FORUM NON CONVENIENS AND THE ARREST OF THE SHIP CHOU SHAN

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I INTRODUCTION

This paper addresses recent developments in the law governing the judicial discretion to decline jurisdiction on the basis of the doctrine of forum non conveniens. The potential application of the doctrine arises in situations where an alternate forum in another jurisdiction is available to try the action. For Australian courts, two jurisdictional contexts may be relevant. The first is where the alternate forum is another Australian jurisdiction. The second is where the alternate forum is in another country. This paper focuses on the latter of those contexts, and in doing so, it draws two key examples from admiralty law: Rares J's decision in *Atlasnavios Navegaçao Lda v Ship Xin Tai Hai (No 2)*[1] (*The Xin Tai Hai (No 2)*) and the more recent decision of the Full Court of the Federal Court, of which I was a member, in *CMA CGM SA v Ship Chou Shan*[2] (*The Ship Chou Shan*).

By way of background, there are two fundamental scenarios where a foreign litigant may ask a court to stay proceedings. First, the defendant may have been properly served with a writ in the jurisdiction and the court, on the strict application of jurisdictional rules, will have jurisdiction to try the matter. The foreign defendant may ask for a stay on a number of bases, including the fact that the same issues are already being tried between the parties elsewhere (*lis alibi pendens*), or that there is another court which, for a number of reasons, is a more appropriate tribunal to try the matter. In respect of the either possibility, the defendant may raise the plea of forum non conveniens. The stay, if granted, is granted in the exercise of the court's discretion to decline jurisdiction that has been ordinarily invoked by the plaintiff (i.e. by serving the writ in the jurisdiction). The effect of such a stay is significant, in that it bars the plaintiff's access to the jurisdiction of the local court which the plaintiff has selected to obtain a judicial remedy.

Secondly, a plaintiff may seek to have the court issue a writ, which will be served on the defendant outside the jurisdiction (service *ex juris*). Various procedural methods to control the

[1] (2012) 215 FCR 265.

[2] (2014) 224 FCR 384.

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potentially broad reach of such provisions have been developed at different times and in different jurisdictions.[3] Nevertheless, they all remain subject to a discretionary power of the court to decline jurisdiction, either by refusing to issue a writ, or by staying proceedings where a writ has issued and the defendant has appeared. In such cases, the defendant may be able to raise "forum conveniens" and have the action stayed on the basis that there is another more appropriate forum to try the case. The High Court in *Voth v Manildra Flour Mills Pty Ltd*[4] (*Voth*) suggested that in such cases the court will look at the appropriate forum more generally.

The application of judicial discretion in cases where there is an alternate, and potentially more appropriate, forum available to try an action is the subject of this paper.

As will be discussed in Part II, the present Australian doctrine of forum non conveniens is fundamentally different from its English counterpart. In fact, the High Court of Australia's statement of the law in *Voth* has been widely regarded as signifying a point of divergence in the Australian approach to the doctrine, as compared to the position in England, following the decision in *Spiliada Maritime Corp v Cansulex Ltd*[5] (*Spiliada*). The Australian approach to the doctrine of forum non conveniens has been regarded by some academics as a unique and stricter than the English approach, making it potentially more difficult for a defendant to obtain a stay of proceedings in Australia, than in England.[6] Part III deals with application of the doctrine in the admiralty context, referring to Rares J's decision in *The Xin Tai Hai (No 2)* and the Full Court's decision in *The Ship Chou Shan* as illustrative examples. Concluding comments are made in Part IV.

II DEVELOPMENT OF THE DOCTRINE OF FORUM NON CONVENIENS

A *The English influence since* Spiliada

For much of the twentieth century, the approach of the Australian and English courts to the discretionary stay of proceedings were essentially identical. This similarity was largely due to

[3] See, e.g., those methods referred to in William Martin Finch, 'Forum Conveniens and Forum Non Conveniens – Judicial Discretion and the Appropriate Forum' (1990) 6 *Queensland University of Technology Law Journal* 67, 68.

[4] (1990) 171 CLR 538.

[5] [1987] AC 460.

