Briggs, A "Forum non conveniens-now we are ten?" (1983) 3 **Legal Studies** 74.
- Briggs, A "The staying of actions on the grounds of "forum non conveniens" in
England today." (1984) **Lloyd's Maritime and Commercial Law
Quarterly** 227.
- Briggs, A "Forum non conveniens-the last word?" (1987) **Lloyd's Maritime
and Commercial Law Quarterly** 1.
- Collins, L. **Dicey and Morris on The Conflict of Laws** 12th ed. (Sweet &
Maxwell 1993)
- Guest, A.G. **Anson's Law of Contract** 26th ed. (Clarendon Press 1984)
- Forsyth, C.F. **Private International Law** 3rd ed. (Juta 1996)
- Forsyth, C.F. "The conflict between Modern Roman Dutch Law and the Law of
Admiralty as administered by the South African Courts" (1982) 99
South African Law Journal 267.
- Friedman, D.M. "Maritime Law in the Courts after 1 November 1983"
(1983) 100 **South African Law Journal** 267.

- Friedman, D.M. "Maritime Law in practice and in the Courts"
(1985) 102 South African Law Journal 45.
- Gloag & Henderson Introduction to the law of Scotland (1987) (9th ed. by A B, Wilkinson, W A Wilson)
- Grimes R., Shipping Law, 2ed (1991) at 26.
- Hahlo, H R. and Kahn, E The South African Legal System and its Background (Juta) (1973).
- Hare, J The Arrest of Ships, Chapter on South Africa, (Lloyds) (1987).
- Halsbury Laws of England 4th ed. vol 11.(Butterworth 1900)
- Halsbury Australian and New Zealand Commentary on Halsbury's Laws of England 4th ed. (Butterworth 1976)
- Halsbury Statutes of England 2nd ed. (Butterworth 1900)
- Hill, C. Maritime law 3rd ed. (Lloyds of London Press Ltd, 1989)
- Hill, C. Maritime law 4th ed. (Lloyds of London Press Ltd, 1995)
- Hofmeyr, G. "Admiralty Jurisdiction in South Africa." 1982 Acta Juridica 30.
- Jackson, D.C. "Current English Admiralty Jurisdiction and Practice", 1982 Acta Juridica 5 at p.9
- Jackson, D.C. Enforcement of Maritime Claims (Lloyds of London Press Ltd, 1985)
- Jackson, D.C. Enforcement of Maritime Claims. 2nd ed. (Lloyds of London Press Ltd, 1996)
- Joubert, D.(ed) Law of South Africa vol 15 paras 98-136.

- Joubert, D.(ed). **Law of South Africa** vol 25 paras 169-194.
- Joubert, D.(ed), **Lawsa First Reissue** Volume 1 (1993) paras 406-408.
- Margolis, R. "Staying an action because the foreign law is ambiguous." 1994 (1) **Lloyds Maritime and Commercial Law Quarterly** 30
- McClellan, D. **Morris on The Conflict of Laws** 4th ed. (Sweet & Maxwell 1993)
- Morris, **The Conflict of Laws**, 3rd ed, (1984)
- Mustill, Sir M.J.
and Boyd, S.C. **The Law and Practice of Commercial Arbitration in England** 2nd ed. (Butterworths 1989)
- North, P.M. and
Fawcett, J.J . **Cheshire and North's Private International Law** 12th ed. (Butterworths 1992)
- Pollack **The South African Law of Jurisdiction** 1937
- Rycroft, A. "Changes in South African Admiralty Jurisdiction" 1984 **Lloyds Maritime and Commercial Law Quarterly** 173.
- Shaw, D.J. **Admiralty Jurisdiction and Practice in South Africa** (Juta 1987)
- South African
Law Commission **Project 32: Report on the Review of the Law of Admiralty** (Juta, September 1982)
- Spiro, E. **Conflict of Laws** (Juta, 1973)
- Staniland, H. "Developments in South African Admiralty Jurisdiction and Maritime Law" 1984 **Acta Juridica** 271.
- Staniland, H., "The implementation of the Admiralty Jurisdiction Regulation Act in South Africa" 1985 (3) **Lloyds Maritime and Commercial Law Quarterly** 462.
- Staniland, H. "The new Carriage of Goods by Sea Act in South Africa" 1987 **Lloyds Maritime and Commercial Law Quarterly** 305.

- Staniland, H. "Is the Admiralty Court to be turned into a Court of convenience for the wandering litigants of the world?" (1985) 103 South African Law Journal 9
- Taitz J., The Inherent Jurisdiction of the Supreme Court 1985
- Tetley, W. Marine Cargo Claims 2nd ed. (Butterworths 1978)
- Tetley, W. Maritime Liens and Cargo Claims (International Shipping Publications 1989)
- Verheul, J.P. "The Forum (Non) Conveniens in English and Dutch law and under some International Conventions." (1986) 35 I.C.L.Q. 413.

**TABLE OF CASES
SOUTH AFRICAN**

Alahah Mai Deribe & Sons v. The Ship "Golden Togo", 1986 (1)
S.A. 505 (N)

Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 263 at p. 274 D-E;

Butler v. Banimar Shipping Co.SA 1978 (4) S.A. 753 (SECLD)

Commissioner for Inland revenue and Another v. Isaacs NO and Others 1960 (1) SA
126 (A)

Crooks & Co. v Agricultural Co-operative Union Limited 1922 AD 423

Kandagasabapathy and others v MV Melina Tsiris 1981 (3) SA 950 (N)

Katagum Wholesale Commodities v The MV Paz

Intercontinental v. MV Dien Danielsen 1982 (2) SA 534 (N)

Lecomte v W & B Syndicate of Madagascar 1905 TS 696

Magat v MV "Houda Pearl" 1982 2 SA 37 (N).

Malilang and Others v MV Houda Pearl 1986 (2) SA 714 (A)

Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another 1986 (4) SA
329 (D)

MV Achilleus v Thai United Insurance Co Ltd and Others 1992 (1) SA 324 (N)

Owners and/or Master of the MV Motoria and others v. Omnipex Overseas SA 1979
(3) SA 616 (N) at p. 623.

Parekh v Shah Jehan Cinemas (Pty) Ltd and Others 1980 (1) SA 301 (D)

Tharros Shipping Corporation S.A. v Owner of the Ship "Golden Trader", 1972 (4)
S.A. 316 (N)

The Rhodesian Railways Ltd. v. Mackintosh, 1932 A.D. 359

Transol Bunker BV v MV Andrico Unity and Others Grecian-Mar SRL v MV
Andrico Unity and Others 1989 (4) SA 325 (AD)

Trivett & Co. (Pty) Ltd. v Wm. Brandt's Sons & Co. Ltd. 1975
(3) S.A. 423 (A)

Yorigami Maritime Construction Co. Ltd. v Nisshoiwai Co. Ltd. 1977 (4) S.A. 682 (C)

Yorigami Maritime Construction Co. Ltd. v Nisshoiwai Co. Ltd. 1978 (2) SA 391 (C).

**TABLE OF CASES
UNITED KINGDOM**

Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. (1983)

Aratra Potato Co Ltd v Egyptian Navigation Co, The El Amria (1981) 2 LIR 119

Citi-March and another v. Neptune Orient Lines Ltd and others [1997] 1 LIR 72.

Clemens v. Macaulay (1866) 4 M. 583, 593.

Connelly v. RTZ Corp [1997] 4 All ER 335, HL.

Currie v. McKnight 1897 A.C. 97 at p.101.

E I Du Pont de Nemours Co and Endo Laborities Inc. v I C Agnew, K W Kerr and others
[1987] 2 LIR 585 (CA)

Halifax Overseas Freighters Ltd. v. Rasno Export; Techno- prominport; and Polskie Linie
Oceaniczne PPW. ("The Pine Hill") (1958) 2 LIR 146.)

Las Mercedes (Owners) v Abidin Daver (Owners) (1984) 1 LIR 339, HL;

MacShannon v. Rockware Glass Ltd (1978) AC 795; (1978) 1 All ER 625

Owners of SS Sheaf Lance v Owners of SS Barcelo 1930 SLT 445.

Sim v. Robinow (1892) 19 R. 665, 666.

St Pierre v. South American Stores Scot (1936) 1 KB 382

Societe du Gaz de Paris v Societe Anonyme de Navigation, " Les Armateurs Francais"
1926 SLT 33; 1926 S.C. (H.L.) 13.

Spiliada Maritime Corporation v. Cansulex Ltd (1987) 1 LIR 1 HL; (1986) 3 All.ER. 841

The Abidin Daver (1984) 1 LIR 339

The Adolf Warski (1976) 1 LIR 107

The Andria (1984) 1 LIR 1126

The Athenee (1922) 11 LIR 6

The Atlantic Star (1973) 2 All ER 198

The Blue Wave (1982) 1 LIR 151

The Camosun 1909 AC 597 (PC)

The Cap Bon (1967) 1 LIR 543

The Eleftheria (1969) 2 All ER 641;

The Fehmarn (1957) 2 All ER 707 and, on appeal (1958) 1 All ER 333

The Forum Craftsman (1984) 2 LIR 102

The Jalamatsya (1987) 2 LIR 164

The Leon XIII 8 PD 121 at 124

The Maritime Trader (1981) 2 LIR 153

The Rena K (1979) 1 LIR 397

The Sidi Bishr (1987) 1 LIR 42.

The Tillie Lykes (1977) 1 LIR 124

The Tuyuti (1984) 2 LIR 545

The Yuri Maru and The Woron (1927) AC 423.

The Wellamo (1980) 2 LIR 229

Wilson v Compagnie des Messageries Maritimes (1954) 2 LIR 544

UNITED STATES OF AMERICA / CANADA

Gulf Oil Corporation v. Gilbert (1947) 330 US 501

Canada Malting Co, Ltd v. Paterson Steamships Ltd (1935) 285 US 413.

The Jerusalem 13 Fed. Cas. 559 (No.7293)(C.C.D.Mass.1814);

The Belgenland 114 U.S. 355 1885

Wilson v. Compagnie des Messageries Maritimes (1954) 1 LIR 229; in appeal (1954) 2 LIR 544 (Aust)

The MV Blooming Orchard: Sonmez Denizcilik ve Ticaret Anonim Sirketi v. MV "Blooming Orchard" (1990) 99 ALR 138 (Aust)

1 INTRODUCTION

On 1 November 1983 Parliament promulgated The Admiralty Jurisdiction Regulation Act, Act 105 of 1983 (hereinafter referred to as "the Act"), which repealed the Colonial Courts of Admiralty Act 1890 of the United Kingdom insofar as it applied in relation to the Republic of South Africa.¹

The Act revolutionised the law applicable to admiralty proceedings in the Republic of South Africa and answered the need for a codified and modern approach toward admiralty law as applied in South Africa, which had been advocated by maritime concerns and jurists for many years. The Act has been described as one which contained "novel, unusual and at times far-reaching provisions"² and that in being enacted it was the intention of the Legislature:³

"to introduce a remedial measure designed to provide what is nowadays referred to as 'a new dispensation' in respect of maritime claims and their enforcement in South Africa".⁴

Many statutory rights and remedies not previously part of the English admiralty law as applied in the Supreme Courts of the Republic of South Africa were introduced by the Act. With the extension in the category of "maritime claims" now available to the claimant came a statutory extension of the Court's powers to adjudicate on matters maritime in terms of the Act brought by "the wandering litigants" of the maritime community. An extended jurisdiction was created but at the same time the drafters of the Act included important and far reaching, and definitely necessary provisions relating to the limitation of

1 Section 16(1) of the Act; confirmed by Corbett CJ in National Iranian Tanker Co. v. MV Pericles GC 1995 (1) SA 475 (AD) at p.479 H

2 Per Friedman J in Katagum Wholesale Commodities Co Ltd v The MV Paz 1984 (3) SA 261 (N) at p.263.

3 Per Leon J in his dissenting judgment in Euromarine International of Mauren v The Ship Berg and Others 1984 (4) SA 647 (N) at p.666.

4 Per Miller JA in Euromarine International of Mauren v The Ship Berg and Others 1986 (2) SA 700 (A) at p. 711 D-H.

It is submitted the enactment of section 7(1)(a) was necessary for three broad reasons:

- (i) firstly, it provided the Admiralty Court with a statutory discretion to regulate the use or abuse of its own proceedings by "the wandering litigants" of the maritime world ;
- (ii) secondly, it enshrined the Scottish law doctrine of **forum non conveniens** into our law in statutory form and thereby removed all doubt, amongst Roman Dutch Law purists, that the doctrine has been received into South African Admiralty law; and
- (iii) thirdly, it provided a mechanism whereby justice can be done between the litigants to ensure the most efficient and cost effective determination of their dispute, in the interests of fairness and justice for all, and in the furtherance of the spirit of comity amongst nations.

In essence the provisions of section 7 (1) of the Act constitute a "safety valve" mechanism which the Court may in the exercise of its discretion apply to regulate the proceedings before it in order to ensure judicial control over admiralty actions under its extended jurisdiction and to assist warring litigants resolve their differences.

Section 7 (1)(b) of the Act, which was not amended by the Amendment Act reads , as follows:

s.7(1)(b) **"A court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed."**

The question may be asked why the need for a separate section 7 (1)(b)? The answer lies close to the reason that it was the intention of the Legislature in providing the specific powers in section 7 (1)(b), to confer on the Admiralty Court a general discretion to exercise jurisdiction primarily in respect of disputes between the litigants which are governed by some prior arbitration agreement or choice of jurisdiction and law clause in terms whereof the parties thereto agreed to refer their dispute to an chosen forum for

adjudication under a certain law, whether by arbitration or court proceedings in the Republic of South Africa or elsewhere, respectively.

The distinction between these similar provisions, have been described by our Court as follows:⁷

"Section 7(1)(a), in effect, introduced into our law the principle of Scottish law that a Court can decline to exercise jurisdiction on the ground of forum non conveniens...which, because it was not accepted as a principle of English law..., was therefore prior to the enactment of s 7(1)(a) also not part of our law."

"Section 7(1)(b), it will be observed does not empower a Court to decline jurisdiction but to stay proceedings which is, of course, something different since the proceedings (and the arrest by means of which they were commenced) will continue until the whole matter is concluded finally."

The discretionary powers conferred by sections 7 (1)(a) and 7(1)(b) on the Admiralty Court is a common feature to these sections which permit the Court to decline jurisdiction and to stay arbitration and other proceedings before it in favour of arbitration tribunals inside and outside of South Africa, and foreign forums in respect of litigation proceedings generally. By virtue of sections 7(1)(a) and (b), the Act makes it clear that the Court's jurisdiction, however wide it may be, is not available to any claimant as a matter of course and just for the asking.⁸

The nature and extent of the principles to be applied by the Court when exercising its discretionary powers now need to be examined. It will be submitted that the principles embodied in the Scottish law doctrine of forum non conveniens is of equal application to the relief provided under sections 7 (1) (a) and (b) of the Act. What is the doctrine of forum non conveniens and how is it to be applied?

7 Per Friedman J. in Katagum Wholesale Commodities v. The MV Paz 1984 (3) SA 261 (NPD) at pp. 266 I- 267 A. *check if have*

8 Per Van Heerden J. in Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another 1986 (4) SA 329 (D) at p.335 A.

2 THE DOCTRINE OF FORUM NON CONVENIENS

The Scottish principle of **forum non conveniens** is a principle of general application which entitles a Court to decline jurisdiction on the ground that the litigation would be better conducted and determined elsewhere, in another forum which is more appropriate.⁹ Under the common law of Scotland, the Scots Court may in the exercise of its discretion decline to exercise jurisdiction in a particular case on a plea of **forum non conveniens**, or as it was stated in the earlier cases, **forum non competens**, raised by a defendant before it.¹⁰

The plea, in essence, states that the Court is a competent, but the inappropriate, forum and invites the Court to decline that jurisdiction in favour of another competent forum elsewhere "more suitable for the ends of justice".¹¹

In Sim v. Robinow,¹¹² Lord Low stated that the doctrine of **forum non conveniens** applies "whenever it can be shown that the case cannot, consistently with fairness and justice be tried in (Scotland)". The most authoritative modern judicial statement of the Scots law on the doctrine of **forum non conveniens** is to be found in the principles laid down by the House of Lords in Societe du Gaz de Paris v Societe Anonyme de Navigation, "Les Armateurs Francais".¹³

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- 9 Anton, A.E. with Beaumont P.R., **Private International Law: a treatise from the standpoint of Scots law**, 2ed. (1990) pp. 212 -218.; see also Grimes R., **Shipping Law**, 2ed (1991) at 26.
- 10 Gloag & Henderson, **Introduction to the law of Scotland** (1987) (9th ed. by A B Wilkinson, W A Wilson), at 40 para.2.22.
- 11 Briggs, A., "The staying of actions on the grounds of "forum non conveniens" in England today." (1984) L.M.C.L.Q. 227 at 249.; See also Anton (supra) pp. 212 -218.
- 12 Sim v. Robinow (1892) 19 R. 665, 666.
- 13 Societe du Gaz de Paris v Societe Anonyme de Navigation, "Les Armateurs Francais" 1926 SLT 33; 1926 S.C. (H.L.) 13. In casu, the House of Lords recognised forum non conveniens as a doctrine of general application in Scotland.; see also Owners of SS Sheaf Lance v Owners of SS Barcelo 1930 SLT 445. The Atlantic Star (1973) 2 All ER 198, per Lord Kilbrandon at 199.

Lord Sumner in Societe du Gaz put the doctrine, in what is regarded as its authoritative form, when he said:¹⁴

"I do not see how one can guide oneself profitably by endeavouring to reconcile and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the best way and in the best tribunal, and that the best man should win. The real proposition is, I think, that the Court has to consider how best the ends of justice in the case in question and on the facts before it, so far as that can be measured in advance, can be respectively ascertained and served....The object, under the words "forum non conveniens", is to find that forum which is more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends."

In the same case, Lord Dunedin pointed out that the proper translation of "conveniens" was "appropriate", not convenient and that "the gist of the matter is that the decision must be taken in light of the whole surrounding circumstances."¹⁵ Lord Dunedin further recognised that the classic statement of the Scots law on the principle was contained in the dicta of Lord Kinnear delivered in Sim v. Robinow, who had stated:¹⁶

" the court has (never) refused to exercise its jurisdiction upon the ground of a mere balance of convenience and inconvenience, and the reason is that such a ground of judgment would make it necessary for the court to proceed upon facts and circumstances the full force of which it cannot appreciate without an inquiry into the whole merits of the case...: and therefore in such a case something more is required than mere practical inconvenience in order to sustain the plea of forum non conveniens. The general rule was stated by the late Lord President in Clemens v. Macaulay (1866) 4 M. 583, 593 in the following terms:

"In cases in which jurisdiction is competently founded, a Court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suitor comes to ask. Judex tenetur impertiri judicium suum; and the plea under consideration must not be stretched so as to interfere with this general principle of jurisprudence."

14 Societe du Gaz (supra) at 22.

15 Societe du Gaz (supra) at 18.

16 Societe du Gaz (supra) at 19.

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

Lord Chancellor Cave in Societe du Gaz, in referring to Sim v. Robinow and Clemens v. Macaulay, made the following remarks:

"I have no doubt that what they meant was that, if in any case it appeared to the Court, after giving consideration to the interests of both parties and to the requirements of justice, that the case could not be suitably tried in the Court in which it was instituted, and full justice could not be done there to the parties, but could be done in another Court, then the former Court might give effect to the plea by declining jurisdiction and permitting the issues to be fought out in the more appropriate forum."¹⁷

Forum non conveniens has long been been a recognised and an accepted doctrine in the Admiralty law of the United States of America¹⁸ and recently accepted in the other common law countries such as the United Kingdom, Canada, and New Zealand. The doctrine has been shunned by the High Court in Australia, although there is a growing body of academic criticism for the Court's strict approach to the matter.

This Scottish doctrine has developed its own body of law relating to its application in these common law jurisdictions. Its recognition and application in the Republic of South Africa will be examined below. To better understand the applicable law applied by the South African Admiralty Court an examination of the development of the doctrine of **forum non conveniens** in English law is required.

17 Societe du Gaz (supra) at pp.16-17.

18 The Belgenland 114 U.S. 355 at p.365-66 (1885), see also The Jerusalem 13 Fed. Cas. 559 (No.7293)(C.C.D.Mass.1814); Gilmore and Black, Law of Admiralty, 2nd ed. at 51.; See also Benedict on Admiralty 7th rev. ed. vol 1, s 216.; The U.S. Supreme Court has accepted and first applied the principle to a non-admiralty matter in Gulf Oil Corporation v. Gilbert (1947) 330 US 501; , and in Canada Malting Co, Ltd v. Paterson Steamships Ltd (1935) 285 US 413.

3 THE ENGLISH ADMIRALTY LAW PRIOR TO THE ACCEPTANCE OF FORUM NON CONVENIENS

Prior to 1973 it could have been said with some measure of certainty with regard to admiralty proceedings in England that once the plaintiff had correctly commenced *in rem* proceedings within the jurisdiction of the English court, the possibility of that action being stayed and referred to a foreign forum on the ground that it ought to be adjudicated there, were minimal.¹⁹ A stay of proceedings was available to the "oppressed" defendant in the English Court's discretion, but on very limited grounds.

The defendant had to allege and prove that the continuance of proceedings were "**vexatious or oppressive**", or that the plaintiff was abusing the process of the court.²⁰ A plea of *lis alibi pendens* was merely a strong factor indicating the Plaintiff's harassment of the defendant by the institution of duplicate proceedings.

It was not enough for a stay to allege that an English trial would cause an injustice because it was not the proper forum, or that the plaintiff was simply taking advantage of English rules or causing gross inconvenience.²¹

This strict approach to a request for a stay lay firmly in the *locus classicus* on the point in the case of St Pierre v. South American Stores.²² In that case, Scott LJ denied that a mere balance of convenience was a sufficient ground for staying a plaintiff's action in an English Court, and continued:

19 Briggs, *op cit.*, at 227.

20 The Atlantic Star (1973) 2 All ER 198, per Lord Reid at 181. See also Briggs A., "Forum non conveniens - now we are ten?" 3 Legal Studies 1983 74 at 75. For a judicial interpretation of the words "oppressive" and "vexatious" see the dictum of Lord Kilbrandon in The Atlantic Star (*supra*) at pp. 201, 202.

21 Jackson, D.C. *Enforcement of Maritime Claims*, (2ed) 1996 at p.250.

22 St Pierre v. South American Stores Scot (1936) 1 KB 382

"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 continuation 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."²³

In 1973, the House of Lords in The Atlantic Star²⁴ was called to revisit the basis for granting a stay of proceedings in English Admiralty Court. The case, which had an element of *lis alibi pendens*, concerned a collision within Belgian waters between the appellant's ship and two moored barges owned by the respondents. The respondents approached the Belgian court for the appointment of a surveyor who issued a report favourable to appellant. Proceedings were brought in the Belgian court against appellant by respondents and other interests.

Thereafter respondents began an action *in rem* in the English Admiralty Court against appellant's ship. The appellant's entered conditional appearance and applied for a stay, tendering to provide reasonable security for the respondent's claims in Belgium. Brandon J in the Trial Court refused the stay and Court of Appeal dismissed an appeal on the ground that, although the Belgian Court was the "**appropriate forum**", appellant's had failed to show any special circumstances which would justify the Court depriving respondents of their right to bring their action in the English Courts.

The two dissenting Lords, Morris and Simon, in The Atlantic Star in refusing to stay proceedings *in rem*, were loath to interfere with the basis of jurisdiction of the English Admiralty Court and premised their dissenting speeches on the doctrine, that if a court has jurisdiction which is invoked by a plaintiff, it would not deny him justice (as compared to the principle of **forum non conveniens**), which had been firmly settled into a consistent

23 St Pierre (supra) at p.398: cited with approval by Lord Morris of Borth-Y-Gest (dissenting with Lord Simon of Glaisdale) in The Atlantic Star (supra) at 185;

24 The Atlantic Star (supra)(1973) 2 LLR 197, HL; (1973) 2 All ER 175

approach by a long line of English cases applying English law and principles. In their respectful opinions, any change to this approach should not be made by judicial decision but by Parliament or some other process of consultation.²⁵

The majority Lords Reid, Wilberforce and Kilbrandon in The Atlantic Star allowed the stay of proceedings by adopting a more liberal approach within the existing framework of the English law as it was then. The House of Lords, although invited by counsel to expressly introduce into English law the doctrine of **forum non conveniens**, unanimously decided not to do so.

The majority Lords, however, shifted the criteria for the grant of a stay in an action **in rem** away from the strict approach embodied in the "the St Pierre dictum" to a more liberal interpretation of what is "oppressive" and "vexatious" on the part of the plaintiff, as balanced against the personal position of the defendant.²⁶ On this score Lord Reid said:

"In the end it must be left to the discretion of the court in each case where a stay is sought, and the question would be whether the defendants have clearly shown that to allow the case to proceed in England would in a reasonable sense be oppressive looking to all the circumstances including the personal position of the defendants. That appears to me to be a proper development of the existing law."²⁷

Lord Wilberforce acknowledged the usefulness of "the St Pierre dictum" over the years, but then stated that:

"too close and rigid an application of it may defeat the spirit which lies behind it. And this is particularly true of the words "oppressive" and "vexatious". These words are not statutory words: as I hope to have shown from earlier cases, they are descriptive words which illustrate but do not confine the court's general jurisdiction. They are

25 The Atlantic Star (supra) per Lord Simon of Glaisdale at 196, 198 and Lord Morris of Borth-Y-Gest at 183, 189;

26 The Atlantic Star (supra) per Lord Reid at 181; Lord Wilberforce at 190, 193; Lord Kilbrandon at 201.

27 The Atlantic Star (supra) at 181;

pointers rather than boundary marks. They are capable of a strict, or technical application; conversely, if this House thinks fit, and as I think they should, they can in the future be interpreted more liberally."²⁸

In Lord Wilberforce's opinion, "the St Pierre dictum" embodied the following principles:²⁹

"A plaintiff should not lightly be denied the right to sue in an English court, if jurisdiction is properly founded. The right is not absolute. The courts are open, even to actions between foreigners, relating to foreign matters. But they retain a residual power to stay their proceedings....In considering whether a stay should be granted the court must take into account (i) any advantage to the plaintiff; (ii) any disadvantage to the defendant: this is the critical equation, and in some cases it will be a difficult one to establish."

By applying a fresh and more liberal interpretation to the principles contained in "the St Pierre dictum" the majority Lords changed the course of the law, moved away from this dictum, and steered toward the doctrine of **forum non conveniens**. By virtue of the majority Lord's judgments in the The Atlantic Star, "the St Pierre dictum" was abandoned and it thereafter did not represent the law.³⁰

3.1 MacSHANNON v. ROCKWARE GLASS LTD

The next step in the development of the English law was taken by the House of Lords in MacShannon v. Rockware Glass Ltd,³¹ which concerned actions **in personam** instituted in England based on claims for damages for personal injury or disability sustained by the plaintiffs, Scottish workers, injured in various Scottish factories, against their employers, English companies, registered in England.

