DISCRETION TO STAY PROCEEDINGS —THE IMPACT OF "THE ABIDIN DAVER" ON JUDICIAL CHAUVINISM

Introduction

It is an established rule in conflict of laws cases that a court which is jurisdictionally competent at common law[1] to hear an action has a discretion to deny jurisdiction by ordering a stay of proceedings.[2] This discretion is by no means an unfettered one and is to be exercised according to settled principles.[3] Traditionally in England and Australia these principles worked in such a way that the courts would tend to exercise their discretion by not granting a stay even if there was clearly a more appropriate forum in which the action could be heard.[4] Since 1973, however, the English House of Lords has gradually liberalised the rules governing the exercise of discretion to grant a stay by giving more weight to forum appropriateness.[5] In *The Abidin Daver*[6] their Lordships appear to have taken this development a stage further (at least so far as *lis alibi pendens* actions are concerned) by acknowledging that the law in this area now stands on the same basis as the Scottish and American doctrine of *forum non conveniens.*[7]

The Historical Background

Until 1974, the rules governing the exercise of discretion to stay proceedings were those laid down by Scott, L.J. in *St. Pierre* v. *South American Stores Ltd:*[8]

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

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[1] This casenote is confined to a discussion of discretion to stay proceedings where a court has jurisdiction at common law through the defendant either submitting to the jurisdiction or being served while present within the jurisdiction. The principles governing exercise of discretion where a court has statutory jurisdiction are necessarily different because of the exorbitant nature of the jurisdiction involved: see further *Amin Rasheed Shipping Corporation* v. *Kuwait Insurance* [1983] 3 W.L.R. 241; C. C. Hodgekiss [1984] 58 *A.L.J.* 461 at 464.

[2] See generally P. E. Nygh, *Conflict of Laws in Australia* (1984) 59-63.

[3] *Ibid.*

[4] See the remarks of Lord Reid in *The Atlantic Star* [1974] A.C. 436 at 453; as to the Australian position, see e.g., *Willen* v. *Lombard* Australia [1970] A.L.R. 77.

[5] *The Atlantic Star* [1974] A.C. 436; *Rockware Glass Ltd.* v. *MacShannon* [1978] A.C. 795.

[6] [1984] A.C. 398.

[7] "*Forum non conveniens*" is discussed at page 3 of this casenote. See further, as to the Scottish doctrine, P. Anton, *Private International Law* (1967) 148-154; as to the American doctrine see Blair, "The Doctrine of Forum non conveniens in Anglo-American Law" (1929) 29 *Columbia L.R.* 1.

[8] [1936] 1 K.B. 382.

(a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and
(b) the stay must not cause an injustice to the plaintiff.
On both, the burden of proof is on the defendant.[9]"

The subjective construction given to the words "oppressive and vexatious" made this test very difficult to satisfy because, in effect, the defendant had to prove moral blameworthiness on the part of the plaintiff in order to get a stay. The additional requirement that the defendant prove that trial elsewhere would cause no injustice to the plaintiff was even more difficult to discharge because of an attitude prevalent among English judges that an English forum offered self-evident advantages over a foreign one. This "judicial chauvinism" was inherent in Scott, L.J.'s judgment in *St. Pierre*; "The right of access to the King's Court . . . must not be lightly refused."[10]

It was also expounded by Lord Denning:

> No one who comes to these courts asking for justice should come in vain. . . . This right . . . extends to any friendly foreigner. . . . You may call this "forum shopping" if you please, but if the forum is England, it is a good place to shop in both for the quality of the goods and the speed of the service."[11]

The practical result of the *St. Pierre* test was that stays of proceedings would rarely be granted: once a litigant had invoked the jurisdiction of an English court he would seldom be deprived of the opportunity to sue in the English forum, even in cases where the subject matter or the parties had little or no connection with England. An extreme example of this situation was the Court of Appeal's refusal to grant a stay in *H.R.H. Maharanee of Baroda* v. *Wildenstein*,[12] despite the fact that both parties resided in France and that the matter had no other connection with England than that the plaintiff was served there while on a fleeting visit.
on a fleeting visit.