[6] See, e.g., Peter Prince, 'Bhopal, Bougainville and Ok Tedi: Why Australia's Forum Non Conveniens Approach is Better' (1998) 47 *International and Comparative Law Quarterly* 573, 576 and 597.

the influence of English cases on the development of this area of law in Australia.[7] For example, in *Maritime Insurance Ltd v Geelong Harbor Trust Commissioners*,[8] in the context of an application for a stay of proceedings instituted as of right, the High Court embraced the "vexatious and oppressive test", as had been applied in early twentieth century English cases. This trend continued well into the second half of the twentieth century.[9]

Following *The Atlantic Star*,[10] in 1973, the English courts began gradually to transform their approach to a discretionary stay of proceedings by relaxing its conception of the vexatious and oppressive test. This significant development did not go unnoticed in Australia; Australian courts were quick in adopting the liberalised test.[11] Indeed, shortly after Lord Diplock's reformulation of the liberalised vexatious and oppressive test in *MacShannon v Rockware Glass Ltd*,[12] courts in Australia appeared to modify their approach accordingly. For instance, the 1980 decision, *In the Marriage of Takach (No 2)*,[13] was a *lis alibi pendens* case concerning, among other things, two sets of divorce proceedings: one in Hong Kong and the other in Australia. In the Australian proceedings, Gibson J applied the *MacShannon* test. He ordered a stay after concluding, in terms identical to those set out in *MacShannon*, that the Australian court was not the "natural forum" for entertaining the dispute.[14]

In 1986, the transformation of the approach of the English courts to the practice of a discretionary stay of proceedings was completed in the House of Lords' landmark ruling in *Spiliada*. Under the *Spiliada* test, which is commonly referred to as the "more appropriate forum test", in order to obtain a stay of proceedings instituted as of right, the defendant has to persuade the court that there is another foreign court which: (a) is available to decide the dispute; and (b) is based in a venue with which the dispute has a closer connection than it has

[7] The Australian courts relied on the English cases, even though they were not generally bound to do so. See further, Ardavan Arzandeh, 'Reconsidering the Australian Forum (Non) Conveniens Doctrine' (2016) 65 *International and Comparative Law Quarterly* 475, 477.

[8] (1908) 6 CLR 194.

[9] See, e.g., *Cope Allman (Australia) Ltd v Celermajer* (1968) 11 FLR 488; *Telford Panel and Engineering Works v Elder Smith Goldsborough* (1969) VR 193.

[10] [1974] AC 436.

[11] See, e.g., the authorities discussed in P E Nygh, 'Recent Developments in Private International Law' (1974–1975) 6 *Australian International Law Journal* 172, 172.

[12] [1978] AC 795.

[13] (1980) 47 FLR 441.

[14] (1980) 47 FLR 441, 447-448.

with the English court.[15] If the requirements of these two limbs are satisfied, it would then be for the plaintiff to seek to resist the stay by showing that the foreign court is not more appropriate because the dispute will not be justly disposed of in that foreign court.

B *Australian position since* Oceanic Sun Line *and* Voth

Given that Australian courts had previously followed the changes in the English approach to a discretionary stay of proceedings, it was perhaps reasonable to assume that, when presented with the opportunity, they would do the same in respect of the *Spiliada* test. Indeed, some ten months after the decision in *Spiliada*, that opportunity presented itself to the High Court of Australia in *Oceanic Sun Line Shipping Co Inc v Fay*.[16] However, in a majority ruling, the High Court refused to adopt the *Spiliada* test.

The facts of *Oceanic Sun Line* are well known.[17] For the purposes of this paper, it is only necessary to revisit the High Court majority's rationale for resisting the adoption of the *Spiliada* test. The majority, comprising Brennan, Deane and Gaudron JJ (with Wilson and Toohey JJ dissenting), rejected the adoption of the *Spiliada* test on two main grounds. First, they saw the scope of the court's discretion under the more appropriate forum test as unduly broad and considered that it would lead to unpredictable outcomes. For example, Brennan J observed that "the English law [had] moved from a discretion confined by a tolerably precise principle [under the St Pierre test] to a broad discretion [under *Spiliada*]".[18] Justice Deane also viewed the post-*Spiliada* expansion in the scope of the court's discretion to stay its proceedings as undesirable.[19]

Secondly, the majority regarded the *Spiliada* test to be out of step with earlier Australian authorities (specifically, *Maritime Insurance*). According to Brennan J, "the function which the courts of [Australia] would be required to perform if the new English approach were adopted would … be inconsistent with what we have hitherto understood to be the function and

[15] (1979) 1 NSWLR 663, 667.

[16] (1988) 165 CLR 197.