28 The Atlantic Star (supra) at 194;

29 The Atlantic Star (supra) at 194;

30 Briggs, "Forum non conveniens - now we are ten?", at pp. 75, 76, 79.

31 MacShannon v. Rockware Glass Ltd (1978) AC 795; (1978) 1 All ER 625

The Defendant companies applied for proceedings to be stayed, which was rejected by both the Trial Court and Court of Appeal.

However, in the House of Lords, the Lords were unanimous in allowing the appeal and granting the stay. Lord Diplock re-examined Scott LJ's statement of the law in the form of "**the St Pierre dictum**" and concluded that the continued use of the words "**oppressive**" and "**vexatious**" to express the principle to be applied in determining whether the action brought in England should be stayed can only lead to confusion, as he believed it had in the instant cases before him.³¹

Lord Diplock then eliminated the words "**oppressive and vexatious**" from "**the St Pierre dictum**" and reformulated this dictum into two rules which become known as "**the MacShannon formula**", applicable to actions **in rem** and **in personam** alike, in the following terms:³²

In order to justify a stay, two conditions must be satisfied, one positive and the other negative:

- (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience 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 MacShannon (supra) at p. 630. In eliminating these words Lord Diplock stated that the gist of the majority speeches of Lord Reid, Lord Wilberforce, and Lord Kilbrandon in The Atlantic Star enabled "the St Pierre dictum" to be restated as he then mentioned. Lord Salmon at 637 supports this approach by raising objection only to the words "**because it would be oppressive or vexatious to him**" in the dictum. Lord Fraser of Tullybelton at 639 supports Lord Diplock's restatement of "the St Pierre dictum" and also proposes that "**the use of the words 'oppressive' and 'vexatious' in this rule ought now to be discontinued.**"

32 MacShannon (supra) at 630.

Upon an examination of the connecting factors in each action, Lord Diplock found that they **prima facie** establish:

"the Scottish courts as the only natural or appropriate forum for each of the actions and throws on the plaintiffs the onus of showing what Lord Reid³³ called "some reasonable justification" for his choice of an English court or, as I have ventured to express it, of showing that if they brought their actions in a Scottish court they would be deprived of a legitimate personal or juridical advantage which would have been available to them in the High Court in England."³⁴

Lord Diplock found that in none of the cases was any personal advantage to the plaintiff relied on or any legitimate personal or juridical advantage shown which was available in an action before the English court, but of which he would be deprived, if forced to litigate in Scotland.³⁵ In the opinion of Lord Salmon:

"The application of the doctrine of forum non conveniens in Scotland would certainly have resulted in these four actions being tried in Scotland since, in all the circumstances, Scotland is clearly a far more appropriate forum for the trials of these actions than is England. This doctrine however has never been part of the law of England. And, in my view, it is now far too late for it to be made so save by Act of Parliament."³⁶

Lord Salmon approved of the statement of Lord Kilbrandon in The Atlantic Star³⁷ concerning the meaning of "oppressive" and "vexatious" and then said:

"In an action brought in England when its natural forum is Scotland, I consider the question as to whether it should be stayed depends on whether the defendants can establish that to refuse a stay would produce prejudice. Clearly if the trial of the action in England would afford the Scottish plaintiff no real advantage and would be substantially more expensive and inconvenient than if it were tried in Scotland, it

33 The Atlantic Star (1973) 2 All ER 175 at p.181.

34 MacShannon (supra) at 631.

35 MacShannon (supra) at 634.

36 MacShannon (supra) at 634.

37 The Atlantic Star (supra) at 201,202.

would be unjust to refuse a stay. If, on the other hand, a trial in England would offer the plaintiff some real advantage, e.g. if he had come to live in England, a balance would have to be struck and the court might in its discretion consider that justice demanded that the trial should be allowed to proceed in England....To my mind, the real test of stay depends on what the court in its discretion considers that justice demands. I prefer this test to the test of whether the plaintiff has behaved "vexatiously" or "oppressively" on a so-called liberal interpretation of these words.³⁸

Lord Keith of Kinkel referred to the distinction drawn by Lord Reid in The Atlantic Star³⁹ between a case where England is the natural forum for the plaintiff and a case where the plaintiff merely comes before that forum to serve his own ends (the proverbial "forum shopper"), and interpreted same as follows:

"where England is not the natural forum it is necessary to weigh any reasonable justification which the plaintiff may show for suing there against any disadvantages from which the defendant may show he will suffer. In certain cases these disadvantages may be inherent in the inappropriateness of the English forum and if the plaintiff can show no reasonable justification, in the shape of advantage to him, for bringing the action there, that may be sufficient for the view to be taken that the continuance of the action would in a reasonable sense, be oppressive to the defendant. Where, on the other hand, England is the natural forum for the action, it is incumbent on the defendant, in order to secure a stay, to show that he will suffer very serious disadvantages there, and that the plaintiff will suffer no injustice in being required to resort to a different forum."⁴⁰

In this dictum Lord Keith of Kinkel emphasised the considerable importance of the "natural forum" and the consequences for the defendant which turns on whether the plaintiff instituted proceedings in the natural forum. Lord Keith of Kinkel considered the existence of "unnecessary expense and inconvenience to the defendant," as a disadvantage relevant for present purposes and an indication of defending an action elsewhere than in the "natural" forum.⁴¹

38 MacShannon (supra) at 636.

39 The Atlantic Star (supra) at 181.

40 MacShannon (supra) at 642.

41 MacShannon (supra) at p.644.

In the opinion of Lord Keith of Kinkel, the defendant:⁴²

"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 court in some way that expression being understood in a broad and reasonable sense and without any necessary moral connotations, and also that the stay would not cause an injustice to the plaintiff. Where England is the natural forum for the action, in the sense of being that with which the action has the most real and substantial connection, it is necessary for the defendant, in order to establish injustice to him and no injustice to the plaintiff, to show some very serious disadvantage to him which substantially outweighs any advantage to the plaintiff.

Where, however, the defendant shows that England is not the natural forum and that if the action were continued there he would be involved in substantial (i.e more than de minimis) inconvenience and unnecessary expense, or in some other disadvantages, which would not affect him in the natural forum, he has made out a prima facie case for a stay, and if nothing follows it may be properly be granted. The plaintiff may, however, seek to show some reasonable justification for his choice of forum in the shape of advantage to him. If he succeeds it becomes necessary to weigh the against each other the advantages to the plaintiff and the disadvantages to the defendant, and a stay will not be granted unless the court concludes that to refuse it would involve injustice to the defendant and ("the grant would involve")⁴³ no injustice to the plaintiff. As to the nature of the advantages and disadvantages which may go into the scale on either side, I am of the opinion that they must be such as are capable of being objectively demonstrated. I do not consider that mere genuine belief that an advantage or disadvantage exists, not supported by adequate established grounds, can properly affect the result.(my underlined emphasis)"

From these speeches in MacShannon it can be concluded that the enquiry whether to grant a stay or not, is twofold: firstly it must be answered whether there is a natural forum for the action, that with which the action has the most real and substantial connection, and then secondly the balancing "critical equation" must be applied where the

42 MacShannon (supra) at pp. 644-645: It is to be noted that only Lord Keith of Kinkel insisted on using the words "oppressive" or "vexatious" in his speech.

43 Lord Keith of Kinkel in The Abidin Daver (1984) 1 LIR 339 at p.346 added this gloss.

advantages to the plaintiff are weighed against the disadvantages to the defendant, and are objectively assessed. It is to be noted that a shift in the onus to the plaintiff occurs should the plaintiff seek to show "some reasonable justification" for electing the forum.

In summary, the development of the doctrine of **forum non conveniens** in English Admiralty law began with the view that the defendant may obtain the stay of English proceedings on a strictly interpreted and limited basis, in that prior to 1973 decision of the House of Lords in The Atlantic Star the burden on the defendant was to show that the action was "**vexatious and oppressive**". The appropriateness of the English Court and the existence of factors connecting the case with England were not the criteria to be applied. In The Atlantic Star, the House of Lords started the development to a doctrine based on connection and convenience. This was affirmed and continued in 1978 in the non-maritime case of MacShannon.⁴⁴

Commenting in 1983, before The Abidin Daver decision, the learned author Jackson held the view that:⁴⁵

"The doctrine remains anomalous in that, even if England is not a natural forum, the defendant will not succeed if the plaintiff can demonstrate that it is advantageous to him to bring the action in Engl

4 THE RECEPTION OF THE DOCTRINE OF FORUM ON CONVENIENS INTO ENGLISH LAW

In 1984, the doctrine of **forum non conveniens** was finally received into the English Admiralty law in the seminal decision of the House of Lords in The Abidin Daver.⁴⁶ Lord Diplock, with the express approval of Lords Edmund-Davies, Keith of Kinkel and Templeman, succinctly endorsed the reception of the doctrine of **forum non conveniens**, in the following words:

"My Lords, the essential change in the attitude of the English Courts to pending or prospective litigation in foreign jurisdictions that has been achieved step-by-step during the last 10 years as a result of the successive decisions of this House in The Atlantic Star, MacShannon, and Amin Rasheed, is that judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge frankly is, in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of forum non conveniens."⁴⁷

The dispute in the The Abidin Daver arose out of a collision between a Turkish ship, The Abidin Daver and a Cuban ship, Las Mercedes, in the Bosphorous, within Turkish territorial waters. The Turkish owners and cargo interests brought in rem proceedings in the Turkish court and successfully arrested the Las Mercedes in Turkey, it being the forum in which the collision occurred. The Cuban concerns were not satisfied with the fact that proceedings would take place in Turkey, and subsequently commenced a concurrent action **in rem** by arresting the sister ship of The Abidin Daver in England.

Sheen, J. in the English Admiralty Court, having received an undertaking from the Turkish shipowners to provide security in the District Court for any counterclaim brought in the Turkish action, exercised his discretion to stay the English proceedings on the

46 Las Mercedes (Owners) v Abidin Daver (Owners) (1984) 1 LIR 339, HL; The Abidin Daver (1984) 2 WLR 196, HL

47 The Abidin Daver (1984) 1 LIR 334.

grounds that an action was proceeding before the District Court in Turkey, which was a more convenient forum, that the plaintiffs would not suffer any juridical disadvantage from such trial and it followed that justice demanded that the English action be stayed.⁴⁸

The Court of Appeal reversed Sheen, J.'s decision and allowed the English proceedings **in rem** to continue. The Court of Appeal essentially followed a "**plaintiff-orientated**" approach. It held that if the proceedings were to be stayed the plaintiffs would be deprived of the juridical advantage of pursuing their claim as plaintiffs before the English Admiralty court and having, as **dominus litus**, control of the action rather than counterclaiming as defendants in Turkey; the plaintiffs were entitled to come to England and litigate their claim in there.⁴⁹

On final appeal by the Turkish owners, the House of Lords allowed the appeal and restored the Sheen, J.'s decision to grant a stay of proceedings **in rem** in favour of proceedings before the Turkish forum. The House of Lords held that the matter had the closest connections with Turkey and that the natural and appropriate forum from the point of view of convenience and expense was and remained the Turkish Court.

The House of Lords found further that Sheen, J. had not erred in exercising his discretion, but made the stay conditional upon the Turkish defendants providing sufficient security for any counterclaim of the plaintiffs, the Cuban defendants in the Turkish Court. The House of Lords in coming to their decision applied with approval the "**MacShannon formula**" to the facts in the present tort action. The application of the "**MacShannon formula**" is not as mechanical and simplistic as it may seem, as Hill, correctly points out.⁵⁰ It should not be taken for granted nor should it be expected by the

48 Headnote in The Abidin Daver (1984) 1 LIR 334.

49 *ibid.*

50 Hill, Maritime Law, 3rd edition, at 126.

applicant/defendant that a stay would be granted if it shows that there is (a) a natural alternative forum and (b) there is no relevant legitimate advantage to the plaintiff. The competing interests of both plaintiff and defendant respectively must be weighed and balanced against each other by the Court when considering whether or not to exercise its discretion to grant a stay of proceedings.⁵¹

In considering these competing interests the Court must apply an objective test to the evidence placed before it. Lord Diplock in The Abidin Daver⁵² provided authority for this approach, when he referred to the Amin Rasheed case⁵³ and said:

"In the same case this House made it clear that the balancing of advantage and disadvantage to plaintiff and defendant of permitting litigation to proceed in England rather than, or as well as, in a foreign forum is to be based upon objective standards supported by evidence."

4.1 THE RELEVANCE OF A LIS ALIBI PENDENS IN EVALUATING THE "CRITICAL EQUATION"

The degree that the defendant would be disadvantaged by a stay not being granted cannot be excluded as a factor going to influence the judge's eventual decision. In The Abidin Daver, the *lis alibi pendens* (the Turkish action) could be regarded, argues Hill⁵⁴, in this light but he finds it "difficult to think readily of another specific disadvantage which a defendant might suffer." In The Abidin Daver, the *lis alibi pendens* of the prior-commenced *in rem* action before the Turkish court, which was the natural and

51 Per Lord Diplock in The Abidin Daver at p.342 hinted at this balancing process, which Lord Wilberforce in The Atlantic Star (1973) 2 LIR 193 at p.194 called a "critical equation".

52. The Abidin Daver (supra) 1 LIR 339 at 343.

53 Amin Rasheed Shipping Corporation v. Kuwait Insurance Co., (1983) 2 LIR 365.

54 Hill (supra) at p. 126.

more appropriate forum, was an influential and important factor.⁵⁵ It is submitted that the **lis alibi pendens** factor ought to be of weighty importance in "the critical equation", and cannot be ignored or its relevance diminished, in similar matters.

The Court of Appeal in The Abidin Daver incorrectly regarded the statement of Brandon J (as he was then) in The Tillie Lykes⁵⁶ that the mere existence of a multiplicity of proceedings is not to be taken into account at all as a disadvantage to the defendant, as authority for the proposition that where **lis alibi pendens** exists, little or no importance should be attached to the co-existence of another action relating to the same subject-matter in a foreign court.

Lord Brandon in The Abidin Daver explained that in concluding in The Tillie Lykes that there was no sufficiently serious disadvantage to the defendants, apart from and additional to the mere disadvantage of a multiplicity of proceedings, to justify a stay of the action against them, he did not purport to lay down any principle of law at all. He sought merely to apply to the particular facts of the matter before him in The Tillie Lykes the principle laid down by Lord Wilberforce in The Atlantic Star that the disadvantage to the defendant in order that it should be taken into account at all, must be serious, and in particular that it must involve more than the mere disadvantage of multiple suits.⁵⁷

Had the decision of the Court of Appeal in The Abidin Daver allowing the English action to proceed in the face of prior-commenced proceedings in the more appropriate forum of the Turkish court not been overruled, it would have, it is submitted, given rise to absurd consequences for both the Cuban plaintiff (the Defendant in the Turkish court) and the Turkish defendant.

55 Anton, Private International Law, 2nd ed. 215.

56 The Tillie Lykes (1977) 1 LIR 124

57 Per Lord Brandon in The Abidin Daver (supra) 1 LIR 339 at p.351; Cf Lord Wilberforce in The Atlantic Star (supra) at pp.194g and 195c.

The immediate effect of the Court of Appeal judgment was to endorse the continuation of two independent yet concurrent proceedings in different countries between the same parties arising from the same collision incident. The secondary effect of this judgment would have propelled the protagonist in each forum into "**an unseemly race to be the first to obtain judgment**" in its jurisdiction.⁵⁸

The additional inconvenience and expense which must result from these concurrent proceedings "**is surely an unwarranted and unjustified extravaganza of costs overall.**"⁵⁹ Apart from the additional inconvenience and expense of these concurrent proceedings, there exists the real possibility that conflicting judgments may be delivered in the two jurisdictions.

Lord Brandon after examining the weight to be attached to the lis pendens factor in The Abidin Daver said:

"...if concurrent actions in respect of the same subject-matter proceed together in two different countries, as seems likely if a stay is refused in the present case, one 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 res judicata or issue estoppel in the latter."⁶⁰

Were the defendant in proceedings before a foreign court which is the natural and appropriate forum for the resolution of the dispute, seeks to institute an action in England about the same subject matter against the plaintiff in the foreign court, this second action and its consequential additional inconvenience and expense "can only be justified if the would-be plaintiff can establish **objectively by cogent evidence** that there is some personal or judicial advantage that would be available to him only in the English action

58 per Lord Diplock in The Abidin Daver (supra) 1 LIR 339 at p.344.

59 Hill, op cit. at 126. Cf Lord Diplock in The Abidin Daver (supra) at p.344.

60 The Abidin Daver (supra) at p.351.

that is of such importance that it would cause injustice to him to deprive him of it."⁶¹

Does the successful Cuban plaintiff in the English Court now proceed, armed with the English ruling, before the Turkish Court, as defendant, and attempt to usurp the Turkish court's powers by requesting a stay of the prior-commenced proceedings before that court on the basis of the English court's decision? What if the Turkish Court refuses the stay in these circumstances and hands down a judgment on the merits in favour of the Turkish Plaintiff which totally conflicts with the English court's decision?

On the fair assumption that in applying the principle of comity amongst nations, the two jurisdictions may recognise the judgment handed down in the other jurisdiction and may accordingly enforce same, how are these conflicting and competing judgments to be reconciled and enforced? Lord Diplock in The Abidin Daver was alive to the potential procedural chaos that would follow and the injustice both parties, it is submitted, would suffer when he stated:⁶²

"Comity demands that such a situation should not be permitted to occur as between Courts of two civilised and friendly states. It is a recipe for confusion and injustice."

It is respectfully submitted that the application of the doctrine of **forum non conveniens** is the possible answer to this judicial quandary, and is the better approach than to empower a Court with extra-territorial powers to interdict parties from continuing to litigate in foreign fora.

4.2 REVERSAL OF THE TRIAL COURT'S DISCRETIONARY DECISION

Lord Brandon of Oakbrook in the course of his speech in The Abidin Daver considered the instances when the Trial Court's discretionary decision may be interfered with,

61 Per Lord Diplock in The Abidin Daver (supra) at p.344.

62 The Abidin Daver (supra) at p.344.

in the following words:⁶³

"...the decision whether to allow or refuse a application for the stay of an action, even though the Court has jurisdiction to try and determine it, is a discretionary decision for the Judge of first instance to whom the application is made. It follows that, where the Judge of first instance has exercised his discretion in one way or the other, the grounds on which an appellant Court is entitled to interfere with the decision which he had made are of a limited nature. It cannot interfere simply because its members consider that they would, if themselves sitting at first instance, have reached a different conclusion. 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."

It is respectfully submitted that our Courts would follow this reasoning when considering the reversal of the trial court's discretionary decision in regard to the stay of admiralty proceedings.

5 THE DOCTRINE OF FORUM NON CONVENIENS AS APPLIED IN THE
SPILIADA

In 1987 the legal doctrine of forum non conveniens was confirmed and finally approved as representing both the law of England and that of Scotland by the House of Lords in the non-maritime case of Spiliada Maritime Corporation v. Cansulex Ltd,⁶⁸ which concerned an application for leave to serve a writ out of the jurisdiction of the Court.

The Spiliada confirmed that the principles underlying the doctrine of forum non conveniens, were of equal application for motions to stay actions and applications for leave to serve a writ out of the jurisdiction. As the learned author Briggs, correctly states:⁶⁹

"As in both types of cases the main concern for the court is that litigation should occur in the most appropriate forum, the cases on stays are immediately and directly relevant to applications for leave under Ord. XI...

The one essential difference between the two types of cases is that when a stay is sought, the plaintiff has invoked the jurisdiction of the court as of right; but in an Ord. XI case, the plaintiff has no right, but asks the court to exercise its discretion in his favour.

This difference can be allowed for in the burden of proof: it lies on the defendant in the first case, on the plaintiff in the second, to show that the forum each party prefers is clearly the most appropriate for the trial of the action. With this it is hard to disagree: the issue is at bottom the same one, and it is greatly reassuring to be told so."

68 Spiliada Maritime Corporation v. Cansulex Ltd (1987) 1 LIR 1 HL; (1986) 3 All.E.R. 841.

69 Briggs, "Forum non conveniens - the last word?", 1987 LMCLQ 1 at p.2.
 70 (1987) 1 LIR 1 at p.10.

71 The Abidin Daver (supra) 1 LIR 339 at 349.

NB In The Spiliada, which has become the leading case on forum non conveniens, Lord Goff formulated an authoritative approach to the doctrine in the following terms:⁶⁹

"The basic principle is that a stay will only be granted on the ground of forum non conveniens where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

The crux of the Court's enquiry is to establish on the available facts before it the natural forum of the dispute. The House of Lords in The Abidin Daver shifted the definition and meaning of the "natural forum" from the reformulated approach of Lord Diplock in The MacShannon case, where the emphasis lay on the forum "in which justice can be done between the parties at substantially less convenience or expense", toward the view held by Lord Keith,⁷⁰ that the focus must be on the forum with which "the action has the most real and substantial connection".

In The Spiliada the Liberian shipowners commenced legal action against Cansulex Ltd., the shippers of a cargo of sulphur as result of damage done to the holds and tank tops of the vessel caused by the corrosive qualities of the wet sulphur loaded on board.

The claim bore much similarity to The Cambridgeshire action (in which matter Staughton J. actually presided over) where the circumstances were essentially the same. In both instances the voyage was from British Columbia, and the cargo of sulphur was of Canadian origin. The Cambridgeshire was British-owned whereas The Spiliada was Greek/Liberian owned with the only English connection being that the vessel was partly managed in England. The crucial question was whether Canada or England was the more appropriate forum?⁷²

70 (1987) 1 LIR 1 at p.10.

71 The Abidin Daver (supra) 1 LIR 339 at 349.

72 Hill, Maritime Law 4th ed. at p.167.

Staughton J., in the Trial Court dismissed the application by the Canadian defendants, Cansulex Ltd., to set aside the proceedings brought against them by the plaintiffs and the service of the writ out of the jurisdiction in Canada, and to stay all further proceedings. In dismissing the application, Staughton J. applied the principles contained in the doctrine of **forum non conveniens** to the factual matrix and held that **"the appropriate test for him to apply was that, if the English Court is shown to be distinctly more suitable for the ends of justice, then the case is a proper one for service out of the jurisdiction."**⁷³

Staughton J. found that the plaintiffs had satisfied the Court that this was a proper case for leave to serve a writ commencing action out of the jurisdiction, having regard to, inter alia, the factors of the availability and convenience of witnesses, multiplicity of proceedings, and principally because of the existing litigation of a similar type to which the defendants were already a party in England (what Staughton J. called the "Cambridgeshire factor", which related to **"the preparation for very substantial proceedings"**, whereunder much expertise, particularly legal, was centred in England and was available for use if required in the Spiliada dispute). Therefore, Staughton J held it was in the interests of efficiency, expedition and economy that the appellants' action proceed in England rather than in British Columbia, and more particularly because if the action proceeded in England the parties would probably settle on the outcome of the **The Cambridgeshire** action.⁷⁴

The Court of Appeal (Oliver and Niell, L.JJ.) overruled the judgment of Staughton J. on the grounds, inter alia,⁷⁵

- (1) that the convenience of the parties and witnesses probably tilted the scales to British Columbia as the forum but certainly did not show that England court would be distinctly more suitable for the ends of justice:

73 Summarised by Lord Goff in the **The Spiliada** (1987) 1 LIR 1 at p.5.

74 See headnote **The Spiliada** (1986) 3 All ER 841.; (1987) 1 LIR 1 at p.3.

75 Headnote in **The Spiliada** (1987) 1 LIR 1 at pp.1-2.

- (2) the multiplicity of proceedings appeared to have played a neutral role in the decision of Staughton J.;
- (3) The Cambridgeshire action was a legitimate factor to weigh in the balance but the trial judge attached too much importance to The Cambridgeshire factor; the fact that the London solicitors had acquired detailed knowledge about shipment of sulphur cargoes from Vancouver were pointers to trial in England but should not be regarded as of decisive importance if other factors tilted the balance the other way.
- (4) Staughton J. misapprehended the extent of the burden which the plaintiffs had to discharge and based some of his conclusions on a wrong or incomplete appreciation of the facts;
- (5) The time bar in British Columbia was not of itself a factor which was conclusive. It appeared to be a neutral factor and not a juridical advantage which could be obtained by the plaintiffs only by action in England. It would be wrong to ignore the disadvantage which the defendants would suffer if they were deprived of a potential limitation defence.

The plaintiffs, Spiliada Maritime Corporation, appealed from the decision of the Court of Appeal to the House of Lords. Lord Templeman in a terse speech agreed with Lord Goff, who delivered the only other but substantial speech of the House of Lords, that there were no grounds for interference with the decision of Staughton J. and that the appeal should be allowed.

Lord Templeman's reasons may be summarised as follows:⁷⁶

"My Lords in these proceedings parties to a dispute have chosen to litigate in order to determine where they shall litigate.... Where the plaintiff is entitled to commence his action in this country, the Court, applying the doctrine of **forum non conveniens** will only stay the action if the defendant satisfies the Court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the Court applying the doctrine of **forum non conveniens** will only grant leave if the plaintiff

satisfies the Court that England is the most appropriate forum to try the case. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere.... Similar litigation took place in England over another vessel, The Cambridgeshire, after Mr Justice Staughton had refused to stay the action. If Mr Justice Staughton had good reason to try The Cambridgeshire, it is difficult to see that he had bad reason for trying The Spiliada.

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. Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the Judge or considerations which are not relevant for his purpose.

NB [...In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial Judge... An appeal should be rare and the Appellate Court should be slow to interfere. I agree with my noble and learned friend Lord Goff of Chievers that there were no grounds for interference in the present case and that the appeal should be allowed.]

In considering the fundamental principle of the doctrine of **forum non conveniens**, Lord Goff stated that:⁷⁷

NB ["In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to Court to exercise its discretion to stay the proceedings on the ground which is usually called **forum non conveniens**.... In The Abidin Daver, 1984) 1 LIR 339; (1984) A.C. 398 at pp 344 and 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinneir in Sim v Robinow, (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p.668:

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

Lord Goff turned to discuss how the doctrine is applied in cases of stay of proceedings. Having then considered the authorities (in particular the Scottish authorities) Lord Goff summarised the law then applicable under 6 heads, as follows:⁷⁸

NB (1) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. **in which the case may be tried more suitably for the interests of all the parties and the ends of justice.**

(2) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay... Each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour and in respect of any such matter the evidential burden will rest on the party who asserts its existence.

Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.

(3) The question being whether there is some other forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established.... A more neutral position was adopted by Lord Sumner in the Societe du Gaz case, 1926 S.C. (H.L.) 13 at p.21, where he said:

L "All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer."

...Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action....I can see no reason why the English Court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right....In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum⁷⁹...In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see MacShannon's case, (1978) A.C. 795 per Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions...

- (4) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in Macshannon's case, (1978) A.C. 795 at p.812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense". Having regard to the anxiety expressed in your Lordships' House in the Societe du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by Lord Keith in The Abidin Daver when he referred to the "natural forum" as being "that with which the action has the most real and substantial connection". So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction.

79 Lord Goff referred to the following cases: in The Atlantic Star, (supra)(Belgium); in MacShannon's case, 1978 (supra)(Scotland); in Trendex, (1982)(supra)(Switzerland); and in the The Abidin Daver (1973) 2 LIR 197; (1984) 1 LIR 339; (1984) A.C. 398 (Turkey).

- (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. It is difficult to imagine circumstances when, in such a case, a stay may be granted.
- (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. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff **will not obtain justice (my emphasis)** in the foreign jurisdiction: see the **The Abidin Daver** (1984) 1 LIR 339; (1984) 1 A.C.398 at pp.344 and 411 per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff.

5.1 THE ROLE OF A LEGITIMATE PERSONAL OR JURIDICAL ADVANTAGE

In **Macshannon's** case, Lord Diplock referred to the negative condition, in the following words:⁸⁰

"the stay must not deprive the plaintiff 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."

Lord Goff in **The Spiliada**⁸¹ correctly pointed out that in **The Abidin Daver**:⁸²

"Lord Diplock himself subsequently realised that the mere existence of a "legitimate personal or juridical advantage" of the plaintiff in the English jurisdiction would not be decisive."

80 **MacShannon** (supra) at p.812

81 **The Spiliada** (supra) at p.10.

82 **The Abidin Daver** (supra) at p 343.

Lord Goff then continued:⁸³

"It is necessary to strike a note of caution regarding the prominence given to "legitimate personal or juridical advantage" of the plaintiff, having regard to the decision of your Lordships' House in Trendex Trading Corporation v. Credit Suisse (1982) A.C. 679, in which your Lordships unanimously approved the decision of the trial Judge to exercise his discretion to stay an action brought in this country where there existed another appropriate forum, i.e. Switzerland, for the trial of the action, even though by doing so he deprived the plaintiff's of an important advantage, viz. the more generous English procedure of discovery, in an action involving allegations of fraud against the defendants."

Lord Goff dealt separately with the role of a "legitimate personal or juridical advantage" to the plaintiff, as follows:⁸⁴

"Clearly, the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in England cannot be decisive. As Lord Sumner said of the parties in the Societe du Gaz case 1926 S.C.(H.L.) 13 at p.22:

"I do not see how one can guide oneself profitably by endeavouring to reconcile and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win."

Indeed, as Oliver LJ pointed out in his judgment in the present case, an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear's statement of principle in Sim v. Robinow, (1892) 19 R.665 at p.668. The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried "suitably for the interests of all the parties and for the ends of justice".

83 The Spiliada (supra) at p.10.

84 The Spiliada (supra) at p.14.

5.2 THE ROLE OF TIME BAR LIMITATIONS

Lord Goff in The Spiliada then considered time-bar limitations in the context of stay proceedings in the light of this underlying fundamental principles of the doctrine of **forum non conveniens**, in the following words:⁸⁵

"Let me consider how the principle of **forum non convenience** should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time-barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time-barred....Indeed, a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of action, a stay should generally be granted even though the plaintiff's action would be time-barred. But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time-bar point) the appropriate forum for the trial of the action is elsewhere than England, the Plaintiff did not act unreasonably in failing to commence proceedings (for example by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country. This approach is consistent with that of Sheen J in The Blue Wave (1982) 1 LIR 151...The appropriate order, where the application of the time-bar in the foreign jurisdiction is dependent on its invocation by the defendant, may well be to make it a condition of the grant of a stay or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time-bar in the foreign jurisdiction; this is apparently the practice in the United States of America."

6 THE DOCTRINE OF FORUM NON CONVENIENCE IN THE ADMIRALTY COURTS OF SOUTH AFRICA PRIOR TO 1 NOVEMBER 1983

Prior to the commencement of the Act on 1 November 1983, the jurisdiction of the South African Supreme Court, sitting as a Court of Admiralty, was governed by the provisions of the Colonial Courts of Admiralty Act 1890 of the United Kingdom.⁸⁶ This Act abolished the Vice-Admiralty Courts which existed at that time in the Cape Colony and Natal and constituted in these British possessions in its stead Colonial Courts of Admiralty, which continued to be so, even when South Africa ceased to be a British possession.⁸⁷

It has been held⁸⁸ that the several Divisions of the Supreme Court in South Africa became Colonial Courts of Admiralty by virtue of their having unlimited civil jurisdiction in a British possession envisaged by section 2(1) of the Colonial Courts of Admiralty Act 1890. This applied equally to the four British Colonies which formed the Union of South Africa in 1910 and the Union of South Africa itself, as they all constituted British possessions as envisaged by section 2(1) of the Colonial Courts of Admiralty Act 1890.

Notwithstanding the formation of the Republic of South Africa, section 2(1) of the Colonial Courts of Admiralty Act, as extended to the Republic by section 107 of The Republic of South Africa Constitution Act, Act 32 of 1961, operated to confer upon the

86 53 & 54 Vict c 27.

87 Alahah Mai Deribe & Sons v. The Ship "Golden Togo", 1986 (1) S.A. 505 (N) 503 at p. 506 H; Cf Botha JA in Trivett & Co. (Pty) Ltd. v Wm. Brandt's Sons & Co. Ltd. 1975 (3) S.A. 423 (A). See also South African Law Commission, Project 32: **Report on the Review of the Law of Admiralty** at p.5. The Eastern Districts Court also became a Colonial Court of Admiralty .

88 Botha JA in Trivett & Co. (Pty) Ltd. v Wm. Brandt's Sons & Co. Ltd. 1975 (3) S.A. 423 at pp 432-433.; Cf Tharros Shipping Corporation S.A. v Owner of the Ship "Golden Trader", 1972 (4) S.A. 316 (N) at pp. 318-319;

several Divisions of the Supreme Court of South Africa the status and jurisdiction of Colonial Courts of Admiralty.⁸⁹ The jurisdiction of the Colonial Court of Admiralty was prescribed by section 2(2), which reads as follows:

"The jurisdiction of Colonial Courts of Admiralty shall, subject to the provisions of this Act, be over like places, persons, matters and things, as the admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Courts of Admiralty may exercise such jurisdiction in the manner and to use as full an extent as the High Court in England, and **shall have the same regard as that Court to international law and the comity of nations.**"

The effect of section 2(2) of the Colonial Courts of Admiralty Act was that it conferred upon South African Colonial Courts of Admiralty the same admiralty jurisdiction as that enjoyed by the High Court in England. It was held in **Alahah Mai Deribe & Sons v. The Ship "Golden Togo"**,⁹⁰ a case which concerned the short delivery and delivery in a damaged condition of a cargo of rice, that section 2(2) conferred only the admiralty jurisdiction, but not the general jurisdiction, of an English Judge sitting in the Admiralty jurisdiction of the High Court. Section 2(2) further did not include any jurisdiction which could not have been exercised by the High Court of Admiralty prior to 1873.⁹¹

Friedman J. in **The Golden Togo** held further that:

"As I have said, the admiralty jurisdiction of the High Court of England, and hence the jurisdiction of the Colonial Court of Admiralty, was neither general nor unlimited. It was a jurisdiction specifically conferred by statute. In the case of cargo claims, its jurisdiction was specifically limited by the statute conferring that jurisdiction to hear only those cargo claims arising out of the carriage of goods into a port in England and Wales (for which, in the case of a South African Court sitting as a Colonial Court of Admiralty,

89 **Trivett & Co. (Pty) Ltd. v Wm. Brandt's Sons & Co. Ltd.** 1975 (3) S.A. 423 at pp. 433-436.

90 **Alahah Mai Deribe & Sons v. The Ship "Golden Togo"**, 1986 (1) S.A. 505 (N) 503 at p. 506 H; Cf **The Camosun** 1909 AC 597 (PC) at p. 608; **Owners and/or Master of the MV Matoria and others v. Omnipex Overseas SA** 1979 (3) SA 616 (N) at p. 623.

91 **The Golden Togo** (supra) at p. 507 C-D;

one must read "South Africa"). That jurisdiction, being created by statute, cannot be extended either by the acquiescence or the by the express consent of the parties."⁹²

In Crooks & Co. v Agricultural Co-operative Union Limited⁹³ the Appellate Division held that the South African Colonial Court of Admiralty was required to apply English admiralty law as administered by the English High Court exercising its admiralty jurisdiction.

Furthermore the Privy Council in The Yuri Maru and The Woron⁹⁴ decided that English law was to be applied as it stood on 1 July 1891, being the commencement date of the Colonial Courts of Admiralty Act. The Privy Council decision, was followed in South Africa by the Appellate Division in Tharros Shipping Corporation S.A. v Owners of the Ship "Golden Ocean".⁹⁵

In Beaver Marine (Pty) Ltd v Wuest,⁹⁶ the Appellate Division endorsed the decision of the Privy Council but clearly stated that the admiralty jurisdiction to be applied in South Africa was not to be affected by subsequent English legislation.⁹⁷

92 The Golden Togo (supra) at p. 508 H;

93 Crooks & Co. v Agricultural Co-operative Union Limited 1922 AD 423, pp 429-430, 432 et seq.; also Currie v. McKnight 1897 A.C. 97 at p.101.

94 The Yuri Maru and The Woron (1927) AC 423.; The South African position was authoritatively set out in Malilang and Others v MV Houda Pearl 1986 (2) SA 714 (A) at 722J-723C.

95 The Golden Ocean 1972 (4) S.A. 263 (AD).

96 Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 263 (A); see also South African Law Commission Project 32: Report on the Review of the Law of Admiralty, p.6.

97 Beaver Marine (Pty) Ltd v Wuest (supra) at p. 274 C-D.; Owners and/or Master of the MV Matoria and others v. Omnipex Overseas SA 1979 (3) SA 616 (N) at p. 621. As at 1891 the admiralty jurisdiction of the English High Court, in so far as it was regulated by statute, was contained in in the High Court of Admiralty Acts 1840 (3 and 4 Vic c 65) and 1861 (24 Vic c 10). It is now authoritatively settled that those English Statutes on admiralty law and jurisdiction became part of our law on the establishment of the Republic in 1961...": Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 263 at p. 274 D-E;

The effect of this body of law was that prior to 1983 the admiralty law as applied by the South African Courts of admiralty was English law pegged at the date of 1 July 1891. The doctrine of **forum non conveniens** was not recognised as part of English law in 1891, and therefore could not be considered part of South African Law, although the idea of a comity of nations was well known to the United Kingdom Legislature and practised by its admiralty courts.

In 1980 the view that the doctrine of **forum non conveniens** was not part of the South African admiralty law was endorsed in the case of Kandagasabapathy and others v MV Melina Tsiris,⁹⁸ which concerned an admiralty action *in rem* brought by seamen for arrear wages heard in the Natal Provincial Division. The Defendant's brought a counter application that the court decline to assume jurisdiction in the actions. Sitting as a Court of Admiralty, governed by the admiralty jurisdiction of English High Court as at 1891, Thirion J held that the South African Admiralty Court must apply English admiralty law⁹⁹ to the dispute before it and it will have regard to English decisions expounding admiralty law as it then was.

The Court found that by statute it had jurisdiction in respect of a seaman's claim for wages earned by him on board a ship, which was a "sacred lien" that could be enforced "**irrespective of where the wages were earned or where the contract of employment was concluded**", and even though neither the parties nor the subject matter of the claim had any connection with the area of jurisdiction of the court. But dealt with the question of its discretion to exercise its jurisdiction, as follows:

"It is clear that the exercise of the court's jurisdiction in such a case is discretionary; i.e. the Court may in its discretion decline to exercise its jurisdiction; leaving it to the parties to pursue their rights in some other competent forum. (The Leon XIII 8 PD 121 at 124.) The principles upon which the Court exercises that discretion are, however, not equally clear."¹⁰⁰

98 1981 (3) SA 950 (N)

99 MV Melina Tsiris (supra) at p.953 A.

100 MV Melina Tsiris (supra) at p.952 E.

By 1980 the doctrine that a court may decline to exercise its jurisdiction on a plea of **forum non conveniens** was not regarded as a principle of English law. In seeking to establish the nature of the principles to be applied, Thirion J examined and considered the applicable English law, and the speech of Lord Wilberforce in The Atlantic Star. Thirion J then stated the following:¹

"I would hesitate to disregard the dicta in The Atlantic Star to the effect that the doctrine of **forum non conveniens** is not part of English maritime law; particularly in view of the fact that it does not seem to be part of our common law. (See Lecomte v W & B Syndicate of Madagascar 1905 TS 696; Pollak South African Law of Jurisdiction at 64.

But the difference between the approach in The Atlantic Star, as evidenced in the speeches of Lord Reid and Lord Wilberforce, and the approach adopted in Societe du Gaz de Paris, does not seem to me to be likely to lead to essentially different results (nor, for that matter, would it, if one were simply to say that the discretion must be exercised judicially and on a consideration of all the relevant circumstances). It seems to me merely to be a difference in emphasis...."

Thirion J then proceeded to compare the observations of the Lord Chancellor, Lord Shaw and Lord Reid in Societe du Gaz de Paris, with the dicta of Lord Reid and Lord Wilberforce in The Atlantic Star, and thereafter remarked that it did not matter which of the two approaches is adopted to decide the defendant's application as it would not succeed on an adoption of either.

The Court considered the special position of the seaman's "sacred lien" for arrear wages, and the fact that "it is convenient and advantageous for all, members of a crew who have claims against the ship to be able to join in one action. Not only is a multiplicity of actions thereby avoided but also, in those instances where the basis of their claims is the same, members of the crew may be able to furnish corroboration of one another's evidence."²

1 MV Melina Tsiris (supra) at p.953 H. Lwsa volume 25 at para 173, p. 104 supports this interpretation

2 MV Melina Tsiris (supra) at p.955 F - 956 D.

Thirion J then remarked that:³

"In the light of the above considerations a Court will not lightly exercise its discretion against the assumption of jurisdiction in respect of a foreign seaman's claim for wages. It will certainly not do so if the declination of jurisdiction might have the effect of rendering illusory the rights flowing from the seaman's lien against the ship or if it might have the effect of the seaman losing the security which the arrest of the ship has given him. **The existence of another appropriate forum in which the case may more suitably be tried is the basis for the application of the forum non conveniens doctrine and, in deciding which way to exercise its discretion, a Court, applying that doctrine, would therefore enquire whether the matter can be appropriately dealt with in that other forum without undue hardship, expense or inconvenience to one of the parties.**

In terms of the Plaintiff's contract of employment with Defendant, the Greek Courts were given concurrent jurisdiction with any other competent court to settle disputes arising from the contract. Counsel for defendant submitted the matter must be tried in the Greek courts and that it would be more costly and more inconvenient for defendants to defend the plaintiff's claims in the Natal court than in the Greek courts. In the light of concurrent jurisdiction provision, the Court saw no reason why the plaintiffs' should not be permitted to proceed with their claims before it. Thirion J reasoned as follows:

"These considerations are, in my view, outweighed by the fact that, if this Court were to decline to assume jurisdiction in respect of plaintiffs' claims, plaintiffs would lose the security which they have at the moment. They would be deprived of a valuable right which the law has given them. The defendants have not offered to provide security in the Greek courts for payment of the plaintiff's claims. It is not known whether the owners of the defendant ships have any assets in Greece against which execution can be levied in the event of the plaintiffs being successful. The ships have now sailed from Durban. Apparently these ships seldom, if ever, call at Greek ports. Therefore the prospect of the plaintiffs being able to obtain the arrest of the ship within the jurisdiction of the Greek Courts seems remote, if not non-existent.

Plaintiffs would find it extremely difficult to proceed in an action against the owners of the two ships. There is some doubt as to who the owners are or where they are

3 MV Melina Tsiris (supra) at p.956 E - F.

domiciled...It would admittedly be inconvenient and costly for defendants to defend the actions in this Court but the expense and inconvenience of having to defend actions relating to their ships in out-of-the-way places is one of the hazards of a shipowner's business. A shipowner knows that his ship is liable to be arrested in almost as many places as it has ports of call. The shipowner should be prepared to litigate in those places to which the ship goes in the course of his business.

The plaintiffs in the present case are not Greek nationals. They are of various nationalities and from different countries - Sri Lankans, Syrians, Pakistanis, Tunisians, Egyptians, etc. A shipowner who employs on his ship a motley crew drawn from the four corners of the earth should not expect them to come trooping to a forum convenient to him whenever a dispute arises relating to their wages - especially if that forum is in a country with which they have no connection and never visit in the course of their employment. A seaman might find himself in almost any place in the world at the time when a dispute between him and his employer arises and when in consequence of that his employment is terminated and it would be imposing an undue hardship on him if it were to be expected of him to proceed any thousands of miles from there to institute a claim in the forum of his employer's choice. To expect of him that he should do so would be to render worthless the lien which he has over the ship in respect of wages due to him....In my view this Court should not decline to exercise jurisdiction in respect of Plaintiff's claims, To decline jurisdiction would be to deprive plaintiffs of their security; to put them to great inconvenience and additional expense (which they cannot afford) and would make it difficult for them to collate their evidence. It would also mean that they would have to go to the trouble and expense of tracking down the elusive owners of the ships."⁴

In the circumstances of the matter the defendant's applications were dismissed. Thirion J held that the Court should refuse to decline jurisdiction and granted an order that plaintiffs be examined by a Judge and their evidence recorded for in that way their evidence could be preserved for the trial at little expense. Thirion J was therefore alive to the unique plight of seaman in dispute with their masters in wages matters. The Court having a general discretion to decline jurisdiction was duty bound to take all the facts and circumstances into account and to exercise its discretion judicially. It is submitted that although Thirion J was bound by English authority not to recognise the Scottish doctrine

4 MV Melina Tsiris (supra) at p.957 A - 958 C.

of **forum non conveniens** as part of South African law, the Court nevertheless in the exercise of its discretion, in effect, came to the assistance of the seaman by applying elements of that doctrine when it enquired "**whether the matter can be appropriately dealt with in that other forum without undue hardship, expense or inconvenience to one of the parties**"⁵

The decision of Thirion J relating to the doctrine of **forum non conveniens** was not taken on appeal when the matter went on appeal to the Full Bench of the Natal Provincial Division. Accordingly, rightly or wrongly, the decision of Thirion J. with regard to the recognition and application of the doctrine of **forum non conveniens** stood as the law until further developments in the law occurred.

The 1981 case of Magat and Others v MV Houda Pearl⁶, also concerned an action **in rem** brought in the Natal Provincial Division by foreign seaman against the foreign owners of the vessel for wages. The parties were peregrini of the Republic and the subject matter in dispute had no connection with the Republic. Friedman J. followed the approach laid down in The Melina Tsiris that the court had jurisdiction to try the action by reason of the vessel having been arrested within South African waters.⁷ In arriving at his decision Friedman J compared the Scottish doctrine of **forum non conveniens**, on the one hand, and the English law approach, on the other, at play and had the following to say:

"There is a principle of Scottish law that a Court can decline to exercise jurisdiction on the ground of **forum non conveniens**, that is, that the Court or forum is not appropriate (Societe du Gaz de Paris v. Societe Anonyme de Navigation Les Armateurs Francais 1926 SLT 33; Owners of the SS Sheaf Lance v. Owners of SS Barcelo 1930 SLT 445). The effect of this principle as explained by Lord Summer in the Societe du Gaz case is that the Court has a general discretion, to be exercised judicially and upon a consideration of all,

5 MV Melina Tsiris (supra) at p.956 F.

6 Magat v MV "Houda Pearl" 1982 2 SA 37 (N).

7 The Houda Pearl (supra) at p.38 following The Melina Tsiris (supra) at p.952 B-D.

the relevant facts, to refuse to entertain jurisdiction in a case where there is another forum which is the

"more suitable for the ends of justice, and is preferable, because pursuit of the litigation in that forum is more likely to secure those ends."

"A similar principle or doctrine apparently exists and is recognised in American law. It is, however, a principle against which the English Courts have turned their faces. The well known case of Atlantic Star (1973) 2 All ER 175 (HL) was concerned, it is true, with the circumstances under which the Court should stay proceedings pending in an English Admiralty Court because of similar proceedings elsewhere. But I agree entirely with the comment of Thirion J in the Melina Tsiris case supra at 953 that what was said by the House of Lords regarding the stay of proceedings applies at least with equal force where it is sought to persuade a Court to decline to exercise jurisdiction. It is to my mind clear from all five judgments in the Atlantic Star case that the doctrine of forum non conveniens is not part of English law and that an English Court will only be persuaded to decline to exercise jurisdiction which it otherwise has where the Plaintiff is acting vexatiously or oppressively or in abuse of the process of the English Court. The only real difference between the reasoning of the majority (Lord Reid, Lord Wilberforce and Lord Kilbrandon) and the minority (Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale) appears to me to be that the former considered the time had come to place a far more liberal interpretation on what amounts to vexatious conduct and oppression than had previously been done by the Courts. Whereas the latter did not. (It may be a matter of debate whether this new liberal approach on the part of the majority correctly reflects English law in 1890 or whether it is a consequence of the modern phenomena of a shrinking world and greater international comity; but fortunately it is not necessary for me to decide this.) The fact nevertheless remains that there is, to my mind, a great deal of difference between the nature of the discretion generally exercised by an English Court in refusing to assume jurisdiction in a dispute before it (even allowing for the greater flexibility of approach favoured by the majority in The Atlantic Star case) and the discretion exercisable in applying the forum non conveniens doctrine. I do not, with respect, agree with Thirion J when he says in the Melina Tsiris case at 953 that the difference is merely a difference of emphasis."⁸

The Court then noted that, Mr Shaw Q.C., Counsel for the defendant shipowner, did not

8 The Houda Pearl (supra) at pp.39 H- 40 F.

seek in argument to challenge any of the foregoing, but submitted rather that an action **in rem** by seamen against their ship for wages fell into a different category from the point of view of the assumption of or refusal to assume jurisdiction. The Court quoted section 5(2) of the English Administration of Justice Act 1956, which appeared to assume that the Court has a discretion to refuse to entertain such an action and tended to lend implied support to Counsel's submission. Friedman J, reasoned as follows:⁹

"I consider therefore that in a case such as this the Court has a general discretion to refuse to exercise jurisdiction; and not the rather limited discretion referred to in The Atlantic Star case supra. Mr Shaw suggested that this general principle falls to be exercised in accordance with the principles relevant to the doctrine of **forum non conveniens**. There may well be merit in this suggestion but I do not consider it necessary to seek to define the nature of the Court's discretion - it is one which will be exercised judicially and in an unfettered manner and in such a way as to ensure that, regard being had to all relevant facts, the parties will obtain a just resolution of their disputes. (my emphasis) To the extent that onus becomes relevant, however, it seems to me that where, as here, the Court has the necessary jurisdiction to determine a dispute, the party seeking to persuade the Court not to hear the matter bears the onus of showing why the matter both can and should more appropriately and justly be heard in another forum."

The Court considered the various factors in favour of either party and proceeded to weigh the scales for each side. With regard to factors favouring the plaintiff seamen, Friedman J. noted that the action was relatively far advanced before him and the matter was ripe for trial; to have the matter heard in the Cyprus Court would cause further delays; the plaintiff's local attorneys have engaged in a great deal of preparatory work and were generally immersed in the case; there would be a great deal of duplication of effort should a Cypriot lawyer take over the case (a prescient view of the "**Cambridge factor**" applied in The Spiliada); the plaintiff seamen would apparently prefer to proceed in this Court than in a Cypriot Court.

9 The Houda Pearl (supra) at p.42 C-E.

The Court proceeded to dismiss the defendant's application with the following words:¹⁰

"In the result it seems to me that from the point of view of the advantages and disadvantages to each of the parties, there is really no substantial balance of convenience favouring the hearing of the action in the Courts of Cyprus as opposed to this Court or indeed *vice versa*. I am accordingly not persuaded that this would be a proper case for me to exercise my discretion in favour of the defendant and against the plaintiffs."

It is submitted that the judgment is remarkable in that the Court although bound by the English line of cases based on the *St Pierre* dictum, referred to as the limited discretion approach, broke new ground in South African admiralty law and with visionary foresight gave, in effect, form to the application of the **forum non conveniens** doctrine. It is to be noted that Friedman J, whilst not being prepared to expressly recognise and apply the doctrine of **forum non conveniens** (because it found itself shackled by English law precedent), or to define the nature of the Court's discretion, in fact departed from the "limited discretion" followed by the minority in *The Atlantic Star* and went on to apply cardinal elements of the **forum non conveniens** doctrine such as a consideration of the "**more appropriate forum**" and the balancing of the "advantages and disadvantages to each of the parties." The Court's approach to the **forum non conveniens** doctrine may be summarised thus: "A rose by no other name smells just as sweet".

¹⁰ *The Houda Pearl* (supra) at p.43 D.

7. THE INTRODUCTION OF THE DOCTRINE INTO SOUTH AFRICAN LAW

It has been held that the Scottish law doctrine of **forum non conveniens** was, in effect, statutorily introduced into South African Admiralty law by section 7(1)(a) of the Act, upon its promulgation on 1 November 1983.¹¹ However, the enactment of the doctrine is not the end of the matter, for the Act has not stipulated the procedure when the defence is raised nor the specific approach to be followed when considering the plea of **forum non conveniens** under this section.¹² In the circumstances, the Courts must be guided by the "common law" in the form of case law as applied by the Admiralty Court in this regard.

Prior to 1 November 1983, the Colonial Court of Admiralty had an **inherent general discretion** to refuse to exercise its jurisdiction in admiralty disputes between foreign litigants, and in particular in respects of actions by often foreign seaman for wages against a foreign vessel.¹³ Section 2 (1) of the Act expressly empowers the Court to exercise jurisdiction over maritime claims whether enforceable by way of an action **in rem** or an action **in personam** between foreigners relating to disputes of an entirely foreign nature, provided the necessary arrest has been made.

Friedman J in The Paz has correctly stated that:¹⁴

"Section 2(1) does not invest the Court with any discretion to decline to hear and determine such claim. The only discretion which a Court has in this regard is to be found in s 7 (1), and that discretion is not a general unfettered one but is somewhat circumscribed."