The House of Lords decision in *The Atlantic Star*[13] in 1974 marked the beginning of a gradual liberalization of the rules relating to stays, by giving a more flexible interpretation to the words "oppressive" and "vexatious". According to Lord Wilberforce, the words were not to be interpreted in their strict, technical sense but were to be seen as "descriptive words only which illustrate but do not confine the courts' general jurisdiction".[14] Thus it was no longer necessary to show bad faith in order to get a stay of proceedings; instead, the Court looked at the advantages to the plaintiff of suing in the chosen forum and the disadvantages to the defendant of being sued there. If the latter outweighed

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[9] *Id.* at 398.
[10] *Ibid.*
[11] *The Atlantic Star* [1937] Q.B. 364 at 281-2 (C.A.).
[12] [1972] 2 Q.B. 283.
[13] [1974] A.C. 436.
[14] *Id.* at 469.

the former, the action would be described as oppressive and vexatious to the defendant and a stay would be granted.[15]

This was taken a step further in *Rockware Glass* v. *MacShannon* where the House of Lords, while agreeing with the basic trend of *Atlantic Star*, sought to put the legal issues on a more rational footing by abandoning completely the use of the words "oppressive" and "vexatious". With the exception of Lord Keith,[16] all the law lords deprecated the continued use of these words on the basis that they suggested a narrow, confined test, and that attempts to liberalize their natural meaning could only lead to confusion.[17] According to Lord Salmon, it was impossible to interpret these words liberally "without emasculating them completely and destroying their true meaning".[18]

Lord Diplock reformulated the *St. Pierre* test in the following terms:

> 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. . . ."[19]

The "advantage" referred to in the second limb of this formulation had to be a real one, shown objectively to exist; a plaintiff's subjective belief in an advantage, however genuinely held, was not sufficient.[20] Lord Diplock contrasted this with the subjective *St. Pierre* test, under which a bona fide but unsubstantiated belief by the plaintiff or his legal advisers that he would have an advantage by suing in England was sufficient to defeat the defendant's application for a stay.[21]

The trend away from judicial chauvinism towards judicial comity continued in *Aratra Potato Co. Ltd.* v. *Egyptian Navigation Co. (The El Amira)*[22] and *Amin Rasheed Shipping Corporation* v. *Kuwait Insurance Co. Ltd.*[23] In these cases, the Court of Appeal and the House of Lords (respectively) strongly discouraged judicial comparisons of the quality of justice available under different procedural systems and emphasized the undesirability of such comparisons being taken into account by a court in deciding whether to grant a stay.[24]

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[15] [1978] A.C. 795. See Weller (1978) 41 *M.L.R.* 739, Pryles, (1978) 52 *A.L.J.* 678; Carter, (1978) *B.Y.B.I.L.* 291.

[16] *Id.* at 829. Although Lord Keith favoured the continued use of the words "oppressive and vexatious" as part of the test, he countenanced their use only if the words were understood in a broad sense, without unnecessary moral connotations.

[17] *Id.* at 811-812 (*per* Lord Diplock); 817-818 (*per* Lord Salmon); 823 (*per* Lord Fraser of Tullybelton and Lord Russell of Killowen).

[18] *Id.* at 819.

[19] *Id.* at 812.

[20] *Id. per* Lord Diplock at 812; *per* Lord Salmon at 820-821 and *per* Lord Keith at 829.

[21] *Id. per* Lord Diplock at 812.

[22] [1981] 2 Lloyd's Rep. 119.

[23] [1983] 3 W.L.R. 241 at ??.

[24] *Supra* n. 18 at ??; *supra* n. 19 at 256.