[17] For a summary of the decision, see generally, M Pryles, 'Judicial Darkness on the Oceanic Sun' (1988) 62 *Australian Law Journal* 774.

[18] (1988) 165 CLR 197, 238.

[19] (1988) 165 CLR 197, 254.

duty of the courts".[20] Deane and Gaudron JJ broadly shared the same view and were also not disposed to embrace the *Spiliada* test.[21]

While united in their rejection of the *Spiliada* test, the majority was divided on the doctrinal framework for the court's application of the forum non conveniens doctrine in Australia. Justice Brennan favoured an approach, which afforded the court a narrow scope for exercising its discretion. His Honour considered that the vexatious and oppressive test, as outlined in *Maritime Insurance*, should continue to provide the basis for the court's discretionary exercise of jurisdiction. Justices Deane and Gaudron, however, preferred a forum non conveniens doctrine, which gave the court greater flexibility. Therefore, Deane J, who had the support of Gaudron J, proposed that, in the context of proceedings instituted as a right, the court has discretion to stay its proceedings if it is persuaded that "having regard to the circumstances of the particular case and the availability of the foreign tribunal, [the Australian court] is a clearly inappropriate forum for the determination of the dispute between the parties".[22]

Justices Deane and Gaudron were explicit in distinguishing between their approach and that outlined in *Spiliada*. They emphasised that, under the clearly inappropriate forum test, the court was concerned with establishing the local court's inappropriateness to entertain the dispute. However, under the *Spiliada* test, the question is whether the available foreign forum is inappropriate. Therefore, Deane and Gaudron JJ stated that under their test, "the mere fact that a tribunal in some other country would be a more appropriate forum for the particular proceeding [did] not necessarily mean that the local court [was] a clearly inappropriate one".[23]

The High Court's decision in the *Oceanic Sun Line* case was criticised because the division in the majority's pronouncements on the application of the forum non conveniens doctrine created doctrinal incoherence in this area of Australian law. Yet, less than three years after its ruling in *Oceanic Sun Line*, the High Court was invited to examine this issue in *Voth*. The facts of *Voth* have already been widely considered in academic commentary.[24] The discussion here

[20] (1988) 165 CLR 197, 238.

[21] (1988) 165 CLR 197, 253 and 265.

[22] (1988) 165 CLR 197, 248.

[23] (1988) 165 CLR 197, 248 and 266.

[24] For a summary of the case, see generally, Peter Brereton, 'Forum Non Conveniens in Australia: A Case Note on *Voth v Manildra Flour Mills*' (1991) 40 International and Comparative Law Quarterly 895.

concentrates on the High Court's pronouncements on the application of the doctrine of forum non conveniens.

The High Court acknowledged that the differences in the judgments in *Oceanic Sun Line* had led to confusion in the understanding of the Australian approach to discretionary non-exercise of jurisdiction.[25] In response, all but one of the judges endorsed the clearly inappropriate forum test as the basis for applying the forum non conveniens doctrine, which meant that the traditional vexatious and oppressive test was abandoned.[26]

The High Court reiterated its earlier opposition to the adoption of the *Spiliada* test in Australia. For example, in the joint judgment, which has been widely seen as representing the present position on the application of the Australian doctrine of forum non conveniens, the High Court was critical of *Spiliada* because, in their view, it allowed the English courts to engage in the assessment of the unsuitability of a foreign court.[27] Instead, the Court regarded the clearly inappropriate forum test to be more appropriate, as it concentrated on the determination of the inappropriateness of the local forum by an Australian judge, who would be best placed to make such a pronouncement.[28] The joint judgment restated the conceptual difference between the English and Australian forum non conveniens doctrines, as identified in Deane and Gaudron JJ's judgments in *Oceanic Sun Line*.[29] Accordingly, the court held that regardless of the availability of another foreign forum with closer connection to the dispute than the local forum, the *Voth* test enables an Australian court to sustain its proceedings if it is not a clearly inappropriate forum:[30]

> The "clearly inappropriate forum" test is similar and, for that reason, is likely to yield the same result as the "more appropriate forum" test in the majority of cases. The difference between the two tests will be of critical significance only in those cases - probably rare - in which it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly inappropriate one. But the question which the former test presents is slightly different in that it focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on the need to make a comparative judgment between the two forums. That is

[25] (1990) 171 CLR 538, 552 and 572.