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- 11 Per Friedman J in Katagum Wholesale Commodities v. The MV Paz 1984 (3) SA 261 (NPD) at p. 267 B; per Berman J in Great River shipping Inc. v Sunnyface Marine Ltd 1992 (4) SA 313 at p. 316 F-G; per Nestadt JA in Weissglass NO v Savonnerie Establishment 1992 (3) SA 928 (A) at 939 F-G; Joubert D. (ed) LAWSA Vol 25, para 173
- 12 Cf the approach to section 5(3) of the Act per Botha JA in Cargo Laden on Board the MV Thalassini AVGI v MV Dimitris 1989 (3) SA 820 (AD) at p. 829 F.
- 13 The Houda Pearl (supra); The Melina Tsiris (supra).
- 14 Per Friedman J in The Paz (supra) at p. 267 B

Before considering the content and application of section 7 (1)(a) of the Act it may be beneficial at this juncture to review the relationship between security arrests under the Act and section 7 (1)(a) and section 7 (1) generally.

7.1 SECURITY ARRESTS AND SECTION 7 (1) OF THE ACT

The importance of the "safety valve" mechanism contained in section 7 (1)(a) in the form of the doctrine of **forum non conveniens** must not be ignored nor its relevance diminished. The doctrine provides an ideal check and balance to the open forum policy to adjudicate on maritime claims, "irrespective of the place where (they) arose", adopted by the drafters of the Act and contained in section 2 (1) thereof.

When applied under section 7 (1)(a) the doctrine of **forum non conveniens** acts as a shield to the thrust of the arrest of a vessel, and it is submitted is of particular value to the party seeking to stave off a "security arrest" of its vessel under section 5 (3) of the Act.

Should the plaintiff satisfy all the requirements for the security arrest as laid down by Botha JA in The Thalassini,¹⁵ and the further requirement that the maritime claim is enforceable in South Africa,¹⁶ the Court has no discretion to decline to exercise its power and would be bound to sanction the security arrest, unless the defendant places countervailing evidence, which is positive and cogent, before the Court, discharges the onus of proof and requests the Court to decline to exercise its jurisdiction pursuant to section 7(1)(a) or to stay the proceedings pursuant to section 7(1)(b).¹⁷

It is submitted that the principles embodied in the doctrine of **forum non conveniens** are of equal application to applications for the Court to decline jurisdiction under

what I
have said

15 The Thalassini (supra) at pp. 832 I - 833 B.

16 Per Van Der Westhuizen AJ in The MV Rosario Del Mar 1995 (1) SA 716 (C) at p. 724 F.

17 The Paz (supra) at p. 267 B- C; The Thalassini (supra) at pp. 833 D-F.

section 7 (1)(a) and application to stay proceedings generally, including on the ground of arbitration agreements, under section 7 (1)(b) of the Act. There is direct authority for this submission in The Atlantic Star and The Spiliada, with the dicta of Thirion J in The MV Melina Tsiris and Friedman J in The Houda Pearl also providing support.¹⁸

This submission is not negated by the dictum of Botha JA in The Thalassini¹⁹ to the effect that the Court hearing an application under section 5 (3) ought not to involve itself with questions relating to whether the chosen foreign Court would grant a stay on the ground that such foreign Court is a **forum non conveniens**. The defendant is not barred from raising this specific defence but, if it does, bears a heavy onus of proof which may be discharged by leading positive and cogent evidence which makes its quite clear to the Court that the chosen foreign Court, despite having jurisdiction, will in fact not exercise it in favour of the claimant.

Botha JA stated that in such a case an order under section 5 (3)(a) will not be granted since it would be futile. Thus, in circumstances when foreign proceedings are contemplated but not yet instituted, the defendant by raising this defence of **forum non conveniens** in security arrest proceedings under section 5(3), may force the plaintiff to agree to a forum which is appropriate or suitable to both parties.

In the case of The MV Paz²⁰, the Natal Full Bench was faced with the "security arrest" of the vessel, The MV Paz, in terms of section 5(3) of the Act. The Court was requested to exercise its discretion to entertain the ancillary proceedings for the furnishing of security in the Natal Provincial Division between foreign litigants relating to a foreign cause of action pending in the main action between these parties in Hong Kong.

18 See Friedman J in The Houda Pearl (supra) at pp.39 H- 40 F, where he refers to these authorities.

19 The Thalassini (supra) at pp. 832 D-E.

20 Katagum Wholesale Commodities v. The MV Paz 1984 (3) SA 261 (NPD)

The Full Bench in The MV Paz held that the applicant should make averments, inter alia, "why he needs the assistance of the South African Court", "why he needs security" and "that he cannot obtain such security in the other contemplated or pending or pending arbitration or proceedings,"²¹ and as Didcott J put it in his dissenting judgment on the judicial policy to be applied, "why he does not have enough yet and cannot get it elsewhere less drastically or more conveniently"²².

After considering and noting the distinction between sections 7 (1) (a) and (b) of the Act, Friedman J pointed out²³ that the resourceful "claimant in South Africa could, without resorting to the provisions of section 5(3) of the Act, achieve a similar "security arrest" result by arresting a vessel to commence a fresh action in rem in South Africa, in which event the Court's discretion to refuse to take action would be not a general discretion but that circumscribed by s.7(1)."

Friedman J furnished the following comment on the ability of the plaintiff to achieve security by a route alternate to making application for a security arrest:²⁴

"A person in the position of the present applicant could therefore have instituted proceedings in rem in this Court, notwithstanding the pending action in Hong Kong, and could have commenced those proceedings by arresting the ship. The Court would have been obliged to hear and determine those proceedings unless and until it was prevailed upon either to decline to exercise its jurisdiction pursuant to s 7 (1) (a) or to stay the proceedings pursuant to s 7 (1) (b). Mr Shaw argued that s 5 (3) should therefore be regarded as a means of "short circuiting" this procedure where all that the applicant really required was security and not to have its claim determined by a South African Court."

Since 1 July 1992 under the amending Act, security arrests under section 5(3) of the Act have been extended to cover proceedings in personam, as well as proceedings in rem.

21 The Paz (supra) at p. 268 B-C per Friedman J; Kriek J and Didcott J concurring.

22 The Paz (supra) at p. 269 C.

23 The Paz (supra) at p. 267 E.

24 The Paz (supra) at p. 267 B-C.

The question of a "security arrest" effected by proceedings **in personam** was considered in the matter of Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another.²⁵

The three parties were **peregrini** of the Republic in an admiralty action **in personam** in which it was alleged that the defendants' attachment of bunkers on a ship chartered by the plaintiff was without good cause as envisaged by section 5(4) of the Act. The defendants disputed the jurisdiction of the Court. However, no information was provided by the defendants why their claim could not have been pursued in some other **more convenient forum**. The Court gained the impression that the attachment was not so much to found jurisdiction but to obtain security for the claim.

Van Heerden J, held that the claim of right to the jurisdiction of the Court under the Act was not an absolute right and that it, the Court, had a wide discretion. The Court held that the attachment was without good cause and that the defendants were liable to the plaintiff in such circumstances under section 5(4) for loss or damage suffered by reason of the attachment.

In an important dictum, Van Heerden J. remarked on the wide jurisdiction to entertain maritime claims granted to the Court in terms of the Act, as follows:

"The jurisdiction in respect of maritime claims even between foreigners and causes of actions arising outside of the Republic thus vested in the Court is undoubtedly wide. The question however is not only how wide the Court's jurisdiction is but also what claim of right anybody has to that jurisdiction. Is it an absolute right? It would seem not. The Court is left with a wide discretion whether or not to come to a claimant's assistance. Section 5 (3), as was held in The Paz case, leaves the Court with a discretion to order the arrest of any property in a claim enforceable by an action in rem. The exercise of the Court's power under s 4 (4) (a) is similarly subject to its

25 Mediterranean Shipping Co.v Speedwell Shipping Co Ltd and Another 1986 (4) SA 329 (D).

discretion. There is yet another section which gives the Court a discretion; it is s 7 (1)(a), which in effect introduced into our law the principle of Scottish law, also recognised in American admiralty law, of forum non convenienc which prior to the enactment of the section was not part of our law as it had not been accepted as a principle of English law. In terms thereof a Court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted if it is of the opinion that the action can more appropriately be adjudicated upon by another Court in the Republic or by any other court, tribunal or body elsewhere. The Act accordingly makes it clear that the Court's jurisdiction, however wide it may be, is not available to any claimant as a matter of course and just for the asking (my underlined emphasis)."²⁶

In section 5(3) security arrests, the plaintiff was required, inter alia, to satisfy the Court "why he needed the assistance of the South African Court and why he cannot more conveniently approach another Court."²⁷

new cases

Having considered these requirements and in applying them to the particular facts in the matter, Van Heerden J. concluded that:²⁸

"It is rather difficult to imagine a claim less qualified and less entitled to a hearing in this Court and, had the case ever gone so far, that the Court in all probability would not in terms of s 7(1)(a) have declined to exercise its admiralty jurisdiction to hear it."

It is submitted that this dictum provides authority for the view that the South African Admiralty Courts have recognised the crucial interplay between the enforcement of maritime claims in terms of the Act and the procedural check and balance vested in the *lex fori* in the form of the doctrine of **forum non conveniens**, and will in the exercise of its discretion apply this doctrine in favour of the party raising this defence in appropriate circumstances.

26 Mediterranean Shipping Co (supra) at pp.334 G - 335 A.

27 Mediterranean Shipping Co (supra) at p. 336 E.

28 Mediterranean Shipping Co (supra) at p. 341 I.

Having briefly considered the relationship between the security arrest procedure and the provisions of section 7 (1) of the Act, the question now posed is have our Admiralty Courts applied the doctrine of **forum non conveniens** to the particular disputes before them? Have our Admiralty Courts religiously followed the principles of the doctrine as laid down in **The Spiliada**, or have they been prepared to refine or further develop the doctrine to meet the changing exigencies of a dynamic maritime world, as perceived by our Admiralty judges?

7.2 PROCEEDINGS IN TERMS OF SECTION 7(1)(a) OF THE ACT ✓

7.2.1 MV Spartan-Runner v Jotun-Henry Clark Ltd

The opportunity to expound on the South African application of the doctrine of **forum non conveniens** under section 7 (1)(a) finally fell to be decided by the Full Bench of the Natal Provincial Division in MV Spartan-Runner v Jotun-Henry Clark Ltd.²⁹

The matter came before the Full Bench as an appeal against the judgment of Gordon AJ. in the Durban and Coast Local Division in which the learned Judge refused to make an order setting aside the previous arrest of the appellant, the MV Spartan-Runner. The vessel was arrested pursuant to a warrant issued out of that Court to assist in the enforcement of a claim made by Jotun-Henry Clark Ltd, the plaintiff in the action, for payment of the balance of the agreed purchase price of paint sold and delivered in accordance with the its standard conditions of sale, containing a choice of law and jurisdiction clause 12, in the following terms:³⁰

"Any disputes arising from this contract will be subject to English law and the jurisdiction of the English Courts."

The appellant disputed liability to make payment on the grounds that the paint in question was defective and did not meet required standards, and raised two contentions in the Court **a quo**; firstly, that clause 12, when properly interpreted, excludes the jurisdiction of the South African Courts and affords the English Courts exclusive jurisdiction in the matter and, secondly, in any event this was an appropriate case for the Court to decline to exercise its admiralty jurisdiction in terms of s 7(1)(a) of the Act. These contentions were rejected by Gordon AJ and the appellant appealed against the refusal to set aside its arrest.

29 MV Spartan Runner v Jotun- Henry Clark Ltd: "The Spartan Runner" 1991 (3) SA 803 (N)

30 "The Spartan Runner" (supra) at p. 804.

In considering the first contention that the choice of English law and jurisdiction clause excluded the jurisdiction of the *lex fori*, Shearer J. who delivered the unanimous decision of the Natal Full Bench referred to section 17 of the United Kingdom Civil Jurisdiction and Judgments Act of 1982, which read:³¹

"If the parties, one or more of whom is domiciled in a contracting State, have agreed that a Court or the Courts of a contracting State are to have jurisdiction to settle any disputes which have arisen, or which may arise in connection with a particular legal relationship, that Court or those Courts shall have exclusive jurisdiction. Such agreement conferring jurisdiction shall be either in writing or evidenced in writing, or, in international trade or commerce, in a form which accords with the practices in that trade or commerce of which the parties are or ought to have been aware."

Shearer J. noted that article 17 of the 1968 Brussels Convention was of similar effect.³² In the factual circumstances of the present matter the United Kingdom was a contracting State and the respondent an English company. In the Court *a quo* Gordon AJ. had rejected, on three grounds, the appellant's contention that the effect of this legislation was that the English Courts have exclusive jurisdiction to the exclusion of the South African Courts. Shearer J, in the appeal court, considered and rejected the findings of the Court *a quo* on all three grounds.

Counsel for the respondent then presented argument on a fourth ground not canvassed before the Court *a quo*, to the effect that the United Kingdom Act only came into effect on 1 January 1987 whereas the contract which formed the basis of the claim may have been concluded, and delivery of the paint products in terms thereof took place, prior to 1 January 1987. In addition the paint products were ordered and supplied in Greece which made it unlikely that the parties intended that clause 12 should be read in the light of section 17 of the 1982 Jurisdiction Act, UK.

31 The Spartan Runner (supra) at p.804 I- 805A.

32 The Spartan Runner (supra) at p.805A.

Shearer J rejected this argument for the following reasons:³³

"What the parties did intend and what was expressed in the contract was that English law should be invoked in the resolution of disputes arising from the contract. The question is not whether the parties intended that the English Courts should have exclusive jurisdiction, it is whether the English law at the time of the litigation provided for the exclusive jurisdiction of the Courts. At the time of the present litigation the Jurisdiction Act is in force and was in force. The English Court therefore has exclusive jurisdiction in terms of the contract, which falls to be interpreted according to English law."

Notwithstanding this finding in favour of appellant, which did not conclude the matter, Shearer J pointed out that in any event the claim in question was a **"maritime claim"** in terms of section 1(1)(l) of the Act and the Court had jurisdiction in terms of s 2(1) to hear and determine any maritime claim:

"irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner."³⁴

With respect, although the Court's view with regard to section 1(1)(l) of the Act appears self-evident, there is a marked difference between jurisdiction so assumed by the Court and the Court being enjoined to uphold an agreed foreign jurisdiction clause in the contract between the parties. To institute an admiralty action, as defined, the claimant must possess a maritime claim in terms of section 1(1)(iv). It has been held that if the arrestor presents a **prima facie** case for arrest, the Court has no discretion to refuse jurisdiction to grant the arrest. However, should this arrest be in breach of a foreign jurisdiction clause, the Court at the arrest stage of proceedings does not give effect to the bargain between the parties. It may appear that the Court furthermore implicitly endorses a plaintiff's breach of the foreign jurisdiction clause. This is not so as the Court in issuing the warrant to arrest a vessel is giving effect to the plaintiff's right to sue in its Court, if

33 The Spartan Runner (supra) at pp. 805 I-J.

34 The Spartan Runner (supra) at p.806 A.

jurisdiction is properly founded in admiralty law to arrest the vessel. The contractual issue as to a prior choice of law and jurisdiction binding the parties is one for the defendant to raise.

Shearer J then turned to consider what he regarded the real question, namely, whether the Court should decline to exercise its admiralty jurisdiction in terms of section 7(1)(a) of the Act, which prior to the amending Act of 1 July 1992, read as follows:

"7. Disputes as to venue or jurisdiction

- (1)(a) A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that the action can more appropriately be adjudicated upon by another court in the Republic or by any other Court, tribunal or body elsewhere."
- (my underlined emphasis)

It is surprising that at this juncture, Shearer J did not consider and comment on the available reported dicta on the application of section 7 (1)(a) of the Act, as expressed by Friedman J in Katagum Wholesale Commodities v. The MV Paz,³⁵ and Van Heerden J in Mediterranean Shipping Co.³⁶

It is with respect submitted that had the learned Judge Shearer done so, he would have clarified in his own mind the approach to follow in determining the exercise of the discretion in terms of section 7 (1)(a) of the Act, in the matter before him. Firstly, under English law where a vessel "is arrested in England in breach of a foreign jurisdiction agreement, the application by the defendant is to stay proceedings and not to have them set aside."³⁷

35 The MV Paz (suprs) at pp. 266 I - 267 A;

36 Mediterranean Shipping Co (supra) at pp.334 G - 335 A.

37 Dicey and Morris on The Conflict of Laws (12th ed.) at p. 434 and the authorities cited at fn.26: The Fehmarn [1958] 1 WLR 159 (CA); The Eleftheria [1970] P. 94; The Pia Vesta [1984] 1 LIR Rep. 169.

The learned authors, Dicey and Morris, citing the decision of the English Court of Appeal in the El Amria,³⁸ hold the view that:

"where plaintiff's sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English Court, assuming to the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not."

Accordingly, it is respectfully submitted that a strong argument can be made that the Court should have "non-suited" the appellant for seeking relief under section 7 (1)(a) of the Act, by requesting the Court to decline jurisdiction. The proper remedy available to the appellant was to request a stay of the proceedings under section 7 (1)(b) of the Act.

Secondly, if Shearer J considered that the application brought under section 7 (1) (a) of the Act was well founded as it fell within the ambit of "**any proceedings**," he was then enjoined by the wording of section 7 (1) to apply the statutorily imposed doctrine of **forum non conveniens** to the action in breach of an agreement to refer disputes to a foreign Court, which otherwise would be within its jurisdiction, by virtue of the arrest of the vessel. In doing so, Shearer J would have to examine the entire factual matrix of the matter, ascertain the relevant connecting factors, which would point toward the forum with which "**the action has its closest and most real connection**:" being the more appropriate forum for the resolution of the dispute. Shearer J did not do so and approached the matter from a different point of departure, when he stated:

"The fact that in terms of their agreement the parties chose the English Courts and the English law as the medium for the resolution of their disputes is certainly material to a consideration of whether such Courts would be the appropriate forum. This involves a consideration of whether such an agreement ought to be enforced by our Courts."³⁹

38 The El Amria [1981] 2 Ll Rep. 119 at 123 (CA) approving The Eleftheria (supra);

39 The Spartan Runner (supra) at p.806 C-D.

In considering whether such an agreement ought to be enforced by the South African Courts, Shearer J quoted with approval the Roman Dutch Law authority, Pollak, in South African Law of Jurisdiction at p.196, where it is stated:

"... (E)ven though no action is actually pending in a foreign Court, if it has been agreed that the dispute should be submitted to a foreign Court, a South African Court will ordinarily refuse to entertain proceedings concerning such dispute."⁴⁰

Shearer J then referred to the following principles of English and Roman Dutch law, which he considered to be of application:⁴¹

"In English law, where a plaintiff sues in England in breach of an agreement to refer disputes to a foreign Court and the defendant applies for the stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (The Eleftheria [1969] 2 All ER 641 (PDA) at 645 ([1969] 1 Lloyd's Rep 237).)

Where the parties have agreed that disputes are to be referred to a foreign tribunal, the onus rests upon a plaintiff and thus, in this case, on the respondent, to show why the Court should not stay the proceedings before it so as to give effect to the agreement between the parties. (Dicey and Morris The Conflict of Laws 10th ed vol 1 at 255.)"

It is submitted that at this juncture of the matter it ought to be apparent that the English law authorities cited above, speak of staying the proceedings, whereas under section 7 (1)(a) the Court must decline its jurisdiction. Shearer J also referred Roman Dutch case law on the point, which he quoted as follows:⁴²

"This is an aspect of party autonomy. With regard to the choice of law "...where the parties have expressly or impliedly or tacitly agreed upon a governing law, our Courts would give effect to the intention of the parties". See Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd 1986 (3) SA 509 (D) at 525 and Standard Bank of South Africa Ltd v Efroiken and Newman 1924 AD 171 at 185. By the same token the Courts will lean towards the chosen forum of the parties."

40 The Spartan Runner (supra) at p.806 E.

41 The Spartan Runner (supra) at p.806 D-G.

42 The Spartan Runner (supra) at p.806 H.

It is submitted that Shearer J by quoting the learned authors Dicey and Morris above, approved of their comment that where the parties have agreed that disputes are to be referred to a foreign tribunal, the **onus** rests upon the plaintiff in the (South African) Court to show why the Court should not stay the proceedings before it to give effect to the agreement between the parties. Shearer J in effect applied the principles laid down by Brandon J in **The Eleftheria**, to the issue before him, even though that matter concerned an application to stay proceedings in breach of a foreign jurisdiction clause.

Counsel for respondent, with respect, muddied the waters even further, by attempting to discharge the heavy onus of showing "strong cause" why the Natal Court, which exercised its jurisdiction with the arrest of the **MV Spartan-Runner** in breach of the jurisdiction clause, should be regarded as the more appropriate forum compared to the chosen English Court for the resolution of the matter. Counsel for respondent advanced the following reasons:

- "(a) the appellant has not tendered any security that would be payable upon a judgment in the English Court;
- (b) accordingly, if the matter were to proceed in an English Court, the plaintiff would lose the security which it has in South Africa;
- (c) the dispute between the parties has no greater connection with England than it does with South Africa; and
- (d) the action in England or, in the alternative argument, in Greece might well be time barred."⁴³

From these reasons, it appears the plaintiff was motivated to arrest **The Spartan Runner** in order to obtain a legitimate juridical advantage of security for its claim, against the defendant. It appears, Shearer J, impliedly accepted that the doctrine of **forum non conveniens** was of application in resolving the matter, by seeking to determine connecting factors pointing toward the "**more appropriate forum**".

43 **The Spartan Runner** (supra) at p.806 I- 807 A.

Shearer J concluded⁴⁴ that the reasons advanced by respondent really concerned the effectiveness of the security which the respondent now held for its claim by virtue of the arrest of the MV Spartan-Runner, and found these reasons to be lacking, in the following words:⁴⁵

"In my judgment the respondent has failed to advance sufficiently cogent reasons why the local Court should be more appropriate than the English Courts for the resolution of the matter."

In considering the appeal court's task of determining whether Gordon AJ in the Court *a quo* was correct in the conclusion to which he came, Shearer J commented, as follows:⁴⁶

"And that Judge in turn had to decide whether the arrest was correctly granted. At the time of the arrest no security had been furnished. The fact that the respondent had chosen the wrong forum and thereby obtained the arrest cannot affect the enquiry. The respondent cannot improve its position by wrongly obtaining security."

This dicta appears to beg the question why should the Admiralty Court authorise the issue of a warrant of arrest, when upon a proper examination of the claimant's *ex parte* application for arrest it ought to be clear to the Court that the claimant seeks to arrest in the "wrong forum," in breach of an agreed foreign jurisdiction clause between the parties? Could the Court not *mero motu* at the initial arrest stage decline to exercise its jurisdiction?

It appears the Court has no such discretion and the rationale for the arrest of the MV Spartan-Runner, in these circumstances lies in the English law principle that the plaintiff is entitled to jurisdiction as of right and may arrest the vessel, albeit in breach of

44 The Spartan Runner (supra) at p.807 A.

45 The Spartan Runner (supra) at p.806 H - I.

46 The Spartan Runner (supra) at p.806 I- 807 A.

a jurisdiction clause, to assist in the enforcement of its maritime claim. Following this approach the Court merely looks to see that a **prima facie** case exists before it exercises its jurisdiction in favour of the arrestor. In other words the Court does not concern itself at this stage with the fact that the arrest is in the "wrong forum," in breach of a jurisdiction clause, but looks at this point when, and if, it is raised by the defendant.

It is submitted that our Admiralty Courts should incline toward a more vigilant approach, to counter the forum shoppers, in terms whereof the Court will critically assess the **ex parte** application for the arrest of a vessel. Should the maritime claim of the arrestor be founded in a contract containing a foreign jurisdiction clause, providing for a dispute resolution forum outside the Republic, the Court there and then ought to exercise its discretion to either permit the arrest or decline jurisdiction, should the arrestor not allege the existence of connecting factors, which **prima facie** point to the **lex fori** as the more appropriate forum.

Such an approach would not negate the doctrine of **forum non convenience** but will in fact increase its potency and development, in that the plaintiff would have to present in its founding papers a **prima facie** case for instituting proceedings in the South African forum, in breach of a foreign jurisdiction clause, on the grounds that the South African Court is more appropriate than the chosen forum to resolve the dispute. If the plaintiff fails at that stage of proceedings to advance sufficiently cogent reasons to establish a **prima facie** case, the Court may decline to exercise its jurisdiction.

It is noted that the Court failed to mention that respondent had also sought and gained a "**legitimate personal advantage**" by proceeding in the Natal Court as it may have been time-barred had it litigated in England or in Greece. It was not a juridical advantage which could only be obtained in the Republic.⁴⁷

47 Cf Court of Appeal in The Spiliada (supra) see headnote at p.2.

However, Shearer J stated his response to the time-bar issue and delivered his judgment, in the following words:⁴⁸

"...the arrest in this matter was made on 23 June 1988. The English or Greek law is presumed to be the same as the South African law. The arrest would have interrupted prescription and hence would have inhibited the operation of a time-bar for the three-year period which applies in South Africa. The conclusion is therefore that the respondent failed to discharge the onus of showing that the terms of the agreement should not be adhered to and this is therefore a case where this Court should decline to exercise its admiralty jurisdiction."

The Court accordingly in adjudicating the matter in terms of section 7(1)(a) of the Act proceeded, wrongly it is respectfully submitted, to decide the appeal on the narrow issue of an agreement as to the choice of the English jurisdiction and law. It upheld the appeal on this basis and set aside the arrest of The MV Spartan-Runner, with costs.

Shearer J,⁴⁹ having made his finding in regard to the choice of jurisdiction and law clause, stated in an **obiter dictum** that it was unnecessary to decide the issue whether or not Greece was a more appropriate forum, which was the appellant's alternate ground of appeal. The learned judge then curiously mentioned he would have been disposed "to **conclude that on balance the appellant had made out a sufficient case, more particularly as proceedings between the former owner of the appellant and the respondent have already been commenced there**(my underlining)."

In its alternative argument based on the doctrine of **forum non conveniens**, the appellant submitted that the Court should decline to exercise its jurisdiction because the action can more appropriately be adjudicated upon by the Greek Court or Courts.

48 The Spartan Runner (supra) at p.807 D.

49 The Spartan Runner (supra) at p.808 E.

With respect it is submitted that the appellant by specifying the appropriate forum had satisfied one of the requirements for relying on section 7(1)(a) of the Act, as stated in the **obiter dictum** of Nestadt JA, in the Appellate Division matter of Weisglass NO v. Savonnerie Establishment,⁵⁰ where he had remarked:

"I am not sure how cogent these points are. But in any event there is a short answer to the argument. It seems to me that a respondent who seeks to rely on s 7(1)(a) as a should generally raise the issue in his papers. Weisglass did not do so. He did not specify which forum he considered to be the appropriate one. It would in the circumstances be unfair to non-suit Atlantic on this ground (which is not dealt with by the Court a quo)."