"Forum non conveniens"

Despite the increasing emphasis by the reformulated English principles on factors such as appropriateness and convenience of the forum, the House of Lords has consistently stopped short of equating these rules with the general doctrine of "*forum non conveniens*" applied by Scottish and American courts. Broadly stated, this doctrine holds that a court will exercise its discretion to grant a stay of proceedings, if there is another tribunal of competent jurisdiction in which the case can be tried more suitably for the interests of all the parties and for the ends of justice.[25] In practice, the doctrine operates as a balance of convenience test in which the court looks for the forum which can most conveniently try the case.[26] Important considerations include availability and cost of obtaining witnesses and relative ease of access to sources of proof.[27]

The House of Lords in *The Atlantic Star* unanimously rejected an invitation to adopt *forum non conveniens* into English law.[28] Similarly in *MacShannon* the law lords were at pains to stress that the liberalized rules relating to stay could not be equated with "*forum non conveniens*" principles applied by Scottish and American courts.[29] Lords Diplock and Fraser acknowledged, however, that the two tests were similar in substance,[30] and consequently there has been much academic speculation about whether the House of Lords in *MacShannon* did in effect adopt a *forum non conveniens* test, but refused to call it such.[31]

Close analysis of Lord Diplock's test in *MacShannon* however shows that it falls short of a simple balance of convenience in two ways. Firstly, it requires that if a foreign forum is to be the natural forum it must be one where justice can be done at "substantially"[32] less inconvenience and expense. Impliedly, therefore, in order to secure a stay of English proceedings, it is not sufficient to show that a foreign forum is simply more appropriate than England,[33] rather it must be shown to be overwhelmingly more appropriate. Secondly, even if a foreign forum is found to be more appropriate, the action may still proceed in England if the plaintiff can establish a "legitimate personal or juridical advantage available to him only in England". The test is therefore not simply one of allowing the action to proceed in the more appropriate and convenient forum: there is a subtle leaning towards the English forum hearing the action, even where a foreign forum may in fact be more appropriate. Fortunately this remnant of judicial chauvinism appears to have been eradicated, at least for *lis alibi pendens* cases, by the House of Lords in *The Abidin Daver*.

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[25] *Sim* v. *Robinow* (1892) 19 665 *per* Lord Kinnear.

[26] See A. Briggs, "Forum non conveniens: now we are ten?"(1982) *I.C.L.Q.* 189 at 195. For an account of the Scottish approach, see P. Anton, *Private International Law* at 148-154.

[27] *Gulf Oil Corporation* v. *Gilbert* (1947) 330 U.S. 510.

[28] *Supra* n. 2 at 453-4, 462, 464, 473, 475-77.

[29] Lord Salmon's rejection of *forum non conveniens* was emphatic: "This doctrine 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", *supra* n. 15 at 817. Lord Diplock at 811 rejected the doctrine on the basis that it was "non consonant" with the traditional development of the common law to incorporate "holus bolus" from other systems of law doctrines hitherto unrecognized in English law.

[30] *Supra* n. 15 at 822.

[31] A. Briggs (1982) *I.C.L.Q.* 189; M. Pryles, 52 *A.L.J.*; Weiler (1978) 41 *M.L.R.* 739.

[32] *Supra* n. 15 at 812.

[33] *Ibid.*

The Abidin Daver

Facts and Decision

In March, 1982, a collision occurred in the Bosphorus, an international water-way, between a Cuban vessel ("Las Mercedes") and a Turkish vessel (the "Abidin Daver"). Both ships were damaged, and each blamed the other for the collision.

In April, 1982, the Turkish shipowners (the appellants) commenced proceedings in Turkey against the Cuban shipowners (the respondents). Three months later the respondents arrested a sister ship of the "Abidin Daver" in England and commenced proceedings in the High Court in respect of the same collision.

The Turkish shipowners applied to have the English action stayed.

At first instance Sheen, J. granted a stay of the English proceedings. On appeal, however, the Court of Appeal reversed this decision and lifted the stay. The appellants then appealed, successfully, to the House of Lords, where Lords Diplock, Edmund-Davies, Keith, Brandon and Templeman unanimously restored the decision of Sheen, J. to grant a stay.