[26] Justice Toohey maintained the same position as in *Oceanic Sun Line*, applying the *Spiliada* test to the facts of the case.

[27] (1990) 171 CLR 538, 558-559.

[28] (1990) 171 CLR 538, 560.

[29] (1990) 171 CLR 538, 558-562.

[30] (1990) 171 CLR 538, 559.

> not to deny that considerations relating to the suitability of the alternative forum are relevant to the examination of the appropriateness or inappropriateness of the selected forum. The important point is that, in those cases in which the ascertainment of the natural forum is a complex and finely balanced question, the court may more readily conclude that it is not a clearly inappropriate forum.

III EXAMPLES FROM ADMIRALTY LAW OF THE APPLICATION OF THE AUSTRALIAN TEST

A ship owner who wishes to bring an action may want to "forum shop" by bringing a limitation action in the country with the most favourable Convention for its interests. This Part considers two admiralty matters, *The Xin Tai Hai (No 2)* and *The Ship Chou Shan*, both of which were concerned with limitation proceedings in China, which, as will be discussed, is not a party to any limitation Convention.

Given that there is no general jurisdiction provision covering such matters, which states where the right of limitation must be invoked, a ship owner may seek to limit its liability in any contracting state that has personal jurisdiction over the respondent (i.e. the liability plaintiff).

Article 11(1) of the Convention on Limitation of Liability for Maritime Claims (1976 Convention) provides that a limitation fund may be constituted in any country where legal proceedings have been instituted in respect of claims subject to limitation. It does not provide that a limitation fund may only be constituted in such a country. Therefore, a shipowner may institute limitation proceedings and constitute a fund in any country it chooses, whether or not it has been sued there.

It is also arguable that the phrase "in which legal proceedings are instituted in respect of claims subject to limitation" in Article 11(1) is not confined to liability claims brought against the shipowner, but may include limitation proceedings brought by the shipowner itself, which would allow it to constitute a limitation fund in a country that it so chooses by instituting limitation proceedings there.

Article 10(1) of the 1976 Convention allows a shipowner to invoke its right to limit without constituting a limitation fund, which allows the shipowner to pre-emptively bring proceedings in a country where no liability claim has yet been brought if the courts of that country have personal jurisdiction over the potential liability plaintiff (i.e. someone who may want to establish a limitation fund).

The choice between available limitation regimes is further complicated by the fact that some countries have denounced the 1976 Convention, thereby renouncing their international

obligations to other countries that are party to the Convention. Moreover, not all countries which are party to the 1976 Convention have yet adopted the 1996 Protocol, which amends the 1976 Convention. Therefore, the result is that there are various convention regimes in existence, imposing different international obligations on the countries which are party to them. Australia, for instance, denounced the 1976 Convention with effect from 1 June 2014, and it is now party only to the 1996 Protocol, but not the 1976 Convention itself.[31] Some countries (including the United States and China) have their own limitation of liability legislation, but are not party to any of the relevant international Conventions. Consequently, they owe no international obligations to other countries.

As outlined in Part II, where limitation proceedings or liability proceedings are properly brought in an Australian court, a forum non conveniens stay will only be granted where the court is persuaded that it is a clearly inappropriate forum in the circumstances. This will be the case even where there are parallel proceedings on the same subject matter (i.e. *lis alibi pendens*) in another country. If the liability plaintiff in one country is the limitation plaintiff in another country, then the existence of the foreign proceedings will not necessarily indicate that the Australian proceedings should be stayed. However, a stay may otherwise be granted in an appropriate case if the court takes the view that it is a clearly inappropriate forum in the circumstances. I turn now to consider two specific admiralty cases which both concerned Chinese limitation proceedings.

A *The Xin Tai Hai (No 2)*

In *The Xin Tai Hai (No 2)*, two ships, being the "B Oceania" and the "Xin Tai Hai", collided in the Straits of Malacca. The B Oceania sank, but the Xin Tai Hai sailed on and arrived at the port of Qingdao in the People's Republic of China. The day after its arrival, its owner applied to the Qingdao Maritime Court to constitute a limitation fund under Ch XI of the Maritime Code of the People's Republic of China, which limits the shipowner's liability at a level equivalent to that under the 1976 Convention, and which may allow the shipowner to limit its liability for wreck removal, which is not permitted under Australian law. The Xin Tai Hai later visited Port Hedland in Western Australia, where it was arrested by the owner of the B Oceania,

[31] This regime forms a basis for limitation of liability under the *Limitation of Liability for Maritime Claims Act 1989* (Cth).

who claimed damages for the loss of the ship, including a substantial sum for removal of the wreck from the Straits of Malacca.