With regard to the doctrine of **forum non conveniens**, appellant accepted that it bore the **onus** as declared in The Spiliada⁵¹ and argued that the following factors made the Greek Courts a more appropriate forum:⁵²

- (a) the respondent is an English company and carries on business in Greece and in Norway, both of which countries are closer to Greece than to Durban;
- (b) the paint was supplied by the respondent's Greek office to the appellant in Greece pursuant to an agreement concluded in Greece;
- (c) the issue between the parties is the quality of the paint supplied and the appellant has six witnesses, all of whom live and work in Greece and five of whom will give evidence of an expert nature on the issue of the paint supplied and the construction of the vessel, all of whom will give evidence in the Greek language;
- (d) while the respondent alleges that its witnesses will almost certainly be from Norway, the former owners of the appellant vessel have brought an action against the respondent in Greece arising out of the defective paint delivered and accordingly the respondent's evidence will have been gathered in Greece for presentation in the Greek Courts, which evidence will canvass the same issues as those between respondent and appellant;
- (e) the appellant has offered to put up an acceptable guarantee in relation to the proceedings in Greece before the arrest is set aside and made this offer before the vessel was arrested in South Africa;

50 Weisglass NO v. Savonnerie Establishment 1992 (3) SA 928 (AD) at p. 939 F-G.

51 The Spiliada (supra) at pp. 854-5.

52 The Spartan Runner (supra) at p.807 F- 808 D.

- (f) Greek and Norwegian lawyers are already involved in the matter and the instruction of a further set of legal representatives in South Africa will constitute an unnecessary and expensive duplication;
- (g) it is more convenient for the parties in dealing with the litigation to be in the country and city where they are based and where they have access to their own records, staff and lawyers;
- (h) the litigation between the appellant and the respondent has no connection with South Africa save that security was furnished here."

In addition to the four reasons mentioned earlier by respondent, which failed to persuade the Court, the respondent countered the appellant's submission by saying:⁵³

- (a) that the evidence of at least three of the appellant's witnesses would be capable of agreement before the trial;
- (b) that to Norwegian witnesses there was little difference in travelling to Greece or South Africa and evidence could in any event be taken on commission or referred to an arbitrator or referee;
- (c) that the South African law of contract and the English law of contract are similar and our Courts have for years been applying the English law in admiralty cases;
- (d) in South Africa no formal proof of English law is required;
- (e) the bona fides of the appellant's defence to the respondent's claim was in issue because of its conduct in the proceedings and negotiations for settlement.

Shearer J considered that these considerations were to his mind part of the issue in the main action and not germane to the choice of forum. In an important obiter dictum the Court inclined toward applying the doctrine of **forum non conveniens** in favour of the appellant. In the words of Shearer J.;

"...(It is unnecessary to reach a decision as to whether or not Greece is a more appropriate venue. I would however have been disposed to conclude that on balance the appellant had made out a sufficient case more particularly as proceedings between the former owner of the appellant and the respondent have already been commenced there."⁵⁴

53 The Spartan Runner (supra) at p.808 B - D.

54 The Spartan Runner (supra) at p.808 B - D.

In conclusion, it is submitted that the following criticism's may be levelled against the judgment of Shearer J in The Spartan Runner:

- 1) the judge correctly identified that (on the assumption that it was correct in law (which is doubted) for the appellant to request the court to exercise its discretion to decline jurisdiction in terms of section 7 (1) of the Act) the doctrine of **forum non conveniens** should be applied to the factual matrix before him. (p. 806 B)
- 2) the judge erred in failing to appreciate that the express wording of section 7 (1) required that he, firstly, must determine the "**more appropriate forum**" for the adjudication of the dispute, before, secondly, exercising his discretion whether to decline jurisdiction.
- 3) the judge erred in failing to appreciate that although "**the parties chose the English courts and English Law as the medium for the resolution of their disputes**", this contractual election was only a material connecting factor, which had to be viewed in the context of the other relevant connecting factors. (p. 806 C)
- 4) the judge erred in failing to appreciate that factual matrix presented three competing forums, and that an election after considering all the relevant connecting factors, had to be made in favour of one of these as the more appropriate forum:
 - 4.1 the **lex fori** seized with the arrest (for apparent security for an action in Greece and to possibly escape time bar limitations in England and Greece) and the issue whether to decline its jurisdiction.

53 The Spartan Runner (supra) at p.808 B - D.

54 The Spartan Runner (supra) at p.808 B - D.

- 4.2 the English Court applying English law as the contracted forum and law for the adjudication of the dispute (which may be time barred), but not necessarily the more appropriate forum to resolve the dispute.
- 4.3 the Greek Court where a dispute was being heard between respondent and the previous owner of appellant, alleged by the appellant to be the more appropriate forum (which also may be time barred)
- 5) although the judge correctly identified that in applying the doctrine of **forum non conveniens** to the factual matrix he must seek to ascertain the more appropriate forum for the resolution of the dispute (p. 806 H), he actually relied on the principles laid down in The Eleftheria to the matter, by requesting the respondent to discharge the heavy onus of showing why the terms of the agreement should not be adhered to.
- 6) the learned judge erred (at p.806 H-I; and at p. 807D.) in principle by requesting the respondent (and then finding that it failed) to advance sufficiently cogent reasons why the local Court should be more appropriate than the English Courts for the resolution of the matter, in order to discharge its onus.
- 7) In conclusion, Shearer J in The Spartan Runner came to the right decision to decline jurisdiction, but with respect for the wrong reasons. The Court with respect followed a convoluted approach to the doctrine of **forum non conveniens** and at the end of the day did not properly apply the doctrine to the particular circumstances of the case. In declining jurisdiction, the Court furthermore erred in failing to indicate the Court in respect of which it was declining jurisdiction (i.e. in favour of proceedings underway before the Greek court, being the more appropriate forum or the English Courts which earlier he had stated had exclusive jurisdiction) and whether such declination was conditional on appellant furnishing adequate security in the English or Greek proceedings.

In The Spartan Runner, Judge President Howard agreed with the finding of Shearer J but took the opportunity to state some additional reasons for rejecting the contention that the Full Bench should not decline to exercise its jurisdiction because the action in the English Courts might be time barred.

The learned Judge President pointed out that the possibility that the action might be time barred was not raised by the respondent in opposition to the application to set the attachment aside, as there was no ground for suggesting that the matter was time barred at that stage either under South African or English law, nor was there any suggestion that the action had become time barred by the time when the judgment of the Court a quo was delivered on 24 November 1989.

Howard JP (Booyesen J concurring) opined as follows:⁵⁵

"Quite clearly, if the respondent was concerned at that stage about the possibility of a time bar, it could have issued a writ in England and so interrupted prescription or, better still, when faced with the application in this case, it could have abandoned the arrest and instituted action in England, which is what it should have done in the first place. The onus being on the respondent to show why this Court should not give effect to the agreement of the parties that the English Courts should have exclusive jurisdiction, it should obviously have taken steps to preserve its right of action in England. The papers do not disclose any grounds for declining to give effect to that agreement on the basis of a possible time bar. I need only add that no application has been made to lead evidence on appeal with regard to the question of any possible time bar.

55 The Spartan Runner (supra) at p.808 B - D.

7.2.2 GREAT RIVER SHIPPING INC. v SUNNYFACE MARINE LIMITED

On 9 April 1992, Berman J handed down in the Cape Supreme Court his judgment in the case of Great River Shipping Inc. v Sunnyface Marine Limited:⁵⁶ the third case in a trilogy between these parties. In the two earlier cases, although faced with arguments based on the doctrine of **forum non conveniens** and its application, the Court decided the disputes on different points and did not consider this ground.

Berman J was called upon to decide the two outstanding points from the previous hearing: namely, whether or not the Court should decline to exercise jurisdiction to resolve the long standing dispute between Great River Shipping Inc. and Sunnyface Marine Ltd, and whether Sunnyface had established a prima facie case justifying the arrest and the contemplated action.

The learned Judge correctly opined that the statutory form of the doctrine of **forum non conveniens** was introduced into our law by legislation through s 7(1) of the Act. The true impact of this statement may easily be overlooked. It being that our Legislature deemed it fit to introduce the doctrine as law at a time, 1 November 1983, when the English Courts were applying the **MacShannon formulation** to similar matters and grappling with the doctrine. The judgment of the House of Lords in the Abidin Daver would only be delivered during December 1983 and our statutory acceptance of the doctrine therefore pre-empted the acceptance of the doctrine as part of English Law by that House.

Berman J in the Great River Shipping Inc. case, with respect brought a measure of clarity as the application of the doctrine of forum non conveniens in South African law. The influential learned author Pollak⁵⁷ has denied that the Scottish law doctrine of **forum non conveniens** is part of our Roman Dutch Law.

56 Great River Shipping Inc. v Sunnyface Marine Limited 1992 (4) SA 313

57 Pollack The South African Law of Jurisdiction 1937

The learned Judge in identifying the doctrine underlying section 7 (1)(a) of the Act, applied the doctrine of **forum non conveniens** to the wording of section 7 (1)(a) of the Act as it stood on 9 April 1992, before the amending Act. At the time of judgment section 7 (1)(a) of the Act read as follows:

"7(1)(a) A Court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that the action can more appropriately be adjudicated upon by another Court in the Republic or any other court, tribunal or body elsewhere."

Judge Berman dealt with the request to decline jurisdiction first. The learned judge held the view that the exposition of the doctrine of **forum non conveniens** as set out in the speech of Lord Goff in **The Spiliada**, has been impliedly accepted in the judgment of Botha JA in **The Thalassini**, as being in accordance with the provisions of s 7(1) of the Act.⁵⁸ With respect, the judgment of Botha JA does not support this contention as Berman J purports it does, even impliedly.

Berman J then summarised the legal position to be applied in South African law in several principles, as it appears from **The Spiliada**.⁵⁹ In stating these principles Berman J referred to, and therefore must have considered, the English Court of Appeal decision of **Du Pont v Agnew**,^{60.1} which in turn had summarised in very cogent terms how the doctrine of **forum non conveniens** laid down by Lord Goff in **The Spiliada** is to be applied. Briefly the summary of Bingham L.J. in **Du Pont v Agnew**,⁶¹ (my underlined emphasis) reads as follows:

- (1) Where a party duly served with proceedings within this jurisdiction seeks to stay them:-

58 **Great River Shipping Inc. v Sunnyface Marine Limited** (supra) at p. 316 F-G. ✓

59 **Great River Shipping Inc** (supra) at pp.316 H - 318 E.

60 **E I Du Pont de Nemours Co and Endo Laborities Inc. v I C Agnew, K W Kerr and others** [1987] 2 LIR 585 (CA).

61 **Du Pont v Agnew** (supra) at p. 588.

"...The basic principle is that a stay will only be granted on the ground of forum non conveniens where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."⁶²

- (2) In general, the burden rests on the defendant to persuade the Court to exercise its discretion to grant a stay;
- (3) If the Court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country;
- (4) The initial burden on the defendant is not just to show that England is not the natural or appropriate forum but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum;
- (5) The first step is to see what factors there are which point in the direction of another forum;
- (6) One must look for connecting factors which point towards another forum as that with which the action has the most real and substantial connection. Such factors:
 - (a) may not only affect convenience or expense (such as availability of witnesses); but
 - (b) may also relate to the law governing the relevant transaction; and
 - (c) the places where the parties respectively reside or carry on business;
- (7) 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;
- (8) 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;

62 The Spiliada (supra), per Lord Goff at p. 10.

- (9) **If the plaintiff can establish objectively by cogent evidence that he will not obtain justice in the foreign jurisdiction, that is a very relevant consideration.**

The words "more", "clearly or distinctly" are nothing more than expressions of the degree of comparison between the forum seized with matter and the alleged "appropriate" foreign forum. In short the Court must be satisfied that there is a tangible and palpable difference favouring the foreign forum as more appropriate, which the Plaintiff cannot gainsay.

How is the question of the onus to be applied? The defendant seeking the stay of proceedings (or the declination of jurisdiction by the Court or the setting aside of a warrant of arrest) on the ground of **forum non conveniens** bears the general burden of persuading the Court to exercise its discretion and come to his assistance. This general onus rests with the defendant until he provides sufficient evidence to shift the onus to the Plaintiff. Therefore, the onus or evidentiary burden will only shift to the plaintiff to prove the existence of special circumstances, if the defendant has discharged the initial general onus (evidentiary burden) of providing sufficient **prima facie** evidence of the existence of another available forum which is **prima facie** clearly or distinctly more appropriate than the English forum for the trial of the action.⁶³

63 The learned author's Hoffman and Zeffert in **The South African Law of Evidence** (4th ed.) at page 496 state: "In its turn, the onus of proof has to be distinguished from the evidentiary burden, which itself, embraces two discrete concepts: (a) a duty to adduce evidence to combat a prima facie case made by one's opponent and (b) the duty cast upon a litigant, who has to begin, of adducing evidence in order to escape certain procedural consequences....The burden or onus of proof has to be distinguished from the evidentiary burden...of combating a prima facie case made by one's opponent. Corbett JA in **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Limited** (1997 (3) SA 534 (A) at 548) has drawn the distinction crisply:

"As was pointed out by Davis AJA in **Pillay v. Krishna** 1946 AD 946 at 952-3, the word onus has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to

Having considered Bingham L.J.'s summary, Judge Berman proceeded to pronounce his interpretation of the legal position to be applied to the matter before him, in the following manner:⁶⁴

- "(a) The basic principle is that a stay will only be granted (or a warrant of arrest set aside) on the ground of **forum non conveniens** where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action' - the other available forum must be one which is more appropriate for the resolution of the parties' dispute rather than one which is merely competent or - despite the wording of the label applied to the principle - convenient.
- (b) An initial general **onus** rests on the party seeking the stay of proceedings (or, as here, the setting aside of the warrant of arrest of the vessel) to persuade the Court to exercise its discretion to grant the stay (or to set aside the arrest).

63 combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In **Brand v. Minister of Justice** 1959 (4) SA 712 at 715 Ogilvie Thompson JA called it "the overall onus." In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift, or be transferred in the course of the case depending upon the measure of profit furnished by one party to the other. See also **Trega v Godart** 1939 AD 16 at 28; **Marine and Trade Insurance Co Ltd v. Van der Schyff** 1972 (1) SA 26 (A) at 378-9."

With regard to the shifting of an onus, see the judgment in **Frankel v Ohlsson's Cape Breweries**, 1909 TS 967, where Innes, C.J., said at pp 961-962:

"When a litigant applies to court for relief the burden is on him to show that he is entitled to the remedy which he seeks; and the plaintiff must invariably begin, and must establish his case, except where the pleadings contain admissions which render the defendant liable unless the inferences to which they give rise are rebutted by him ...unless a further position is developed."

See also **Cele v Hunt, Leuchars and Hepburn**, 1927 AD 498.

64 **Great River Shipping Inc.** (supra) at pp. 316 H - 318 E.

- (c) Once that party succeeds in discharging that **onus**, viz of satisfying the Court that there is another forum available for the resolution of the dispute which **prima facie** is a more appropriate one, then the **onus** will be shifted to the other party, ie the party relying on the arrest of the vessel to establish the Court's jurisdiction, to show that special circumstances exist which warrant the dispute being resolved in this forum.
- (d) In deciding whether such special circumstances exist, the Court will have regard to what 'connecting factors' (as they have been called) are present which point towards another forum as that with which the action has the most real and substantial connection, for example, the availability of witnesses; the place(s) where the parties reside or where they carry on business; the extent of expenses and costs which will be incurred; the law governing the situation; the likelihood (or otherwise) of the arresting party obtaining justice in that other forum - all this does not purport to be exhaustive of these connecting factors, for the Court will indeed have regard to all relevant circumstances.
- (e) The **onus** of establishing the existence of these special circumstances resting on the party contesting the application for a stay of proceedings (the setting aside of the arrest) is dischargeable on a preponderance of probabilities, although - and, more particularly, because of its relevance to the present case - where it is contended by that party that it will not obtain justice in the foreign jurisdiction, positive and cogent evidence to support this contention will have to be adduced, for the **onus** in this regard has been authoritatively described in this country in The Thalassini as a "heavy" one. (The reference to the **onus** as being a heavy one does not mean that it is any more burdensome than that borne by a party in ordinary civil proceedings:

"...(T)he degree of proof required is a preponderance of probability; but this is less easily envisaged in that one does not readily impute dereliction of duty to a responsible body."

Per Holmes JA in National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735H, and this is more particularly the case where a Court, albeit a foreign one, is alleged to have been party to a conspiracy.) See also E I du Pont de Nemours Co and Endo Laboratories Inc v I C Agnew, K W Kerr and Others [1987] 2 Ll LR 585 (CA) at 588."

....It is against this background, set out in subparas (a) - (e) above, that the opposing contentions of the parties, viz whether or not the warrant for the arrest of the vessel should be set aside and as to whether or not the dispute as to its ownership should be determined by a Court in the Peoples' Republic of China ('PRC') having jurisdiction, fall to be examined."

Berman J. confirmed that the application of the doctrine of **forum non conveniens** as set out in The Spiliada concerns essentially one cardinal principle that a stay will only be granted (or a warrant of arrest set aside) on the ground of **forum non conveniens** where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action.⁶⁵

Berman J. then further applied, what he categorised the "two-stage approach" of **forum non conveniens** adopted in The Spiliada", to the present application.⁶⁶ The two-stage approach as applied by Berman J. refers to the shifting of the burden of proof during the application from firstly, "the general initial onus" placed on the party seeking the stay (better phrased seeking the declination of jurisdiction) to make out a **prima facie** case that the foreign case is the more appropriate and to secondly, the "transferred onus" placed on the protagonist seeking to retain the jurisdiction of the **lex fori** to show that special circumstances exist which nevertheless warrant that the dispute be resolved by the **lex fori**. In other words:

- (1) an initial general **onus** rests on the party seeking the stay of proceedings (or, as in The Great Eagle, the setting aside of the warrant of arrest of the vessel) to show that there is another competent forum which is more appropriate for the resolution of the dispute.
- (2) Once the initial onus is discharged and the court is satisfied that another available forum is **prima facie** the appropriate forum, then there is a transference of onus to the party who has resorted to the jurisdiction of the **lex fori** to show that special circumstances exist which warrant the dispute being resolved in the **lex fori**.

65 Great River Shipping Inc. (supra) at p. 316 I.

66 Great River Shipping Inc. (supra) at pp. 316 C, 319 I.

Should the evidence proffered in support of the transferred onus be of sufficient weight to discharge the transferred onus, the Court would be justified in retaining its jurisdiction to entertain the action and pronounce judgment thereon.

Counsel for the applicant contended that a Court in the Peoples' Republic of China ('PRC') existed which was more appropriate for the hearing and the resolution of the parties dispute. Berman J accepted this contention, and explained the reasons for so doing, in the following words:⁶⁷

"Certainly, and without entering into an exhaustive analysis of the evidence, it would readily appear therefrom that, taking a practical and commonsensical overview of the matter, a Court in the PRC having the requisite jurisdiction would provide a more natural appropriate forum to deal with this dispute. That this is so cannot, in my view, be gainsaid. Mr Hofmeyr pointed out that Sunnyface's case, for which the arrest of the vessel was to afford this Court the necessary jurisdiction to hear and to decide that dispute, was that the arrest of the vessel in Qingdao (a major port in the PRC) and its sale and transfer there as a result of which it was deprived of its ownership, all purportedly done in accordance with Chinese law and pursuant to proceedings in a Chinese Court, was null and void. He submitted that this Court should exercise its discretion to set aside the warrant of arrest in that the events giving rise to such proceedings all took place in China; the witnesses who would be required to testify would be almost exclusively Chinese, speaking a language common to them but unintelligible to the Court; it would not be possible to compel them to attend proceedings in South Africa to testify; the costs involved in procuring their attendance here (if all were prepared to come) would be exorbitant; the proceedings would not result in a just and fair decision being handed down if only some of the witnesses which one or other of the parties considered were necessary to advance its case came to Cape Town and testified, whilst others refused to do so; the law relating to the propriety and validity of the proceedings in the Qingdao Maritime Court and to what was done with the vessel thereafter was Chinese law, about which expert testimony would be necessary and which of necessity would be given by Chinese lawyers; and the difficulties which counsel (and the Court) encountered when faced with differing translations of documents in the Chinese language (which were highlighted by the

67 Great River Shipping Inc. (supra) at pp. 318 C-319 I.

request, later withdrawn, made in Chambers by counsel for Sunnyface some weeks after judgment was reserved, to hand in yet a further affidavit or affirmation concerning the translation from the Chinese of yet another document). In addition it is self-evident that it was mere happenstance that found the vessel in a South African anchorage, and that no person in this country has the slightest interest or concern in the vessel or the dispute as to the ownership thereof or the outcome of the dispute regarding such ownership, other than those who have incurred expense in relation to the vessel since it sailed into Saldanha Bay."

Berman J found these "connecting" factors compelling and sufficient evidence to conclude that a **prima facie** case had been established on behalf of Great River Shipping that a Court in the PRC would be a more appropriate forum for the resolution of the parties' dispute.

At that stage of the matter the applicant had discharged the initial onus it bore. The Court held the view that if Sunnyface Marine wished to succeed in the application it was required to discharge the burden of showing: "**that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country**".⁶⁸

Counsel for respondent did not formally concede that a **prima facie** case had been made out on behalf of Great River, and placing reliance on an approach similar to the approach adopted by the Australian High Court, submitted that Great River had failed to show that the Chinese Court would be a "**distinctly more appropriate forum**" for that purpose.

The effect of this argument, according to Berman J. was to place the **onus** on Great River to satisfy the Cape Supreme Court, as **lex fori**, that a forum in the PRC would "**clearly**" (my emphasis) be a more appropriate forum to try Sunnyface's action (or to satisfy this Court that it, ie the Cape Supreme Court, is a clearly inappropriate one to do so).

68 Great River Shipping Inc. (supra) at p. 319 G-H.

Berman J., correctly with respect, regarded the approach relied on by counsel for respondent as "an approach inconsistent with the two-stage approach laid down in The Spiliada." What the Court found unacceptable was the enforced emphasis of proving "distinctly" or "clearly" that the other foreign Court was more appropriate.

In terms of this approach, the onus is fused into a single more onerous burden under which the applicant alone is charged with "clearly" proving that the local forum is inappropriate as opposed to comparing the competing fora so as to decide which forum is the more appropriate. This is far removed from the accepted approach in The Spiliada of establishing a *prima facie* case in favour of a more appropriate foreign forum which could be rebutted by the respondent alleging the existence of special circumstances. As Berman J. put it this approach leaves:

"...no room or call for any transference of onus to Sunnyface requiring it to show that special circumstances existed warranting the dispute between the parties being resolved in and by a Court in the PRC."⁶⁹

In this manner, it is submitted, the Court expressly rejected the analogous approach of the Australian High Court to the doctrine of *forum non conveniens*. Earlier in an *obiter dictum* Berman J had canvassed briefly the difference in approach followed by the Australian High Court to the doctrine of *forum non conveniens* and the heavy burden of proof placed on a party seeking a stay in the Australia High Court, as follows:

"It is to be noted in passing that the decision in The Spiliada had not met with universal approval. In two cases the High Court of Australia declined to follow The Spiliada; in one, Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197, by a majority of three to two and in Voth v Manildra Flour Mills Pty Ltd (1991) 65 ALJR 83 a majority of the High Court adhered to its view as expressed in Fay's case. Both cases, however, have been trenchantly criticised: see (1991) 107 Law Quarterly Review 182 and the (1991) 40 International and Comparative Law Quarterly 895. In any

69 Great River Shipping (supra) at p. 319 F.

event, I have already observed that in The Thalassini the Appellate Division held that there is a heavy **onus** on a party contending that it will not receive a fair hearing in a foreign Court where it would appear **prima facie** that such Court is a more appropriate one to try the action; the view of the Australian High Court is that it is for the party seeking the stay of proceedings to show that the local Court is a clearly inappropriate one. In other words, the approach of the Australian High Court is to place the **onus** on the party seeking the stay (or the setting aside of the warrant of arrest) to show that the local Court is a clearly inappropriate forum to resolve the parties' dispute, whereas the approach of the English Courts is to have the matter dealt with in two stages, the first requiring that party to make out a **prima facie** case that the foreign Court is the more appropriate forum, and the second to burden the other party with the **onus** (which - as will be seen - has been said to be a heavy one) of showing the existence of special circumstances justifying the retention by the less appropriate local Court of jurisdiction to resolve the parties' dispute. It will be observed that the English approach, which is to be preferred, places Great River in a more advantageous position than it would be if the Australian approach was operative."⁷⁰

Berman J then proceeded on the basis that if Counsel for the respondent did not dispute that the two-stage approach adopted in The Spiliada is to be applied in this application, then the reasons advanced are to be considered as representing those special circumstances, which are to be weighed in the balance in order to determine whether they are of sufficient weight to discharge the onus now transferred to Sunnyface.

In support of the submission that special circumstances exist which justifies the Court retaining jurisdiction to entertain Sunnyface's action against Great River, the following points were advanced:

- (a) whereas in this Court Sunnyface has the advantage that its claims are secured by the arrest of the vessel, it would not enjoy this advantage in a Chinese Court;
- (b) Sunnyface will be unable to obtain legal representation in that forum;
- (c) the Qingdao Maritime Court is not impartial and does not act in accordance with the principles of natural justice.

70 Great River Shipping (supra) at pp. 317 I - 318 D.

Berman J considered and then commented on the first contention as follows:^{70a}

"Whilst it is no doubt correct that Sunnyface has the advantage, if the matter is heard in this Court, of having security for its claims, an advantage it will not enjoy once the matter is to be tried before a Chinese Court, nevertheless, and notwithstanding that Sunnyface's action is a vindicatory one and that the vessel lies within the jurisdiction of this Court, actual repossession of its vessel it would not obtain were its action to be heard in Cape Town in that if security were to be provided the vessel would depart South African waters and thus be lost, possibly irretrievably, to Sunnyface. In any event too much weight should not be afforded any 'legitimate personal or juridical advantage' which Sunnyface may forfeit if the arrest is set aside (see The Spiliada at 10) it is, however, a factor not to be left out of consideration."

In response to the two remaining contentions Berman J held that insufficient evidence had been placed before him in support thereof. The learned Judge Berman opined that no sufficient positive and cogent evidence had been placed before the Court that Sunnyface will be denied justice at the hands of any such Court in the PRC so as to discharge the heavy onus which burdens the party advancing such a contention that this will be the case.

The contention that Sunnyface will be unable to obtain legal representation before a Chinese Court in that Chinese lawyers are 'fettered' by political or economic considerations, was furthermore not borne out by the evidence.

Berman J then held^{70b} that on the evidence before him Sunnyface Marine had failed to discharge the onus of showing the existence of special circumstances which would warrant a finding that a Court in the PRC is not a more appropriate forum to entertain the action which Sunnyface Marine seeks to institute against Great River Shipping. The Court then set aside the arrest of the MV Eagle with costs.