Rares J of the Federal Court refused to grant a forum non conveniens stay, finding that Australia was not a clearly inappropriate forum. The owner of the B Oceania admitted, and Rares J agreed, that the dominant purpose for proceeding in Australia was that the limit of liability was higher here than in China.[32] Nevertheless, a stay was not warranted. Rares J rejected the argument made on behalf of the Xin Tai Hai that the Chinese proceedings were commenced before the Australian ones.[33] The Australian proceedings were commenced when the writ was issued, not when it was served on the Xin Tai Hai in Port Hedland.[34] The writ was issued before the owner of B Oceania submitted to the jurisdiction of the Chinese court, which it did only because the time limit for participation in the Chinese proceedings had expired before the Xin Tai Hai had arrived in Australia.[35] Rares J concluded that the Federal Court was not a clearly inappropriate forum because the owner of B Oceania had invoked its jurisdiction in the regular manner and sought the benefit of the legitimate advantages of the greater amount of security for its claim, a larger limitation fund, and exclusion from a limitation of liability for wreck removal expenses.[36]

B *The Ship Chou Shan*

The Full Court of the Federal Court addressed the doctrine of forum non conveniens in *The Ship Chou Shan*. The significance of the decision for present purposes lies in the way in which the concept of juridical advantage is deployed in the application of the Australian test as compared with the test applied in England.

The Chou Shan collided with the CMA CGM Florida (Florida) about 100 nautical miles off the east coast of the People's Republic of China in the Chinese Exclusive Economic Zone (EEZ). The Florida leaked oil and fuel and there was a substantial pollution issue as a result of the collision. Liability for the collision and the subsequent loss and damage was in dispute.

[32] (2012) 215 FCR 265, 290 [104].

[33] (2012) 215 FCR 265, 294-295 [124].

[34] (2012) 215 FCR 265, 295 [125].

[35] (2012) 215 FCR 265, 295 [130].

[36] (2012) 215 FCR 265, 299 [143].

The facts are complex and I will not go into all the details. It is sufficient to say that on 9 April 2013 the owners of the Florida filed a writ in rem in the Federal Court of Australia commencing proceedings against the Chou Shan claiming USD 60 million in damages, plus interest and costs arising out of the collision.

On 6 May 2013, the owners of the Chou Shan applied to the Ningbo Maritime Court to set up a limitation fund under Ch 11 of the Chinese Maritime Code.

On 17 May 2013 the Federal Court at the request of the owners of the Florida, issued an arrest warrant for the Chou Shan. The ship was arrested on 22 May 2013. The owners' claim was on a maritime lien being proceedings on a lien for damage done to a ship.[37] The Chou Shan's P + I Club provide security in the amount of USD 61,751,213 and the vessel was released.

Meanwhile various proceedings in the Ningbo Maritime Court continued.

The owners of the Chou Shan, who had become parties to the Federal Court proceedings, applied for a stay of the Federal Court proceedings on the basis that the Court was clearly the inappropriate forum. In addition to the fact that the Federal Court proceeding had been commenced first and the security right under Australian law the owners of the Florida raised the difference in the amount of the limitation fund under Australian law as compared with Chinese law. The 1996 Protocol had increased the limitation amounts provide for in the 1976 Convention. At the time, Australia was signatory to both. China was not a signatory to either, although Ch XI of the Chinese *Maritime Code* largely adopted the relevant provisions of the 1976 Convention. The owners of the Florida argued that the higher limitation amount was a legitimate juridical advantage which should be given considerable weight.

The primary judge granted the stay having regard to a number of factors, including the following:

1. Other than the fact that the proceedings were commenced in Australia, they had no connection with Australia.

2. The pollution claims at least were governed by Chinese law.

[37] *Admiralty Act 1988* (Cth) s 15(2)(b).

3. There were proceedings in the Chinese Court which had jurisdiction over all persons and claims such that substantial justice would be done in in China.