70a Great River Shipping (supra) at pp. 320 D - F.

70b Great River Shipping (supra) at pp. 322 C.

With respect, Berman J correctly applied the doctrine of **forum non conveniens** to the proceedings under section 7 (1) (a) of the Act before him. The only difficulty that one has with his judgment is the nomenclature he uses to describe the "onus" and the transference thereof during the proceeding. The *Spiliada* does lay down what could be described as "a two-stage approach" in regard to the aspects of proof. However it would be more correct to see the *The Spiliada* as setting out a three stage approach.

- (1) **The initial burden resting on the defendant to provide sufficient prima facie evidence that another forum is clearly more appropriate for the trial of the action;**
- (2) **The transference of the burden of proof to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place before the lex fori;**
- (3) **The general burden throughout resting on the defendant to persuade the Court to exercise its discretion to grant a stay; the Court weighs up all the connecting factors to reach a decision within which forum substantial justice can be done between the parties to the dispute.**

Support for this approach it is submitted may be found in the recent decision of Lord Goff in House of Lords matter of *Connelly v. RTZ Corp.*^{70c} Lord Goff restated the two stage approach relating as to the passing of the onus from defendant to plaintiff in proceedings where the doctrine of forum non conveniens is applied, but after considering all the factors the Court, correctly it is submitted, opted for the forum in which the case can be tried more suitably for the parties' interest and the ends of justice. This forum in which "substantial justice could be done" was the lex fori and not the "appropriate forum", where legal aid was not available to the Plaintiff, but was available in the lex fori.

Furthermore, Berman J appears to have confused the stage when the connecting factors are introduced as he has them at point (d) where special circumstances should be proved by the Plaintiff.

70c *Connelly v. RTZ Corp* [1997] 4 All ER 335, HL.

It is submitted that Berman J's formulation in this regard may not be correct. Notwithstanding these comments, the court reached the correct decision and it should be followed, save that the formulation of the onus must be considered with caution.

Since the decisions in The Spartan Runner and The Great River Shipping, the Legislature has deemed it fit to amend section 7 (1)(a) of the Act. The amended section 7 (1)(a) came into effect on 1 July 1992, and the amended section now provides:

"7. **Disputes as to venue or jurisdiction**

- (1)(a) **A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.**

(my underlined emphasis)

The important change to the section is the insertion of an additional requirement that the applicant in seeking to rely on this provision to decline jurisdiction; namely that it must provide evidence to establish in its papers that the allegedly "more appropriate" forum "**will exercise jurisdiction in respect of the said proceedings.**" Besides increasing the quality of evidence to be placed before the Court the amended section now forces the applicant to specifically set out in its papers which forum is the more appropriate forum. The latter requirement was not clear in the previous wording of the section and is a welcomed amendment. It with respect removes all doubt on the issue, although it may be said that the position of potential "forum shoppers" is strengthened somewhat as the defendant seeking the stay has to nominate the more appropriate forum and then leading sufficient prima facie evidence to "shift the onus" to the plaintiff. It is respectfully submitted that the previous wording of the section may have lead the Court in The Spartan Runner astray, and its amendment clarifies the position for both the litigants and the Court.

8 PROCEEDINGS IN TERMS OF SECTION 7 (1) (b) OF THE ACT

Section 7 (1)(b) of the Act reads , as follows:

" 7(1)(b) **A court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed.**"

It has been contended earlier that matters falling under the purview of this particular section generally contain some consensual element between the parties as to the proper forum to determine their disputes in times of disagreement. This consensual element may arise either before the proceedings are instituted or whilst they are in progress. The latter scenario may arise should the parties agree after the arrest of a vessel by proceedings in rem and before opposing papers are filed to refer the dispute to arbitration. The words "any proceedings" clearly covers such a scenario. It is submitted that the words "any proceedings in terms of this Act" refers only to proceedings instituted in the Admiralty Court's of the Republic.

Section 7 (1)(b) therefore contemplates a stay of proceedings being granted by the Court in two instances: firstly, when it is agreed by the parties that the matter be referred to arbitration, and secondly, on the broader general ground when the Court is of the opinion for any other sufficient reason that the proceedings should be stayed. With respect therefore, the contention made by Shaw⁷¹ that section 7 (1)(b) deals with the question of arbitration only, at first blush appears incorrect. Later in the section the learned author's comments reflect that the section applies to stays generally, as well.

The wording of section 7(1)(b) is clear and unambiguous. It empowers the litigants to request the Court to stay any proceedings in terms of the Act and to refer the matter in

71 Shaw D., Admiralty Jurisdiction and Practice in South Africa p.54

dispute to arbitration in the Republic or elsewhere, if it is so agreed by the parties concerned before it. Shaw⁷² holds the view that the Legislature intended to confer on the Court a general discretion somewhat similar to that contained under section 3 (2) of the Arbitration Act⁷³ but wider, which enables the Court to set aside an arbitration agreement or order that any particular dispute be not referred to arbitration or order that the arbitration agreement shall cease to have effect "on good cause shown."

Section 7 (1)(b) furthermore provides a defensive shield to the aggrieved party faced with the task of opposing an admiralty action in a South African Admiralty Court, in breach of an agreement with the other party, to refer all disputes arising out of their contract to arbitration for dispute resolution. The aggrieved party may request the Court in terms of section 7(1)(b) to stay any proceedings in terms of the Act if it is in breach of an agreement to refer the matter in dispute to arbitration whether in the Republic or to a foreign arbitration tribunal. There is as yet no decided case in South Africa concerning a referral to arbitration under section 7 (1)(b) of the Act. The question is posed, should such a matter arise which law would the Admiralty Court apply to determine whether or not to grant the stay of the admiralty action and refer the matter to arbitration?

Eng law /
SA law (CRD
(law))

It has been held that if the matter to be decided is one in respect of which a Court of Admiralty of the Republic referred to in the Colonial Courts of Admiralty Act 1890 of the United Kingdom had jurisdiction before the commencement of the Act on 1 November 1983, the South African Admiralty Court must apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied on 1 November 1983 in so far as that law can be applied, in terms of section 6 (1)(a) of the Act.⁷⁴ The English Admiralty Court have exercised its jurisdiction

72 loc. cit.

73 Act 42 of 1965.

74 per Marais J in Transol Bunker BV v MV Andrico Unity and others, Grecian Mar SRL v MV Andrico Unity and others: "The MV Andrico Unity" 1987 (3) SA 794 (C) at p.801I.

to hear matters requesting a stay of admiralty actions in favour of arbitration.⁷⁵ Section 23 of the Admiralty Court Act 1861⁷⁶ conferred on the English High Court of Admiralty all the powers of a superior Court "with regard to references to arbitration, proceedings thereon, and the enforcing of awards of arbitrators". Accordingly, it would appear that should such a matter arise the South African Admiralty Court will be enjoined to apply English Law to the matter.

However, it must be kept in mind that, in terms of section 6 (5) of the Act, the provisions of section 6 (1)(a) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute. Section 6 (5) is clearly intended to preserve provisions specifying the choice of law contained, apart from foreign jurisdiction clauses, in arbitration agreements and other maritime agreements, such as charterparties and bills of lading.⁷⁷ For example, if there is a valid choice of law clause, requiring the application of English law, in an voyage charterparty, containing also an arbitration clause providing for the referral to arbitration in England of any dispute arising out of such agreement, then in terms of section 6 (5) of the Act the South African Admiralty Court seized with the matter would be enjoined to apply the chosen English law in determining the referral of the arbitrable dispute. In the particular circumstances of each matter, the law to be applied by the Court in determining the referral to arbitration would vary and depend on the choice of law clause contained in the commercial agreement between the parties.

The English Court may stay proceedings in breach of an arbitration agreement under the inherent jurisdiction of the Court, in appropriate circumstances, which it considers should not be allowed to continue on the grounds that the proceedings are frivolous, vexatious, oppressive or an abuse of the process of the Court. This inherent power the Court

75 The Cap Bon (1967) 1 LIR 543; The Rena K (1979) 1 LIR 397;

76 24 Vict. c. 10. See authorities cited in Intercontinental v. MV Dien Danielsen 1982 (3) SA 534 at p.540B.

77 Shaw D., Admiralty Jurisdiction and Practice in South Africa p.72

possesses in order to regulate its own affairs and is independent of any specific powers conferred by statute.⁷⁸ The South African High Court has a similar inherent jurisdiction with which it regulates proceedings before it.⁷⁹

More commonly, the English Court may stay proceedings under the English Arbitration Acts, such as the 1950 Act⁸⁰, which concerns domestic arbitration agreements, and the 1975 Act⁸¹ which concerns non-domestic arbitration agreements as defined under section 1 of that Act. Generally proceedings in the United Kingdom may also be stayed under the English common law.

Under the English common law an agreement which purports to oust the jurisdiction of the Courts is contrary to public policy as each person has the right to have his legal position determined by the ordinary Courts. An arbitration clause in a contract, referring a dispute between the parties to arbitration for determination is valid and binding. Except as provided by the aforementioned Arbitration Acts, an arbitration clause cannot deprive the parties of their right to have any point of law determined by the Courts.⁸²

The English Arbitration Acts do permit the parties, in certain circumstances, to agree by way of a written exclusion clause that the arbitration would be final and binding on the parties, thereby effectively ousting any right of appeal to the Court. This ouster is limited however to taking the matter on appeal and the Court retains its residual jurisdiction over the arbitration process.

78 Mustill, Sir M.J., and Boyd, S.C., The Law and Practice of Commercial Arbitration in England (2nd ed.) 1989 p. 461.

79 Taitz J., The Inherent Jurisdiction of the Supreme Court 1985

80 (14 Geo.6.c.27), which Act consolidated the English Arbitration Acts 1889 to 1934.

81 (1975 c.3), which gave effect to Article III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). South Africa is a party to this Convention.

82 Guest, A.G. Anson's Law of Contract 26th ed.(1984) at page 317 and Czarnikow v Roth Schmidt (1922) 2 K.B. 478 cited therein.

It is submitted that the South African law is similar in approach and effect. Where the English Court renounces jurisdiction over a dispute subject to an arbitration agreement, such renunciation is only provisional and the Court retains its underlying jurisdiction until a final award in the arbitration proceedings is made. Should the English Court stay its own proceedings in favour of arbitration in order to give effect to an arbitration agreement its jurisdiction is not ousted but is retained for the purposes of making orders to assist the process of arbitration.⁸³

The view of the English Courts⁸⁴ that submission to the jurisdiction of a foreign court by way of a foreign jurisdiction clause operated as an arbitration clause requiring a referral to arbitration was correctly not accepted by the Australian High Court in Wilson v Compagnie des Messageries Maritimes⁸⁵, and it is submitted would not be followed by a South African Admiralty Court.

In certain circumstances under section 1 of the 1975 Arbitration Act, a party against whom proceedings are brought in an English Court in breach of an arbitration agreement which is not a "non domestic arbitration agreement", may insist on a mandatory stay of the proceedings. The Court has no discretion and must order a stay of the proceedings brought in breach of the arbitration agreement, unless it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed, or that the dispute does not relate to a matter the parties agreed to be referred to arbitration.⁸⁶ The burden of proof is on the party alleging these circumstances. It has been further held that the Court has no power to impose terms as a condition of an order for a stay under section 1 of the 1975

83 Mustill and Boyd (supra) at p. 156 and authorities cited at fn 11,12.

84 Shaw D., Admiralty Jurisdiction at p.

85 Wilson v Compagnie des Messageries Maritimes (1954) 2 LIR 544.; Shaw, Admiralty Jurisdiction and Practice in South Africa at pp.54-55.

86 North P.M. & Fawcett J.J., Cheshire and North's Private International Law 12th ed. (Butterworths 1992) at p 240 and the authorities cited therein.

Act.⁸⁷ The definition of a "domestic arbitration agreement" contained in section 1 (4) of the 1975 Act is very narrowly defined and in essence means that all arbitration agreements with no real foreign element fall within section 1 of the 1975 Act.⁸⁸ It is important to note that the application for stay under the 1975 Act⁸⁹ may be made at any time after appearance, but must be instituted before the delivery of pleadings or any other steps being taken in the Court proceedings. In comparison under section 4 (1) of the 1950 Act, the English Court has a general discretion to stay proceedings brought in breach of a "domestic arbitration agreement", which by definition only concerns foreign arbitration agreements.

The key foreign element which alone determines whether it is a "domestic arbitration agreement" or not, is the character of the parties to the agreement. Therefore an agreement may be concluded in England, governed by English law, provide for arbitration in England, relate to disputes arising out of a purely English transaction, and yet not be a "domestic arbitration agreement".⁹⁰

87 The Rena K (1979) 1 LIR 397; The World Star (1986) 2 LIR 274.; The Vasso formerly The Andria (1984) 1 LIR 235; The Tuyuti (1984) QB 838; Mustill and Boyd (supra) p.462.

88 North P.M. & Fawcett J.J., Cheshire and North's Private International Law (supra) at p 239.

89 1975 Act, section 1 (1); see also The Maria Gorthon (1976) 2 LIR 720.

90 Mustill, Sir M.J., and Boyd, S.C., The Law and Practice of Commercial Arbitration in England (supra) p.467.

8.1 REFERRAL TO ARBITRATION IN SOUTH AFRICA IN TERMS OF SECTION 7 (1)(b) OF THE ACT

In the event of the matter requiring the referral of the dispute to arbitration in South Africa, the arbitration proceedings would be governed by the provisions contained in the Arbitration Act,⁹¹ which concerns only written arbitration agreements, or the Roman Dutch common law, which was not repealed by the Arbitration Act and which permits oral submissions to arbitration.⁹² In South African law, if a party to an arbitration agreement takes an arbitrable dispute to a South African Court, the other party to the arbitration agreement has an election either to raise no objection to the Court proceedings in which event the litigation would continue in its normal course, or more importantly, may object to these proceedings and insist that the matter be referred to arbitration.

Section 6 (1) of the Arbitration Act provides that objection may be made at any time after entering appearance but before pleadings are delivered or taking any other steps in the Court proceedings, by way of an application to the Court seized with the arbitrable matter to stay the proceedings in that Court and to refer the dispute to the agreed and proper forum of arbitration. It is still permissible under the Roman Dutch common law to raise the defence of an arbitration clause in the pleadings by way of a special plea.⁹³

It is settled law in South Africa that arbitration agreements do not oust or lessen the jurisdiction of the Courts of the Republic.⁹⁴ In Parekh v Shah Jehan Cinemas (Pty) Ltd and Others,⁹⁵ Didcott J restated the Roman Dutch law with regard to arbitration

91 Arbitration Act

92 Joubert, D.(ed), Lawsa First Reissue Volume 1 (1993) para's 406-408.

93 Lawsa (supra) para 424.

94 per Howard J in Intercontinental v. MV Dien Danielsen 1982 (2) SA 534 (N) at p. 539 G, who cites Russell Arbitration 19th ed. at p. 172; The Rhodesian Railways Ltd v. Mackintosh 1932 AD 359 at p. 369; See also Yorigami Maritime Construction Co. Ltd. v Nisshoiwai Co. Ltd. 1977 (4) S.A. 682 (C) at pp. 693 - 694.

95 Parekh v Shah Jehan Cinemas (Pty) Ltd and Others 1980 (1) SA 301 (D)

agreements in the following terms:

"An arbitration agreement does not deprive the Court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to the Court for a final judgment that this should have happened. While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due supervision. And the award of the arbitrator cannot be enforced without the Court's imprimatur, which may be granted or withheld. But that is by no means all. Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitration disputes straight to court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the dispute itself. When it chooses the latter, the case is resumed, continued and completed before it, like any other. Throughout, its jurisdiction, though sometimes latent, thus remains intact."⁹⁶

A South African Court has a general discretion, which must be judicially exercised, whether or not to grant a stay of proceedings relating to an arbitrable dispute subject to an arbitration agreement. It has been held in a line of cases that there should be compelling reasons for refusing to hold a party to his agreement to refer disputes to arbitration.⁹⁷ Should the South African Court exercise its discretion not to grant a stay and electing to deal with the matter itself, the case before it is resumed, continued and completed like any other case.⁹⁸ In the event of the South African Court granting a stay of existing proceedings or enforcing a referral to arbitration in the face of pending proceedings, it may make in terms of section 21 (1) of the Arbitration Act orders, inter alia, in respect of securing the amount in dispute between the parties and the provision of security for costs.⁹⁹

96 Parekh case (supra) at 305 E-H; cited with approval in Intercontinental v. MV Dien Danielsen 1982 (2) SA 534 (N) at p. 539 H -540 A.

97 See the cases cited in Joubert, D.(ed), Law of South Africa First Reissue (supra) para 421 fn 8.

98 Lawsa (supra) para 424.

99 Lawsa (supra) para 436.

It is submitted that any case which falls to be decided in terms of the arbitration provisions of section 7 (1) (b) would be able to rely on earlier South African decisions on arbitration agreements in the maritime context. Such a case being Yorigami Maritime Construction Co. Ltd. v Nisshoiwai Co. Ltd.¹⁰⁰

In the 1977 matter of Yorigami Maritime, Friedman J (as he was then) in an application to set aside an order for the attachment **ad fundandam jurisdictionem** of the tug belonging to the applicant before the Cape Provincial Division, considered an arbitration clause in a towage charter entered into in Japan between the two Japanese perigrini before the Court. Clause 17 of the towage charter contained a provision referring disputes arising under the towage charter to arbitration in the city of Osaka, Japan. Clause 19 provided that the agreement shall be construed and its performance determined in accordance with the laws of Japan.¹

The founding affidavit filed on behalf of Yorigami contained hearsay opinions from a member of the Japanese Bar of the applicable Japanese law. It provided that **"according to Japanese law an arbitration clause such as clause 17 would exclude the jurisdiction of the Court which would be obliged to enforce and give full effect to it."**² No confirmatory affidavit was filed. The Court was not prepared to accept the unconfirmed account of Japanese law and dealt with matter on the basis that Japanese law was the same as South African law. Friedman J. said as follows:

"In the present case the relief sought is not interlocutory; if the order sought by Yorigami were to be granted it would amount to a final judgment in terms of which the tug would be released from attachment. In these circumstances I am not prepared to accept as proof of Japanese law, the hearsay opinion expressed by Nakanuma. In the absence of proof that Japanese law differs from South African law there is a

100 1977 (4) S.A. 682 (C)

1 Yorigami Maritime (supra) at p.687 F.

2 Yorigami Maritime (supra) at p.691 H.

presumption that the law of Japan is the same as the law of this country. I accordingly proceed to consider the effect of the arbitration clause on this basis."³

Friedman J. then considered the applicable South African law relating to arbitration clauses and stated:

"In our law an arbitration clause does not oust the jurisdiction of the Court and, if a party to an agreement seeks to rely on an arbitration clause when sued on that agreement, the Court has a discretion as to whether or not it should itself determine the dispute or whether it should order the proceedings to be stayed pending the arbitrator's decision....As an arbitration clause in a contract does not preclude the jurisdiction of the Court, it is incumbent on a defendant, who seeks to rely on such a clause, to file a special plea and ask that the action instituted by the plaintiff be stayed pending the determination of the dispute by arbitration. What this Court has to decide is whether any grounds exist upon which the Court's jurisdiction is ousted. The fact that grounds exist on which a trial Court would probably order a stay of proceedings, does not mean that the Court has no jurisdiction in the action which Nissho has instituted. I am therefore of opinion that even if this Court should take the view that the probabilities favour a stay being ordered, that would not entitle this Court set aside the attachment."⁴

Notwithstanding the clear provisions of the arbitration clause and although Friedman J stated that counsel's argument was not without merit, Friedman J held the view that in the particular kind of case before it the Court should exercise its discretion to hear the dispute itself rather than staying proceedings before it pending an arbitration in Japan.

Friedman J. gave the factors which compelled him to this decision, as follows:

- (1) Not only are the vessels in connection with which the damages claim arises, within the jurisdiction of the Court, but
- (2) many of the witnesses who will have to testify in any proceedings required to determine the liability or otherwise of the master of the tug, are resident in Cape Town.
- (3) Investigations will have to be carried out in Cape Town by experts and these witnesses could not be compelled to give evidence at an arbitration held in Japan.

3 Yorigami Maritime (supra) at p.692 D-E.

4 Yorigami Maritime (supra) at p.692 E-F, H - 693 A.

- (4) In addition to the action against Yorigami, Nossho has instituted proceedings against the South African Railways and Harbours in which it contends that the latter is also responsible for the tankers having been wrecked inasmuch as the negligence of the Port Captain was a cause of the loss.
- (5) It is furthermore contemplated that proceedings might be instituted against Trade Traffic, and those proceedings would also have to be heard in Cape Town. It seems to me that there is a great deal to be said for Mr. Hoberman's argument that, if arbitration proceedings against Yorigami were held in Japan and legal proceedings against the railways - and possibly Trade Traffic - were held in Cape Town, there might be a multiplicity of actions with resultant conflicting decisions. (See, in this regard, Halifax Overseas Freighters Ltd. v. Rasno Export; Techno- prominport; and Polskie Linie Oceaniczne PPW. ("The Pine Hill"), (1958) 2 LIR 146.)
- (6) The considerations in the present case are, in my opinion, similar to those which would apply if a contract should provide that disputes are to be settled by a foreign Court. In a case like that where there are other possible defendant's a Court has a discretion to hear the matter and it has been held that such a provision in a contract is not absolutely binding. (See The Fehmarn, (1958) 1 All E.R. 333 at p. 335.) (my enumeration)"⁵

In Intercontinental Export Company (Pty) Ltd v MV Dien Danielsen,⁶ the defendant applied for an order staying an action brought *in rem* in the Natal Provincial Division (sitting as a Court of Admiralty) pending arbitration proceedings in London. The plaintiff was the charterer of the vessel Dien Danielsen in terms of a voyage charterparty concluded between plaintiff and the ship's owners. Clause 33 of the charterparty embodied an arbitration agreement which provided that "**any dispute arising under the charter to be referred to arbitration in London...**"

The plaintiff charterer claimed it was the holder of a bill of lading relating to, and the owner of, the cargo of canned fish loaded on board in Peru and discharged in Durban in a damaged condition. The bill of lading provided *inter alia* that: "**All terms and conditions, liberties and exceptions of the charterparty, dated as overleaf, are herewith incorporated.**"

5 Yorigami Maritime (supra) at p.693 B- 694 B.

6 Dien Danielsen 1982 (3) SA 534 (N) per Howard J.

Plaintiff's Counsel, whilst conceding that an arbitration agreement does not ordinarily oust or lessen the Court's jurisdiction, argued that the arbitration clause in issue would have that effect if the Court did not retain its power to enforce or set aside the arbitrator's award made in London. Plaintiff's Counsel contended that clause 33 must be construed as a stipulation or agreement purporting to oust or lessen the Court's jurisdiction and was accordingly invalidated by the provisions of s 310 (6) of the Merchant Shipping Act 57 of 1951 (now repealed)⁷ in that it purported to oust or lessen the jurisdiction of the Court of the Republic.

Howard J held that he could not accept the proposition that a stay of the action pending arbitration proceedings in London would have the effect of terminating the Court's jurisdiction, and reasoned as follows:

"If the Court has jurisdiction to determine the dispute itself it has the power to enforce or set aside the arbitrator's award, and the mere fact that the arbitration takes place in London does not deprive it of that power. (See Benidai Trading Co Ltd v Gouws & Gouws Pty Ltd 1977 (3) SA 1020 (T) especially at 1028 — 9, 1038). In any event, even if arbitration in London did have the practical effect of terminating this Court's jurisdiction, that would be the result of the exercise by the Court of its discretionary jurisdiction to stay the action rather than determine the dispute itself — a jurisdiction which the arbitration agreement in clause 33 does not purport to oust or lessen. I do not think that it is correct to attribute that result to the operation of the arbitration agreement, or to construe it on that account as a stipulation or agreement purporting to oust or lessen the Court's jurisdiction.

As the Legislature is presumed to be acquainted with existing law (Steyn Die Uitleg van Wette 5th ed at 132) it presumably knew when enacting s 310 (6) of the Merchant Shipping Act 57 of 1951 that arbitration agreements are not ordinarily construed as

7 The provisions of s 310 (6) of the Merchant Shipping Act 57 of 1951, read as follows:

'Any stipulation or agreement, whether made in the Republic or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Republic in respect of any bill of lading or document relating to the carriage of goods by sea from any port in the Republic to any other port, whether in or outside the Republic, or from any port outside the Republic to any port in the Republic shall be null and void and of no effect.'

ousting or lessening the jurisdiction of the Courts, and it is therefore unlikely that there was any intention to invalidate arbitration agreement on the hypothesis that they purport to have that effect. Moreover, as arbitration clauses are commonplace in bills of lading and charterparties and serve a useful purpose, the Legislature, if it intended to invalidate all such clauses and deprive the Court of its discretion to give effect to them, would surely have expressed such intention directly, explicitly and unambiguously. It seems that Mr Shaw was alive to these obstacles to interpreting s 310 (6) as invalidating all such arbitration clauses and sought to avoid the difficulty by suggesting that the language of the subsection could be modified to accommodate arbitrations in South Africa. However, he did not explain how the language could be modified to invalidate only those clauses which provide for arbitration outside South Africa. I think that if the section invalidates arbitration agreements it can only be construed as invalidating all arbitration agreements."⁸

The learned Howard J then held that clause 33 of the charterparty was not invalidated by the provisions of s 310 and the Court retained its discretion to stay the action, which it must now exercise. He stated as follows:

"In my opinion clause 33 of the charterparty is not invalidated by the provisions of s 310 (6) of Act 57 of 1951. This Court has a discretion to stay the action and thereby give effect to the arbitration clause, or to refuse the application and determine the dispute itself. It remains to consider how that discretion should be exercised."⁹

Following the agreement of counsel for the parties, Howard J ruled¹⁰ that if the Court had a discretion to stay the action it should be guided in the exercise of that discretion by the often quoted dictum of Brandon J in The Eleftheria.¹¹ In applying the facts Howard J. granted a stay in circumstances where evidence on the main issues of fact involving:

- a) the manner in which the cargo was packed, loaded and stowed at Callao;
- b) events during the course of the voyage, the defence being that the damage was occasioned by the ship encountering exceptionally heavy weather;
- d) the extent of the damage and the quantum of the plaintiff's claim,

would be that of the master and members of the crew of the Dien Danielsen and possibly other witnesses from Peru.