4. Whatever happened in Australia, proceedings in China would continue and this raised the risk of inconsistent findings and verdicts.[38]

The primary judge treated this last matter as a matter to be accorded substantial weight.[39] That was consistent with well-established High Court authority.[40] For reasons that will become clear, it should be noted that the Full Court recorded that no case was run before the primary judge that there should be a temporary stay pending findings and verdicts of the Chinese Court which may eliminate the possibility of inconsistent findings while at the same time preserving the juridical advantages in the local forum for the owners of the Florida.[41]

The Full Court upheld the primary judge's decision to grant a stay. Of most interest is the Court's approach to the weight to be given to the local plaintiff's juridical advantage in Australian law compared with English law.

In *The Chou Shan*, the plaintiff's juridical advantage was the security put up by the P + I Club for the maritime lien or the value of a limitation fund, if set up, in an amount under the 1976 Convention and the 1996 Protocol under Australian law. There are of course many possible types of juridical advantage. In *Spiliada*, Lord Goff gave the following examples:[42]

> Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that the substantial justice will be done in the available appropriate forum.

The Full Court clearly identified the significance of the plaintiff's juridical or legitimate advantage in the case of the now discarded traditional test, the Australian *Oceanic Sun Line*/*Voth* test and the English test of the clearly more appropriate forum. Under the traditional test, juridical or legitimate advantage was often an overwhelming influence whereas under the

[38] [2014] FCA 74, [150]-[166].

[39] [2014] FCA 74, [128].

[40] See, e.g., *Henry v Henry* (1995) 185 CLR 571.

[41] (2014) 224 FCR 384, 394 [36].

[42] [1987] AC 460, 482.

Australian test it is a relevant factor to balance in the exercise of the discretion and is not necessarily determinative.[43] Then again it is not dealt with as it is under the English test as often cancelled out by the equal and corresponding disadvantage. The Full Court in *The Ship Chou Shan* rejected the notion that a juridical advantage is of little weight if substantial justice can be done in the foreign forum. The Full Court said:[44]

> The third of the reasons stated by the primary judge at [159] of his reasons (set out at [35] above) reflects the neutrality of so-called juridical advantage in the *Spiliada* test. As discussed earlier, the requirement in *Voth* to focus upon the local chosen forum and its asserted inappropriateness means that juridical advantage in that chosen forum must have a greater part to play in the analysis than it does under the *Spiliada* test. It may not have the potentially overwhelming importance that it does in the traditional test, nevertheless, the focus being upon the local chosen court means that it cannot be simply counterbalanced by an equivalent disadvantage to the defendant. That said, the majority in *Voth* did say at 564-565 that what Lord Goff said in *Spiliada* about juridical advantage at 482-484 provided "valuable assistance". Overall, however, the necessary focus upon the local court and whether it is inappropriate required by *Voth* gives the juridical advantage to the plaintiff (if otherwise legitimate) a degree of weight that is simply not cancelled out by a comparative equivalence approach mentioned by Oliver LJ in *Spiliada* and adopted by Lord Goff in *Spiliada* and *De Dampierre*.

The Full Court said that the English admiralty cases which place little weight on juridical advantage are to be read with caution because they have been decided in the context of the English test. That test requires the Court to consider first which is the more appropriate forum and if prima facie it is the foreign forum, the next step requires the Court to ask whether there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. That can lead into a consideration of whether as a matter as a matter of abstract justice one law system is objectively more just than the other.

This is not the Australian approach and the plaintiff's juridical advantage must be considered as part of the consideration of whether the local forum is a clearly inappropriate forum. The Full Court said:[45]

> The law in this country as laid down in *Voth* mandates a different approach to juridical advantage. As we have said, the test is whether the local forum is a clearly inappropriate forum, and the plaintiff's juridical advantage is to be assessed in that context, together with the other factors identified in *Voth* and in our reasons. It is, of course, to be properly assessed, but we do not think that, ordinarily at least, it is to be

[43] (2014) 224 FCR 384, 397-398 [55] and [57].

[44] (2014) 224 FCR 384, 401-402 [77].

[45] (2014) 224 FCR 384, 402 [81].

> compared in terms of abstract justices with the laws of the foreign forum. It owes its existence to the laws of the local forum and those laws represent the views of the local legislature and are binding on the courts of the local forum. Having said that, it is also well-established that juridical advantage is not decisive. The decision in *Voth* itself provides an illustration of this proposition. Mason CJ, Deane, Dawson and Gaudron JJ (at 571) acknowledged certain juridical advantages but said that they were insufficient to resist the conclusion that the local forum was a clearly inappropriate forum.

This is no mere difference of opinion which is unlikely to have any practical effect. For example, the Full Court suggested that one option was to refuse a permanent stay so that the plaintiff retained his or her juridical advantage, but to grant a temporary stay while the foreign Court decided the facts and thereby avoid the possibility of inconsistent findings. That was the course taken by Clarke J in *Caltex Singapore Pte Ltd v BP Shipping Ltd*[46] (*Caltex*).

In *Caltex*, a vessel collided with a jetty in Singapore. The shipowners commenced limitation proceedings in Singapore, which was the natural forum for the action. The jetty owners commenced proceedings in the English High Court to obtain the advantage of the higher limitation figure available under the 1976 Convention. Clarke J held that England was the appropriate forum on the grounds of justice and that, if possible, any stay should be temporary only so as to allow the Singapore courts to assess the quantum of the claim. If it then appeared that the quantum would fall below the Singapore limitation figure, only then would the stay be made permanent.

The Full Court in *The Chou Shan* acknowledged that Clarke J's approach had been heavily criticised in a judgment delivered on 30 April 1997,[47] by Rix J (as his Lordship then was) in *Caspian Basin Specialised Emergency Salvage Administration v Bouygues Offshore SA (No 4)*.[48] That judgment recorded the strong attack on Clarke J's reasoning by Mr Steel QC (the future Admiralty judge) as being:[49]

> [I]nconsistent with what Lord Goff had said in *Spiliada* at 482-484 and in *De Dampierre v De Dampierre* [1988] AC 92 at 100 about juridical advantage to the effect that a stay should not be refused because of the loss to the plaintiff of a juridical advantage if the court is satisfied that substantial justice will be done in the appropriate forum elsewhere.

[46] [1996] 1 Lloyd's Rep 286.

[47] (2014) 224 FCR 384, 401 [74].

[48] [1997] 2 Lloyd's Rep 507.

[49] (2014) 224 FCR 384, 401 [74].

It is also worth noting, as the Full Court did in *The Ship Chou Shan*,[50] that a month later Timothy Walker J in *Bouygues Offshore SA v Caspian Shipping Co (No 5)*[51] did not disturb the approach of Clarke J in *Caltex*, and the following year saw the English Court of Appeal in a judgment delivered by Sir Christopher Staughton in *The Herceg Novi v The Ming Galaxy* overrule Clarke J in *Caltex*.

Before leaving *The Ship Chou Shan* it is worth noting the Court's approach to the question of what was the *lex causae*. The Court said that China no doubt had authority to deal with the protection of the environment. However, that did not lead to the conclusion that the rights of ships of other nations were regulated by Chinese law as to navigation generally. The Court said that the rights and liabilities arising from the collision were governed by the general maritime law as administered in the forum, rather that strictly by the law of any particular country. This law is not a law of the world or a supra-national binding law, but maritime law accepted and administered by the forum as its law and thus as governing.[52]

IV CONCLUSION

In *The Xin Tai Hai (No 2)*, Rares J said:[53]

> In *Voth* 171 CLR at 565 Mason CJ, Deane, Dawson and Gaudron JJ suggested that, in "the ordinary case" of a stay application on the ground of clearly inappropriate forum, counsel should be able to furnish the primary judge with any necessary assistance by a short, written and preferably agreed summary identification of relevant connecting factors "and by oral submissions measured in minutes rather than hours". Their Honours had described earlier approaches dealing with this difficult area as involving "a war of affidavits" (171 CLR at 558). As in *Suzlon (No 3)* [2012] FCA 123 at [51], that encouragement seems to have bypassed this application.

Some of the applications for a stay by reference to the doctrine of forum non conveniens are of their very nature complex and time consuming. *The Ship Chou Shan* itself was heard over two days.

As the passage from *Voth* set out above illustrates, there are cases where the differences between the Australian and English test will be of very little practical significance. However, *The Ship Chou Shan* reaffirms that there is a difference, particularly in the weight placed on

[50] (2014) 224 FCR 384, 401 [75]-[76].

[51] [1997] 2 Lloyd's Rep 533.

[52] (2014) 224 FCR 384, 405 [93].

[53] (2012) 215 FCR 265, 290 [107].

juridical advantage. Furthermore, it raised the possibility of a middle position of a temporary stay while issues are litigated in the foreign forum.