8 MV Dien Danielsen (supra) at pp. 540 G - 541 C.

9 MV Dien Danielsen (supra) at p. 541 D.

10 MV Dien Danielsen (supra) at p.541 D.

11 The Eleftheria (supra) at p. 645.

Howard J then commented on the question of "convenience" as follows:

"From the point of view of convenience and expense there would be little to choose between arbitration in London and litigation in Pietermaritzburg if these were the only witnesses. However, it is common cause that a hearing in London would involve the plaintiff in very much greater expense than a hearing in this Court, partly because of the additional expense of making its witnesses on the quantum of damages available in London. The ship is registered in the Netherlands and its owners are in Denmark but it is difficult to see what bearing that can have on the question. The plaintiff on the other hand is a South African company. I accept that arbitration in London will be much more expensive and inconvenient for the plaintiff than a hearing in Pietermaritzburg, but it agreed to the arbitration clause in the knowledge that this could and probably would be the case."¹²

The Court held further that the plaintiff had not made out a sufficiently strong case to warrant a refusal of the relief which the defendant sought and made the following order, the terms of which were settled by counsel in the course of the hearing:

- (a) Upon the defendant's furnishing the plaintiff, within 14 days of the date of this order, with security for the plaintiff's claim in respect of any arbitration proceedings which have commenced or may hereafter commence in London, such security to be in an amount equivalent to the security furnished by the defendant in this action, all further proceedings in the present action are stayed.
- (b) As against the provision of security in terms of para (a) hereof the security provided by the defendant in this action will be released.
- (c) The plaintiff is ordered to pay the costs of this application.

Howard J's judgment was reversed on appeal by the Full Bench of the Natal Supreme Court in Intercontinental Export Company (Pty) Ltd v MV Dien Danielsen¹³ on different points, namely, that the question whether the bill of lading fulfilled the function contended for by the appellant (plaintiff) was one of fact to be determined at a trial and, further, that the "respondent's application for a stay had been bad since it was a totally

12 MV Dien Danielsen (supra) at pp. 541 H -542 B.

13 Intercontinental Export Company (Pty) Ltd v MV Dien Danielsen 1983 (4) SA 275 (N) per Heerden J, Didcott J and Friedman J.

inappropriate procedure for testing the validity of the appellant's cause of action."¹⁴

It is therefore submitted that the portion of Howard J's judgment relating to the referral of the dispute to arbitration in London, the ousting or lessening of the Court's jurisdiction, the discretion to be applied and the salutary approach followed by the Court in granting a stay subject to security being furnished for the arbitration proceedings in London, still constitutes the law on the subject.

It is submitted further that the appeal Court's finding that on the facts the request for a stay was a totally inappropriate procedure would not be followed by subsequent Courts in the light of the express provisions of section 7 (1)(b) of the Act, although the Court may elect to hear oral evidence on that particular issue should it arise again. It appears therefore that the drafters of the Act in formulating section 7 (1)(b) provided a salutary counter to the Full Bench decision in MV Dien Danielsen that an application for a stay was bad in law as "it was a totally inappropriate procedure for testing the validity of the appellant's cause of action," in these circumstances.

14 Intercontinental Export Company (supra) at p. 275 B.

8.2 ARREST FOR SECURITY IN RESPECT OF ARBITRATION PROCEEDINGS

It is possible in South African admiralty proceedings to arrest a vessel specifically as security for arbitration or any proceedings contemplated, pending or proceeding either in the Republic or elsewhere.¹⁵ This novel and far reaching provision is unique in its scope of application and effect. Our legislative innovation with regard to security arrests, in particular with reference to arbitration proceedings has surpassed the uncertain state of reference to arbitration proceedings has surpassed the uncertain state of English law and constitutes a marked improvement on a conflicting line of English cases in this regard.

It has been suggested¹⁶ that to a certain extent section 5 (3) of the Act was modelled on section 26 of the United Kingdom Civil Jurisdiction and Judgments Act 1982,¹⁷ it would be more correct to state that section 5(3) improved on the inadequacies contained in section 26.

Shaw¹⁸ has summarised the position in English law prior to the advent of section 26 of the United Kingdom Civil Jurisdiction and Judgments Act 1982, in the following statement:

"The question whether it was competent to arrest property purely for security in admiralty proceedings in England was the subject of conflicting decisions. In The Cap Bon¹⁹ and The Rena K²⁰ Brandon J (as he was then) held that the court had no jurisdiction to arrest a ship purely for the purposes of obtaining security. This was followed by Sheen J. in The Maritime Trader.²¹ In The Andria²² the Court of Appeal held that there

15 Shaw, Admiralty Jurisdiction at p.42

16 The MV Paz (supra) at p.267.; see also per Miller JA in Euromarine International of Mauren v The Ship Berg and Others 1986 (2) SA 700 (A) at p.711H.

17 Chapter 27.

18 Shaw, Admiralty Jurisdiction at p.42

19 The Cap Bon (1957) 1 LIR 543

20 The Rena K (1979) 1 LIR 397

21 The Maritime Trader (1981) 2 LIR 153

22 The Andria (1984) 1 LIR 1126

was jurisdiction to make the arrest but that it is an abuse of the process of the Court to obtain an arrest without disclosing the existence of the arbitration proceedings. In The Tuyuti²³ it was held that, where there had been an arrest and there was an application to stay the action because there was a submission to arbitration, the Court could make it a condition of the stay that in appropriate circumstances there could be an arrest or the continuation of an arrest in order to provide security for any award."

A narrow approach was adopted by Brandon J. in The Cap Bon who stressed that security obtained by arresting a vessel by way of an action in rem could not be used to satisfy an arbitration award. The Court even went as far as to regard the claimant's conduct in arresting a vessel and submitting his dispute to arbitration, as vexatious. This unfortunate decision became known as The Cap Bon principle, which was jettisoned upon the enactment of section 26 of the United Kingdom Civil Jurisdiction and Judgments Act 1982.

The effect of the Court of Appeal decision in The Tuyuti was to permit a plaintiff, whose action in rem has been stayed under the English Arbitration Act to have the security obtained continue as security in relation to a possible judgment in rem if the stay was removed as a consequence of the defendant failing to pay the award made on arbitration.

In the 1987 case of The Jalamatsya²⁴ the Court was called upon to decide an arrest for the purposes of providing security in arbitration proceedings under the new dispensation created by the enactment of section 26 of the United Kingdom Civil Jurisdiction and Judgments Act 1982. The Court held that the purpose of section 26 of the Civil Jurisdiction and Judgments Act 1982 was to allow the plaintiff if it proceeded by way arbitration, rather than by way court action, to obtain security by way of proceedings in rem in the Admiralty Court.

23 The Tuyuti (1984) 2 LIR 545

24 The Jalamatsya (1987) 2 LIR 164.

Accordingly, many but not all of the difficulties experienced in the English Court in seeking to arrest for arbitration security or security for legal proceedings generally were removed by the enactment of section 26 in 1984. When compared with the power to arrest for security granted under section 5(3) of the Act, the power provided by section 26 is limited to the retention of the property arrested as security to satisfy an arbitration award and does not confer the right to proceed directly to arrest as security for arbitration or foreign proceedings. This position in English law is unsatisfactory as it forces the plaintiff, who seeks to obtain security for the arbitration proceedings, to institute proceedings *in rem* to arrest a vessel, to found such security, and thereby breach the arbitration agreement.²⁵

Prior to the 1992 Amendment, section 5(3) of the Act provided that the court may order the "security arrest" of any property if the person seeking the arrest has a claim enforceable by an action *in rem* against the property concerned and the claim is or may be the subject of an arbitration or any proceedings in the Republic or elsewhere. The plaintiff with only an action **in personam** against the owner of the property concerned was excluded from making a security arrest under section 5(3). This anachronism has been remedied by the 1992 amendment to the Act and now persons having admiralty actions whether **in rem** and **in personam** may avail themselves of this statutory relief.

25 Jackson, D.C. Enforcement of Maritime Claims 2ed. 1996. at p. 331.

9 A STAY FOR A REASON OTHER THAN ARBITRATION IN TERMS OF SECTION 7 (1) (b) OF THE ACT

It is submitted that the latter portion of Section 7 (1)(b) of the Act refers to all non-arbitration proceedings instituted within the jurisdiction of the South African Admiralty Court. The applicable wording is underlined, as follows:

"7(1)(b) A court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic, or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed."

The general power vested in the Court by the latter portion of section 7 (1)(b) created a statutory remedy which confirmed the inherent power exercised by the Court under the English admiralty law, but it did not repeal or substitute that power. Accordingly, the South African Admiralty Court would be enjoined to apply English Law as a notional United Kingdom Court exercising admiralty jurisdiction on 1 November 1983 would have applied English law to the matter, in so far as that law can be applied, in terms of section 6 (1)(a) of the Act. However, in terms of section 6 (5) of the Act, the provisions of section 6 (1)(a) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute. Accordingly, the Court seized with the matter which concerns an agreement containing a choice of law would be enjoined to apply the chosen system of law agreed by the parties in determining the dispute. The choice of law or proper law of the contract will usually but not invariably be the law of the country of the chosen foreign Court.²⁶

The general discretionary power conferred on the Admiralty Court under section 7 (1)(b) to stay "any proceedings in terms of the Act "for any sufficient reason" would be raised primarily to stay proceedings in breach of a foreign jurisdiction clause. However the power--

26 McClean D., Morris on the Conflict of Laws (1993) at p.99.

conferred should be liberally interpreted, and therefore ought to be of application to stay "security arrest" proceedings on the grounds that sufficient security has already been furnished or the security requested is excessive, in the circumstances. *think about*

The author of Anson's Law of Contract in the 1984 edition summarised the approach of the English Courts to a foreign jurisdiction clause, as follows:

"The Courts will normally uphold a clause in a contract whereby any dispute between the parties is to be referred to the exclusive jurisdiction of a foreign Court. But such a clause is not absolutely binding, and may be overridden if England is the more convenient forum."²⁷

As the powers conferred by section 7 (1)(b) are discretionary in nature the applicant seeking the Court's assistance in terms of this section bears the onus of establishing a prima facie case for the exercise of the Court's discretion. How would a South African Court approach the request for a stay of proceedings for any other sufficient reason, in particular in the light of proceedings in breach of a jurisdiction clause. An indication can be gained from decisions prior to the Act to which we now turn.

9.1 The South African Law position prior to 1983

Not to look at

How did the South African Colonial Court of Admiralty treat this subject prior to the Act? In 1978 the Court in Butler v. Banimar Shipping Co.SA²⁸ held that it has a similar discretion where there is a foreign jurisdiction clause in existence. In that matter the applicant as cessionary of a claim for damages, arising out of a bill of lading containing a

27 Guest, A.G. Anson's Law of Contract 26th ed.(1984) at page 318 and the authorities cited at fn 26 therein namely: The Fehmarn (1958) 1 WLR 159; The Eleftheria (1970) P. 94; The Adolf Warski (1976) 1 LIR 107. But see the Civil Jurisdiction and Judgments Act 1982 (c.27) Sched.1, art.17.

28 Butler v. Banimar Shipping Co.SA 1978 (4) S.A. 753 (SECLD)

foreign jurisdiction clause ceded to him by the Netherlands Government, obtained a provisional order to attach **ad fundandam jurisdictionem** a Greek vessel, owned by the respondent. On the return day the respondent contended, inter alia, that clause 3 of the bill of lading which provided that:

"Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein"

ousted the jurisdiction of the Court. No other relevant provision was mentioned elsewhere in the bills of lading. Counsel for respondent contended that in view of the foreign jurisdiction clause the dispute which grounded the applicant's acquired cause of action must be decided in a Greek Court in accordance with Greek law.

Furthermore, to allow the applicant to attach the vessel and thereby confer jurisdiction on the South Eastern Cape Court would run counter to the agreement from which the applicant derived his right to sue and would prevent the respondent raising clause 3 as an absolute bar to the presiding Court's jurisdiction in the main action. The applicant's response to these contentions was summarised by the Court as follows:²⁹

"It was not for this Court but the trial Court (meaning the Court hearing either the action itself or a special plea requesting a stay of the action) to determine whether effect should be given to clause 3 and ...there are many factual issues on which evidence would have to be led in this regard before those issues could be resolved one way or the other. Such evidence would concern, inter alia, the domicile or residence of the relevant witnesses and, generally, practical questions of convenience and effectiveness concerning a trial in South Africa as opposed to a trial in Greece."

For the reasons mentioned below, Howie AJ³⁰ rejected the respondent's contention and confirmed the attachment:

29 **Butler** (supra) at p. 761 G - 762 D.

30 **Butler** (supra) at p. 761 G - 760 F - H.

"A foreign jurisdiction clause, although obviously not the equal of an arbitration clause in form and effect, is nonetheless equivalent to the latter in the sense that neither is absolutely binding and, in the case of both, the Court in which the action is brought in breach thereof has a discretion to hear the matter itself and to refer it to the chosen foreign court or arbitrator: see, as regards England, The Athenee (1922) 11 LIR 6 at 7; The Fehmarn (1957) 2 All ER 707 and, on appeal, (1958) 1 All ER 333 at 335 and 336; The Eleftheria (1969) 2 All ER 641; and, as regards South Africa, Commissioner for Inland revenue and Another v. Isaacs NO and Others 1960 (1) SA 126 (A) at 134 G; the Yorigami case supra at 692 E- 693A and 694 A-B.

It was held in the Yorigami case supra, wherein an application was made for the setting aside of an attachment order, that it was not for the Court hearing such application to decide whether the trial ought to be stayed and referred to arbitration under an arbitration clause but merely to decide whether that Court's jurisdiction was at all ousted. It was decided that an arbitration clause did not oust the Court's jurisdiction and the application was dismissed. I think, on parity of reasoning, that jurisdiction is also not ousted where, as here, attachment is being requested, where the clause relied on by the party opposing attachment is a foreign jurisdiction clause and where all the requirements for attachment have been shown.

"It will, in my opinion, be for the trial Court to decide whether the latter clause ought to result in the action being pursued in Greece or in South Africa and, even if the indications now are - and I express no view in this regard - that the trial Court will probably grant a stay, this is not enough to disentitle the applicant to the attachment which he seeks. It is to be noted that the aforesaid decision in the Yorigami case concerning the effect of the arbitration clause was not attacked or overruled when the matter went to appeal: see 1978 (2) SA 391 (C).

"The argument that, if the attachment is confirmed, the respondent will be deprived of the opportunity of pleading lack of jurisdiction in this Court is not sound. This pre-supposes that clause 3 would, but for the attachment, be a complete bar to this Court's hearing the action. On the authorities referred to above, however, this type of clause is never a complete bar. It merely results in the party breaching it having to carry the **onus** of showing why the clause ought not to be complied with. Without the attachment there would indeed be no jurisdiction in this Court but that would not be due to the existence of clause 3 but to the absence of any recognised basis of jurisdiction vesting in this Court."

It is submitted that it is clear from the English and South African authorities mentioned in Butler's case that the same approach was followed in the English and South African jurisdictions prior to the Act.

9.2 STAY OF PROCEEDINGS IN TERMS SECTION 7 (1)(b) OF THE ACT

The latter aspect of this section, as mentioned earlier, contains the general provision covering the stay of all proceedings, of a non-arbitration nature. The stay of non-arbitration related proceedings before the English and our Admiralty Courts, can generally be divided into two broad categories, firstly those cases arising from disputes subject to a jurisdiction clause and/or a choice of law clause, whether foreign or otherwise, and secondly all other cases, predominately collision cases where there is no pre-existing agreement or provision regulating the jurisdiction to hear such matters. In the second category of cases, it is submitted that in the wake of The Spiliada the doctrine of forum non conveniens would be applied unreservedly by the English and our Admiralty Courts, where a stay of proceedings are sought by the defendant who alleges that a foreign court is the more appropriate forum than the *lex fori*, to adjudicate on the action.

Under the first category of cases, the legal position where there is a foreign jurisdiction clause in existence, prior at least to The Spiliada, seems to have been settled in English law along the principles laid down in the seminal decision in the The Eleftheria. The Courts have always departed from the premise that the parties should honour their agreements to refer disputes to the foreign tribunal, and therefore the burden was placed on the plaintiff to show a strong cause for a stay to be refused. The authors of Halsbury³¹ have commented on the relationship between the stay of proceedings brought in England in breach of a foreign jurisdiction clause and the doctrine of *forum non conveniens*, as follows:

"Although the factors relevant to the exercise of the Courts discretion are broadly similar to the criteria considered under the doctrine of *forum non conveniens*, the position is not precisely the same, for it is a *prima facie* rule that the parties should honour their agreement to refer disputes to the foreign tribunal, and accordingly the burden is on the plaintiff (or in the case of a counterclaim, on the defendant) to show a strong cause for a stay to be refused."

31 Halsbury, Vol 1(1) Admiralty at para 355

The learned author Morris also had the following to say prior to The Spiliada:

"The court will stay proceedings brought in England in breach of a foreign jurisdiction clause., unless the plaintiff proves that it is just and proper to allow him to continue(citing as authority: The Athenee,³² The Fehmarn,³³ The Adolf Warski³⁴). The burden of proof is on the plaintiff, and not in the cases of forum non conveniens (lis alibi pendens) on the defendant. This is because the ground on which a stay is granted is not so much that there is injustice as that the court makes people abide by their contracts, If the plaintiff seeks leave to serve the writ out of the jurisdiction in disregard of a foreign jurisdiction clause, the burden of proof on him is of course much heavier. But even in this situation the court will sometime grant leave and disregard the foreign jurisdiction clause³⁵

It is submitted that in theory there is very little separating the position of a plaintiff requesting leave from the English Court to serve a writ out of the jurisdiction and the plaintiff, who has invoked the jurisdiction of the English Court as of right when arresting a vessel, albeit contrary to and in breach of a foreign jurisdiction clause. The onus on the plaintiff in both these instances is to "show that the forum each party prefers is clearly the most appropriate for the trial of the action,"³⁶ with the burden on the plaintiff seeking to sue out to persuade the *lex fori* that it is not only the appropriate forum for the trial of the action, but "that this is clearly so."³⁷ The Spiliada has confirmed that the principles underlying the doctrine of *forum non conveniens*, were of equal application for motions to stay actions and applications for leave to serve a writ out of the jurisdiction. Accordingly, it is submitted the principles underlying the doctrine of *forum non conveniens*, should also extend to and be of equal application for instances where jurisdiction of the *lex fori* has been invoked by the plaintiff as of right in breach of a foreign jurisdiction clause.

32 The Athenee (1992) 11 LIR 6.

33 The Fehmarn [1958] 1 WLR 159.

34 The Adolf Warski [1976] 2 LIR 241.

35 Morris, The Conflict of Laws, at pp.98-99: further citing Ellinger v. Guinness Mahon (1939) 4 Ll er 16. Evans Marshall & Co. Ltd. v. Bertola SA (1973) 1 WLR 349.): page

36 Briggs, "Forum non conveniens - the last word?", 1987 LMCLQ 1 at pp 2,4.

37 The Spiliada (supra), per Lord Goff at p. 14 col.1.

As to the onus to be discharged by the plaintiff, under the application of the doctrine of **forum non conveniens**, it is submitted that it should either be to show "strong cause" as it now is, but cannot be greater than the onus on the party seeking to issue a writ out of the jurisdiction. The commentary of the authors of Dicey and Morris, lend support to this submission. They said as follows:

"The Court's discretion to refuse to grant a stay will only be exercised if the plaintiff shows a strong case, more than that England is the forum conveniens, why the English proceedings should not be stayed. This is because the underlying principle is that the court makes people abide by their contracts. There is an even heavier burden on the plaintiff who applies to serve a foreign defendant out of the jurisdiction than on a plaintiff who institutes proceedings in England against a defendant present in England."³⁸

Furthermore the principles in The Eleftheria bear a marked resemblance to the doctrine of forum non conveniens as laid down in The Spiliada, and at the end of the day its were the onus of proof lay that is the distinguishing feature. Save for this difference the underlying principles and the formulation of relevant factors, are similar and each enjoins the Court to take all the circumstance of the case into account before exercising its discretion.

How have our Courts dealt with the question of a stay in these circumstance under section 7 (1)(b) of the Act.

In the only reported case before our Admiralty Courts on the stay of proceedings in terms of section 7(1)(b) of the Act, MV Achilles v Thai United Insurance Co Ltd and Others,³⁹ the Full Bench of the Natal Provincial Division considered an appeal against the judgment of Kriek J. refusing to stay the proceedings before it concerning a bill of lading providing for the submission of disputes to the jurisdiction of the Greek Courts of Piraeus.

38 Dicey & Morris, The Conflict of Laws, (12th ed.) Vol 1, at p 434.

39 MV Achilles 1992 (1) SA 324 (N) per Howard JP, Galgut J and Combrink J, at pp 331 D-332 C.

The bill of lading contained a exclusive foreign jurisdiction clause which read:

"Any dispute relative to the execution of this contract to be submitted to the Courts of Phireus exclusively."

Clause 3 of the terms printed on the reverse of the bill of lading also constituted a foreign jurisdiction and a choice of law clause, which read:

"Jurisdiction. Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein."

The jurisdiction clause in the bill of lading was not an arbitration clause as the dispute was not expressly referred to arbitration. The respondents were the owners of cargo shipped on the appellant's associated ship, The Hymetus, which sank with the loss of its cargo in the South China Sea in 1989. The respondents caused the arrest of The MV Achilleus in Durban, to enforce their claims against its associated ship The Hymetus alleging that the cargo had been lost through the breach of the appellant shipowner of its duty as carrier and through its negligence, inter alia, by reason of faulty welding repairs of the plates of The Hymetus carried out in Durban.

Of cardinal importance to the respondent was the fact that any contemplated action in the contracted Greek Courts of Pireus would have become time-barred. Facing a time-bar in the Greek forum, the respondent had elected to institute action **in rem** in the local South African Court, notwithstanding its prior contractual submission to the jurisdiction of the foreign Greek Court contained in the bill of lading.

Furthermore, had the respondent instituted action in the Greek Court it would have been also limited in the type of proceedings permissible before that Court in that an action **in rem** was not available in the Greek Court, even though the respondent was nevertheless not precluded from bringing an action **in personam** in the Greek Court of Pireus.

The respondent therefore sought the assistance of the Natal Supreme Court in order to receive a juridical or procedural advantage, which would not exist in the contracted Greek forum.

The appellant opposed the action in the Court a quo and applied for a stay of the action in terms of s 7(1)(b) of the Act, on the grounds that the foreign jurisdiction clauses were applicable. The appellant contended that the foreign jurisdiction clauses constituted "**sufficient reason**" for the action in the South African Court to be stayed.

The following "**unequivocal statements of facts**" relating to ownership and control of the The Hymetus were presented in hearsay evidence on behalf of the appellant:⁴⁰

- 1 The vessels were owned by Adonis Shipping Co, Incorporated under the laws of Lebanon, with registered offices in Bierut.
- 2 The day to day affairs of the owners of the appellant were controlled in Greece.
- 3 The owner's board of directors had its meetings and passed resolutions there and its controlling shareholders resided in Greece.

In order to escape the effect of the exclusive foreign jurisdiction clause the respondent argued, inter alia, that the expression "**the execution**" of the contract referred to the conclusion of the contract not its performance and the dispute did not relate to the execution of the contract.

This argument was rejected by Kriek J (as he was then) in the Court a quo, who found in dismissing the application for a stay that although the foreign jurisdiction clauses were applicable, in the sense that they operated as a submission of the matters in dispute to the Courts of Greece, they did not constitute sufficient cause, in the circumstances, for a stay of

40 MV Achilleus (supra) at pp. 331 D- 332C.

the proceedings. The learned judge Kriek's reasons for refusing a stay are summarised by the Appeal Court as follows:⁴¹

- "(i) There is no connection between Greece and the loss of The Hymetus or the cause of such loss, whilst certain repairs done to the vessel in Durban some months previously do have a distinct bearing on the loss;
- (ii) the majority of the potential witnesses are more readily available in Durban than in Greece;
- (iii) the appellant's defence to the claims based on contract is that the loss resulted from "perils of the sea", and that was a defence under the Hague Rules which will be determined by the application of the same principles whether the actions proceed in Greece or South Africa;
- (iv) To the extent that the respondents have sued in delict, South African law applies, that being the law of the place where the delict was committed;
- (v) If the second respondents were now to institute action in Greece against Adonis Shipping Co. they would be faced with a time-bar;
- (vi) The actions which it sought to stay could not have been duplicated in Greece where the law does not provide for an action **in rem** against an associated ship such as the appellant. This unique jurisdiction having been made available to the respondents (in South Africa), they should not be denied the benefit of having complied with the time-bar in this country."

The Appellate Division granted the appellant leave to appeal to the Natal Full Bench against Kriek J.'s refusal of the stay. Respondent's challenged the finding that the foreign jurisdiction clauses were applicable on three basis, contending: (1) that the expression "**the execution of the contract**" referred to the conclusion of the contract of carriage evidenced by the bill and not its performance; (2) that the foreign jurisdiction clauses created a conflict between the jurisdiction of the Courts of Phireus and those of the place where the carrier had his principle place of business; (3) and that these clauses were limited to claims based on breach of contract and did not cover delictual claims based on allegations of ownership and negligence such as claimed in the particulars of claim.

41 MV Achilleus (supra) at p. 335 D-H.

The Full Bench rejected all the respondents arguments and held, inter alia, that the word "execution" referred to the performance of the contract and not to the conclusion thereof. It was further clear to the Court that Greece was the country where the carrier had its principal place of business and there was no conflict between the foreign jurisdiction clauses.

The Full Bench cited as authority the judgments in The Makefiell and The Cap Blanco, and held that the claims arose from obligations in the bills of lading incorporating the Hague Rules, which applied to any action for loss of goods carried under the contract, whether found in contract or delict, and therefore were disputes "relative to" the execution of the contract of carriage and arose under the bills of lading within the meaning of the foreign jurisdiction clauses.⁴² Accordingly, both contractual and delictual claims arising out of the performance of obligations under a contract of carriage were covered by the foreign jurisdiction clauses in the bill of lading.

Howard JP considered that the crucial question before the Full Bench was whether the foreign jurisdiction clauses operate as a submission of the matters in dispute in the actions to the Courts of Greece. As mentioned above, Kriek J in the Court a quo held that the foreign jurisdiction clauses were applicable and applied them to the matters in dispute.

The Full Bench upheld this finding by Kriek J but then considered whether it can and should reverse the decision of Kriek J to exercise the Court's discretion against a stay on the ground that the foreign jurisdiction clauses did not constitute "**sufficient cause**", on the facts and in the circumstances of the matter.

Although the Full Bench heard exhaustive argument about the principles governing the exercise of its discretion under section 7(1)(b) of the Act, Howard JP did not proceed to debate same with counsel, as he considered the present Full Bench bound by the earlier

decision of the Full Bench of that division in The Spartan Runner⁴³ to hold, as follows:⁴⁴

"conformably to English law, a plaintiff who sues in this country in breach of an agreement to refer disputes to a foreign Court bears the onus of showing why the court should not stay the proceedings and thereby give effect to the agreement. The Court referred in this connection to the summary of the relevant principles by Brandon J in The Eleftheria (1969) 2 All ER 641 (PDA) at 645, which was adopted by the Court of Appeal in The El Amria (1981) 2 Ll R 119 (CA) at 123-4:

- (1) Where plaintiff's sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
- (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown (my emphasis).
- (3) The burden of proving such strong cause is on the plaintiffs.
- (4) In exercising its discretion, the Court should take into account all the circumstances of the particular case.
- (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:
 - (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.
 - (b) Whether the law of the foreign Court, and if so, whether it differs from English Law in any material respects.
 - (c) With what country either party is connected, and how closely.
 - (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
 - (e) Whether the plaintiff's would be prejudiced by having to sue in the foreign Court because they would:
 - (i) be deprived of security for that claim;
 - (ii) be unable to enforce any judgment obtained;
 - (iii) be deprived of a time-bar not applicable in England; or
 - (iv) for political, racial, religious or other reasons be unlikely to get fair trial.

43 MV Spartan Runner (supra) at p. 806 E: per Shearer J, with Howard JP and Booysen J, concurring.

44 MV Achilleus (supra) at pp 334 C - 335 B.

Howard JP then stated: "Paragraphs (1)-(4) of the above passage reflect the approach adopted by this Court in The Spartan-Runner and para (5) serves as a useful guideline to the matters which the court may have regard to when exercising its discretion."⁴⁵

With all respect to Howard JP, having sat in The Spartan Runner, and to Galgut J and Combrink J who comprised the Appeal Court with him in the MV Achilleus, the Full Bench as a Court of similar judicial weight to the Court in The Spartan Runner, did not have to consider itself bound to the decision in The Spartan Runner, and could have revisited the matter. In particular, the Full Bench could have departed from the previous decision if it considered same to be clearly wrong.⁴⁶ In the light of the earlier submissions as to the correctness of the decision in the The Spartan Runner, the Full Bench in the MV Achilleus, with respect, should at the very least have revisited the issue and were it needed to be done, have departed from the decision in The Spartan Runner.

It is submitted that there was a need for a fresh ruling on the matter in order to bring the South African law into line with the proper application of the principles contained in the doctrine of **forum non conveniens**, as laid down by Lord Goff in The Spiliada. Howard JP however held the view that the English law applicable to the question of the stay of proceedings in the context of a foreign jurisdiction clause, was solely governed by the relevant principles enunciated by Brandon J in The Eleftheria, as adopted and applied by the Court of Appeal in the The El Amria, and that the general principles contained in the doctrine of **forum non conveniens**, as laid down by Lord Goff in The Spiliada was not applicable.

Counsel for the Respondents had argued before Kriek J the substantial prejudice the respondent would face under Greek limitation provisions compared to limitation under South African law. Due to the lack of clarity of the evidence no finding was made.

45 MV Achilleus (supra) at p. 335 B.

46 Hahlo and Kahn, The South African Legal System and its Background at pp 240, 252-253.

Before the Full Bench respondent's Counsel approached the issue from a different angle contending that, whatever the Greek limitation provisions may be, the respondents would be substantially better off in proceedings in South Africa than they would be in Greece, citing as authority The Vishva Abha.⁴⁷ In that collision matter the English Admiralty Court, Sheen J, refused to stay an action properly instituted in England on the grounds of **forum non conveniens**; one of the reasons for the finding being that the South African Court was not a more convenient forum as the plaintiff would be prejudiced by the lower limitation of liability under South African law compared to the limitation placed on liability by English Law.

Howard JP did not consider this contention persuasive and commented, as follows:⁴⁸

"We have been referred in this connection to The Vishva Abha. That case is entirely distinguishable, of course, because there was no agreement between the parties to refer their dispute to the South African Courts. Here we have an agreement to refer the dispute to the Greek Courts and have them determined in accordance with Greek law. One of the disputes concern the scope and effect of Greek law regarding abandonment and limitation. It is obviously preferable that Greek courts determine questions of Greek Law, and it is inconvenient and expensive for a South African Court to have to decide such questions on the basis of expert evidence. (Cf The Eleftheria (supra at 649E-H)). It is by no means clear that the respondents would be substantially prejudiced by the imposition of the Greek rather than the South African limitations provisions, for it has not been shown that Greek law imposes any limit on contractual claims. Accepting however that they stand to recover less in Greece than they would in South Africa, that affords no justification for permitting the respondents to litigate here rather than in the agreed forum in accordance with the chosen system of law."

Howard JP then considered the grounds upon which Kriek J refused to stay the proceedings, based on his finding that the loss of the vessel and the cause of the loss had no connection with Greece and that the majority of potential witnesses in the case as a whole are more

47 The Vishva Abha (1990) 2 LI R 313 (QB Adm Crt)

48 MV Achilleus (supra) at p. 336 E-H.

readily available in Durban than in Greece. Howard JP disagreed with these conclusions and stated his own findings as follows:⁴⁹

" To the extent that the claims are based on a breach of the contract of carriage, Greek law undoubtedly applies and the defence to the claim must be determined according to the principles of that law. It follows that if the actions were to proceed in South Africa the relevant principles would have to be established by the expert evidence of one or more Greek lawyers, and that would be expensive and less satisfactory than leaving the matter to be decided by a Greek Court as the parties agreed to do. With respect, the mere fact that the defence invokes an exception under the Hague Rules does not justify the learned Judge's conclusion that it would be determined by the application of the same principles under South African law. There is no evidence of the relevant provisions of Greek law and no indication of the manner in which Greek Courts interpret and deal with the Hague Rule exception of perils of the sea. "

In the court *a quo*, Kriek J placed reliance on the often quoted passage from the speech of Lord Goff in **The Spiliada**⁵⁰ concerning the application of the doctrine of **forum non conveniens** where there is a time barring of actions, and held that the respondents should not be denied the benefit of having availed themselves of the South African jurisdiction before their actions were time barred. In **The Spiliada** Lord Goff concluded on this point that **"if justice demands, the Court should not deprive the plaintiff of the benefit of having complied with the time bar in this country."** Howard JP replied to these contentions as follows:⁵¹

" It is true that the respondents could not have enforced their claims in Greece by way of actions in rem against the appellant, but there was nothing to stop them doing so by instituting actions in personam against Adonis Shipping Co. Indeed, the first respondents took the precaution of instituting such actions in Pireaus before the time bar came into operation. The reason vouchsafed for the failure of the second respondent to do likewise is simply that "it was not reasonable to expect them to institute proceedings in Greece where there was little or no prospect of any substantial recovery"

49 **MV Achilleus** (supra) at p. 338 G.

50 **The Spiliada** (supra) at p. 15, quoted in the **MV Achilleus** (supra) at pp. 339 A - F.

51 **MV Achilleus** (supra) at p. 339 F- G.

Kriek J in the Court *a quo* following this issue went on further to say, as quoted by Howard JP:⁵²

"In any event, disregarding for the moment the forum selection clauses in annexures D1 and D2, I would,

- (a) not regard second respondents' decision to institute action in South Africa and to refrain from instituting action in Greece as being an instance of the "extreme examples" mentioned by Lord Goff in the passage quoted above;
- (b) not regard a Greek court as being "clearly more appropriate for the trial of the action" than this Court...."

Howard JP,⁵³ observed that Kriek J then dealt with the point that the second respondents could have instituted actions *in personam* in Greece by paraphrasing and adapting the last sentence of the above-quoted passage from the *Spiliada* case to read:

"It is not to be forgotten that, by making its jurisdiction available to the respondents, even the discretionary jurisdiction under s7(1), the Courts of this country have provided the respondents with an opportunity to start proceedings here; accordingly, if justice demands, the Court should not deprive the respondents of the benefit of having complied with the time bar in this country."

Following his understanding of the applicable English law, as stated in *The Eleftheria* and as approved by the Court of Appeal in the *The El Amria*, Howard JP then held that Kriek J had misdirected himself in applying the doctrine of *forum non conveniens* to the issues before him. Howard JP, said:⁵⁴

"In my respectful opinion the learned Judge misdirected himself by treating what Lord Goff said in the *Spiliada* case, which dealt with the application of the principle of *forum non conveniens*, as being *mutatis mutandis* to the instant case where the respondents have instituted actions in breach of foreign jurisdiction clauses by which they are bound and bear the onus of showing "strong cause" against a stay of the actions.

52 Quoted in the *MV Achilleus*, (supra) at pp. 339 H - I.

53 Quoted in the *MV Achilleus*, (supra) at p. 340 A.

54 *MV Achilleus*, (supra) at p. 340 B

The Full Bench in upholding the appeal held that the opinion of the second respondent that the prospects of recovery in the agreed amount was poor could not justify their breach of the agreement or the pursuit of their claims in another jurisdiction where their prospects were perceived better. The respondent deliberately decided not to sue in Greece and elected to sue in South Africa. because they regarded certain provisions of South African law more favourable than the Greek counterpart. The fact that proceedings in Greece would have become time barred before that foreign court did not afford the slightest reason for refusing a stay of the actions instituted in South Africa.

In conclusion, Howard JP held⁵⁵ held that in his judgment the foreign jurisdiction clauses constitute sufficient for the stay of the actions in terms of s7(1)(b) of the Act, and that the respondents had failed to show any, or sufficient, cause for the Court to exercise its discretion against the granting of a stay. The judgment of the Court a quo was declared clearly wrong and the following order, with respect salutary order in regard to security, inter alia, was made:

"3(a) Subject to the applicant providing within 14 days of the date of this order, and in substitution for the security provided in South Africa, security in similar form to the said security (mutatis mutandis) for such claims before the Greek Courts, it is ordered that the actions brought by the respondent...are hereby stayed pending their determination by Courts of competent jurisdiction in Greece."

A few comments will be made in regard to certain aspects of the judgment of Howard JP. The Court's finding that even if it were accepted that the respondents would recover less in Greece than in South Africa, that afforded no justification for permitting the respondents to litigate in South Africa rather than the agreed forum. This point appears to go against the grain of the decision of Lord Goff in The Spiliada, where the reasonableness of the plaintiffs conduct was the test.

55 MV Achilleus, (supra) at p. 340 H.

In other words did the plaintiff show a lack of diligence in disregarding the time bar in the Greek Courts and taking no reasonable steps to protect his interests in that forum.⁵⁶

The Court's finding that none of the parties were connected with South Africa and that if it were not for the fact that the vessel had undergone repairs in Durban the case had nothing to do with South Africa. This finding is with respect, as a point of departure, against whole intention of section 2 (1) of the Act and constitutes a very narrow view of The Court's jurisdiction. By its very nature the Court will be required **"to hear and determine any maritime claim...irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner."**

The Court's finding that it appeared that the respondents' prospects of proving that the shipowner knew or ought to have known of the defective welding carried out in Durban and that such welding contributed to the sinking of the ship were not good. With respect the Court is only required to look at procedural connecting factors and not forecast on the prospects of success. The Court therefore, with respect, erred in taking into account prospects of success as a relevant factor to be balanced in the critical equation. The learned author Jackson⁵⁷ in discussing the staying of limitation proceedings made the following comments:

"The issue for the forum was the adducing the limit of liability in relation to the claim, and thus no more excludes the entire satisfaction of the claim than would the likelihood that on a stay the other party would succeed. It would mean that a stay was only to be contemplated if the plaintiff would succeed at least in part. Success of one party is not as such a relevant factor."

To the extent these factors were incorrectly considered by the Court it is submitted that the judgment may be subject to criticism, by a later Court.

56 See the judgment of Colman J. in Citi-March and another v. Neptune Orient Lines Ltd and others [1997] 1 LIR 72.

57 Jackson (supra) at p. 254.

9.3 THE EFFECT OF AN OVERRIDING STATUTE OF THE FORUM

The normal rules governing stay of actions will not apply if there exists in, the *lex fori*, the forum hearing the dispute an "overriding" statute which binds the Court to produce a result different to that contracted by the parties. In such instances the doctrine of *forum non conveniens* can have no application.

The effect of a foreign jurisdiction clause is a matter for the *lex fori*. If the law of the *lex fori* contains a prohibition against ousting the jurisdiction of the Court in a particular context or lessening the liability of one of the parties, no jurisdiction clause can prevail against it.⁵⁸ In other words, the parties will not be able to contract out of these mandatory provisions.

The Hague and Hague-Visby Rules contain no express jurisdiction provisions, which is to be contrasted with the Hamburg Rules, which in Art. 21 provides for a number of jurisdictions connected with a dispute at the option of the plaintiff. In the United Kingdom, there exists The Carriage of Goods by Sea Act 1971 UK, which in sections 1 (2) & (3) gives "force of law" to the Hague-Visby Rules regulating the rights and liabilities of shipowners and cargo owners under bills of lading. The Rules govern the extent to which the liability of a shipowner can be limited. Art. III, para.8 of the Rules, provides that:

"any clause....in a contract of carriage....lessening such liability by these Rules shall be null and void and of no effect."

In the seminal decision of The Hollandia⁵⁹, House of Lords considered a bill of lading which contained an exclusive jurisdiction clause in favour of the Court of Amsterdam and also a choice of law clause selecting Dutch law as the proper law, which jurisdiction admitted lower limits of liability of the carrier.

58 Morris, The Conflict of Laws, 3rd ed, (1984) p.99.

59 The Hollandia (1983) AC 565; (1983) 1 LIR 1 HL, (reported at first instance as The Morviken (1981) 2 LIR 61.)

Under Dutch law the liability of the shipowner would be restricted to 250 English pounds, whereas under the Hague-Visby Rules this limit would have been 11 000 English pounds. The Cargo damage done was estimated at 22 000 English pounds. The Cargo concerns instituted an action **in rem** in England and arrested **The MV Morviken**. The defendant shipowner moved for a stay on the ground that the bill of lading gave the Dutch courts jurisdiction and that the selected proper law of the contract was Dutch law. The House of Lords refused a stay of English proceedings instituted contrary to the express jurisdiction of the Dutch court. The House held that UK COGSA 1971 must be applied, as the effect of both the Dutch jurisdiction and the choice of law clauses was to lessen the limitation liability of the shipowner in a way not permitted by the Rules. The House of Lords held that these clauses subjecting disputes to a jurisdiction with a lower limitation of liability were invalid and of no effect, because these provisions of the Hague-Visby Rules were mandatory. The author Jackson commented as follows:⁶⁰

"As a result, a choice of forum clause in a bill of lading to which the Hague-Visby Rules apply "by force of law" will be treated by an English Court as void to the extent that it falls foul of Art. III, para.8 of the Rules. However, it will remain valid in all other respects."

According to the learned author, Jackson, the effect of **The Hollandia** decision on the validity of arbitration in England is not clear, particularly in the light of the express duty to recognise such clauses imposed by section 1 of the UK Arbitration Act 1975.⁶¹ In the 1983 case of the **The Benarty**,⁶² Sheen J., applied **The Morviken**, to a clause in a bill of lading referring all "actions under the Contract of Carriage" to the Court of Djakarta, and declared it void on the basis that the Djakarta court would apply a domestic statute relating to the limitation of shipowner's liability, which would have the result that the carriers liability would be less than the limit specified by the Rules.

60 Jackson, **Enforcement of Maritime Claims**, 2nd ed., (1996) p.106.

61 Jackson, (supra) at p.245 fn 73: also states that the "reasoning applies to the choice of law as to choice of forum, or otherwise an English court may simply have to apply the law of the source of the objection to jurisdiction."

62 **The Benarty** (1984) 2 Lloyd's Rep. 244 reversing (1993) 2 Lloyd's Rep 50:

The Djakarta Court would not apply the Hague-Visby Rules as they were not expressly incorporated into the bill of lading. Sheen J held that the clause was a clause lessening liability contrary to the provisions of the Rules, Art. VIII of which provided that the rules:

"shall not affect the the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea going vessels"

The provisions of section 9 of the Australian Sea-Carriage of Goods Act 1924 (Cth), contains similar provisions, and section 9(2) thereof provides as follows:

"Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods by sea from any place outside Australia to any place in Australia shall be illegal, null and void and of no effect."

The provisions of section 9(2) was considered in the Australian High Court case of Wilson v. Compagnie des Messageries Maritimes,⁶³ which matter concerned a French bill of lading for a shipment from France to Australia providing for all actions arising out of the bill to be decided in France. The defendant applied for the stay of the plaintiffs action for short delivery, on the ground that actions arising under the bill of lading should be tried by the French Court. The Australian High Court, upheld the decision of the Supreme Court of New South Wales, by declaring that a clause calling for actions to be tried in a French court, purported to oust the the jurisdiction of the Australian Courts and was invalid. The stay of proceedings was refused.

63 Wilson v. Compagnie des Messageries Maritimes (1954) 1 LIR 229; in appeal (1954) 2 LIR 544: applied in The MV Blooming Orchard: Sonmez Denizcilik ve Ticaret Anonim Sirketi v. MV "Blooming Orchard" (1990) 99 ALR 138 :(Voyage charterparty under which goods carried from any place in Australia is "a document relating to the carriage of goods" within meaning of section 9(1) of the Sea-Carriage of Goods Act 1924 (Cth). Accordingly, the arbitration clause in the voyage charterparty was rendered illegal, null and void by section 9(1) of the Act.)

The South African Carriage of Goods By Sea Act 1986 (COGSA), (Act 1 of 1986), which came into force on 4 July 1986 contains provisions similar to the Australian Sea-Carriage of Goods Act 1924 (Cth). Section 3 (1) of the SA COGSA repealed the provisions of section 310 (6) of the Merchant Shipping Act 57 of 1951, and section 3 reads as follows:

"(1) Notwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, and notwithstanding the provisions of the Arbitration Act, 1965 (Act 42 of 1965), and of section 7 (1) (b) of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), any person carrying on business in the Republic and the consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in the Republic or to any port in the Republic, whether for final discharge or for discharge or for discharge for further carriage, may bring any action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in the Republic.

(2) The provisions of subsection (1) of this section shall not apply to arbitration proceedings to be held in the Republic which are subject to the provisions of the Arbitration Act, 1965."

The effect of these provisions is to give persons carrying on business in the Republic, and the consignee or holder of a document falling within the provisions of this section, in respect of goods carried to a destination or to any port in the Republic, an election to institute action in the South African Court, notwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, and notwithstanding the provisions of the Arbitration Act, 1965 (Act 42 of 1965), and of section 7 (1)(b) of the Act.⁶⁴

Agreements referring disputes to arbitration proceedings in South Africa subject to the South African Arbitration Act, are excluded from the ambit of section 3, will retain their effectiveness.

64 See Shaw (supra) at p.56.

It also means that applications in terms of section 7 (1)(b) of the Act for a stay of proceedings in breach of a exclusive foreign jurisdiction clause or agreement to refer any dispute to arbitration, or on the ground of a purported ouster of jurisdiction, before the South African Admiralty Court, will not be upheld. It is submitted that all other applications for a stay of proceedings in terms of section 7 (1)(b) of the Act ought to be heard by the Court.

The learned author Hare,⁶⁵ holds the view that subject to the provisions of section 7 (1) of the Act, "exclusive jurisdiction clauses are usually of no effect" and "they are specifically emasculated in relation to claims brought by South African consignees under carriage contracts by Section 3 (1) of the South African Carriage of Goods By Sea Act 1986."

The provisions of section 3 of the South African Carriage of Goods By Sea Act 1986, was considered in The Owners of the Cargo Lately laden On Board The MV Kairos Transhipped into the MV Jelsa v. MV Alka,⁶⁶ which concerned a bill of lading providing for all disputes arising out of the contract of carriage to be submitted to the District Court in Split, Yugoslavia.

The plaintiff arrested in rem The Alka, an associated ship of The Kairos in Durban. The defendant pleaded three points: (1) in terms of the bill of lading the parties had agreed to refer all disputes to the Yugoslavia Court in Split; (2) There existed no particular reasons why the dispute should be litigated before the Court; and (3) the Court ought to decline jurisdiction in terms of section 7(1)(a), alternatively stay the present proceedings in terms of section 7(1)(b).

65 Hare, Arrest laws: South Africa (Lloyds) 1987. pp.78-9.

66 The Owners of the Cargo Lately laden On Board The MV Kairos Transhipped into the MV Jelsa v. MV Alka, 1994 (4) SA 622 (D) per Hugo J.

The plaintiff replied that section 3 of the South African Carriage of Goods By Sea Act 1986 applied and it was entitled so that was entitled to bring the action in the Durban Court. The plaintiff alleged further that it carried on business in South Africa and that it was the holder of the bill of lading upon which it had brought its action. The bill described the plaintiff both as shipper and consignee.

The Court found that the plaintiff as consignee fell within the ambit of section 3, as "any person carrying on business in South Africa" had to be read disjunctively from the "consignee under, or holder of any bill of lading" and not conjunctively. The person referred to in the section could be either of those persons and not both.

9.4 FORUM NON CONVENIENS AND LIMITATION OF LIABILITY

The aspect or factor of limitation of liability is a consideration of relevance in applying the doctrine forum non conveniens. The Court in exercising its discretion to stay proceedings before it on the ground of forum non conveniens often has to consider the prejudicial effect of lesser limitation liability in the foreign Court.

The author Jackson,⁶⁷ holds the view that "apart from any Convention provisions excluding its operation the possible application of **forum non conveniens** to limitation proceedings is twofold- a stay of limitation proceedings either because of such proceedings elsewhere or because of liability proceedings elsewhere. In addition the varying national approaches to limitation may be a factor in a stay of liability proceedings."

In The Vishva Abha,⁶⁸ SheenJ regarded lesser maximum compensation in South Africa as a factor working against a stay of English proceedings. He found that it would be a grave

67 Jackson, d.c ,*Enforcement of Maritime Claims* 1996 at 532

68 Jackson (supra) at p. 534 , fn 66 (see The Vishva Abha (1990) 2 LIR 312; Aldington Shipping v. Bradstock Shipping (1988) 1 LIR 475; Adhiguna Meranti (1998) 1 LIR 384 overruled (1994) 3 All ER 749)

injustice to deprive the plaintiffs of their right to litigate in England and to send them to South Africa where their chances of recovering damages would be limited to so much less than in England.

The learned author Jackson⁶⁹ in commenting on limitations proceedings had the following to say:

"The jurisdiction of the English courts in relation to limitation claims, the law which governs them and the recognition of any decree or settlement in English law, was traditionally (n6) approached on the basis that the issue was essentially procedural or remedial. It was therefore seen as a matter solely for the English courts and English law. A claimant entitled to a limitation decree under an English statute was not deprived of such a decree because of foreign proceedings, foreign connection, foreign judgment or foreign payments. At most any payment made abroad would be taken into account on the basis on which such a claim could be made in English law."

69 Jackson *Enforcement of Maritime Claims* at p. 521, citing The Giacanto Motta (1977) 2 LIR 221.;

10 THE CONCLUSION:

On an examination of the case law it will be noted that the Courts have often not when ruling on the issue of foreign time bar limitations, adopted a balanced approach favouring neither plaintiff or defendant when declining jurisdiction or staying proceedings in favour of another more appropriate forum.

The Courts would in these instances decline jurisdiction or stay the proceedings without making its order conditional on two things: firstly, that any foreign time bar limitations be waived, in appropriate cases, and secondly that, adequate security for the released vessel (where no offer of adequate security had been made by the defendant) in order to allow the plaintiff to keep the benefit of the security obtained in the **lex fori**. In particular the waiver of the foreign time bar is a necessity in order to not shut out the plaintiff in the more appropriate forum, where the plaintiff has not acted unreasonably in failing to timeously commence proceedings in the foreign forum.

The aforementioned judicial approach would give effect to what Lord Goff in **The Spiliada**, speaking in the context of time bar limitations, termed "**practical justice**" between the parties in "**the interests of all the parties and the ends of justice.**" Lord Goff specifically dealt with the appropriate order to be delivered in the following terms:⁷⁰

"The appropriate order, where the application of the time bar in the foreign jurisdiction is dependent upon its invocation by the defendant, may well be to make it a condition of the grant of a stay or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time bar in the foreign jurisdiction; this is apparently the practice in the United States of America."

70 **The Spiliada** (supra) at p. 15 col 2, p 16 col 1.

It is therefore submitted that where our Admiralty Court declines or stays Admiralty proceedings under section 7 (1) of the Act on the ground that the dispute in question should be submitted to arbitration or to the determination of another Court or tribunal in South Africa or elsewhere overseas, it ought, as a matter of sound judicial practice, to make such order conditional on the furnishing of adequate security, and the waiver of time bar limitations, in appropriate matters.

This salutary approach of providing for security was followed by Howard JP in The Achilleus, but not followed by Shearer J in The Spartan Runner, and Berman J in Great River Shipping.

To the extent that our Courts may hold the view that they do not have this power under the Act and under English admiralty law generally, and that therefore it is a matter for the Legislature, not the Courts, to address (what is respectfully considered a possible *casus omissus* on the part of the Legislature in the first place) the following proposed amendment is suggested to section 7 (1) of the Act:

"7(1)(c) In declining jurisdiction or staying any proceedings in terms of this section, the Court may in the exercise of its admiralty jurisdiction order that the declination or stay of such proceedings be conditional on the provision of adequate security for the satisfaction of any such claim, award or judgment, of the more appropriate forum in the Republic or elsewhere, on terms it may deem fit and/or the waiver of any time bar limitation in the appropriate forum, in appropriate instances."

To the contrary may be argued based on the comments made by Didcott J in his dissenting speech in The Mv Paz that the proposed amendment would merely afford the forum shopper with a "revolving door" entry to the South African jurisdiction, to achieve its ends which are normally to obtain security and a forum best suited to the prospects of its claim, in terms whereof no matter which section is utilised to obtain the security the same result is achieved.

These concerns it is respectfully submitted ought not to detract from the benefit would could be derived from such an amendment, at the end of the day it protects the plaintiff's interests in securing that his security would be carried forward to the more appropriate forum. The defendant should be satisfied in having the matter referred to the appropriate forum, subject to security being furnished and a waiver of the possible time bar.

At present the provisions of section 7 (1)(a) regarding the declining of jurisdiction could be prejudicial to the plaintiff. This may occur upon the Court declining his action without adequate making provision regarding his "lost security" and the looming prospect the plaintiff being time barred in the appropriate forum.

In any event, it is submitted that the proposed amendment has a similar form in England under Section 26(1) (a) & (b) of the Civil Jurisdiction and Judgments Act 1982, UK, which provides as follows:

- "(1) Where in England and Wales or Northern Ireland a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another part of the United Kingdom or of an overseas country, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest**
- (a) order that the property arrested be retained as security for the satisfaction of any award or judgment which**
 - (i) is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed; and**
 - (ii) is enforceable in England and Wales or, as the case may be, in Northern Ireland; or**
 - (b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment.**

In conclusion, it is submitted that in order for the doctrine of **forum non conveniens** to be of real benefit to litigants and our admiralty Courts, its application must be fortified by the introduction of supporting legislative provisions, as recommended herein.

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