The Judgments: An Overview

The crucial issue in the case was the weight to be given, in exercising discretion to stay proceedings, to the existence of a *lis alibi pendens* situation (that is, a situation where proceedings on the same subject matter were already pending between the same parties in another forum). Sheen, J. at first instance thought it was no longer consonant with the general approach to the question of stays adopted in *MacShannon* to give only minimal weight to *lis alibi pendens*. The Court of Appeal by contrast held that on the basis of comments made by Brandon, J. in *The Tillie Lykes*,[34] *lis alibi pendens* was not important enough in itself to displace the right of a plaintiff to choose his own forum.[35]

Lord Diplock in the House of Lords, however, considered that Sheen, J. had rightly identified the step forward taken in *MacShannon*, in the light of which *lis alibi pendens* was to be treated as a decisive factor in the exercise of discretion.[36] Lord Brandon, delivering the other key judgment, held that *The Tillie Lykes* had turned on its own special facts and that, in any case, the Court of Appeal, in regarding that case as authority for the proposition that little or no importance was to be attached to *lis alibi pendens*, had misinterpreted his judgment.[37] His Lordship went on to state[38] that in *The Tillie Lykes* he had in fact drawn a distinction between cases where a multiplicity of proceedings was of little consequence (and could therefore be disregarded) and cases where it had serious effects, and was therefore to be treated as a decisive factor.

Both Lord Diplock and Lord Brandon placed considerable emphasis on the problems that could result from concurrent proceedings on the same issue being allowed to continue to conclusion in different forums. In

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[34] [1977] 1 Lloyd's Rep. 124; at 127 Lord Brandon said: "the mere existence of a multiplicity of proceedings is not to be taken into account . . . as a disadvantage".

[35] [1983] 1 W.L.R. 884 at 891, 892.

[36] *Supra* n. 5 at 413.

[37] *Id.* at 423.

[38] *Ibid.*

particular they stressed the considerable additional inconvenience and expense, the danger of conflicting decisions, and the possibility of an "ugly rush" to acquire judgments, which could raise novel issue estoppel problems for English law.[39] According to Lord Diplock:

> Comity demands that such a situation should not be permitted to occur as between courts of two civilized and friendly states. It is a recipe for confusion and injustice.[40]

Lord Diplock (with whom Lord Edmund-Davies, Lord Keith and Lord Templeman agreed) acknowledged that in cases involving a *lis alibi pendens*, the law now stood on the same basis as *forum non conveniens*:[41]

> 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* [1974] A.C. 436; *MacShannon* [1978] A.C. 795 and *Amin Rasheed* [1983] 3 W.L.R. 241 is that judicial chauvinism has been replaced by judicial comity to an extent which I think the law 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*. (emphasis added)

Lord Diplock went on to state a basic test to be applied to determine whether a stay should be granted in *lis alibi pendens* cases:

> . . . where a suit . . . is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute . . . and the defendant in a foreign suit seeks to institute as plaintiff an action in England about the same matter . . . then the additional inconvenience and expense that must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries . . . 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, that is of such importance that it would cause injustice to him to deprive him of it."[42]

On the facts of the case, their Lordships regarded Turkey as the natural and appropriate forum.[43] Neither the parties nor the collision had any connection with England, whereas the Turkish element was very strong: the collision had occurred in Turkish waters and had involved a Turkish ship manned by a Turkish crew. As far as witnesses on the Turkish side were concerned, Turkey was clearly the most convenient and economic forum, while for the Cuban witnesses there was little to choose between England and Turkey.

The House then considered whether the Cuban shipowners had established the existence of any advantage in England that was of such

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[39] *Id.* at 411-412 (*per* Lord Diplock); 423-424 (*per* Lord Brandon).

[40] *Id.* at 412.

[41] *Id.* at 411.

[42] *Id.* at 411, 412.

[43] *Id.* at 409 (*per* Lord Diplock); 415-416 (*per* Lord Keith); 421 (*per* Lord Brandon).

importance it would cause injustice to deprive them of it. Lord Diplock could see no evidence that the costs of litigation would be greater in Turkey than in England.[44] Nor was there any evidence that the Cuban shipowners would be disadvantaged by being counter-claimants in Turkey as opposed to being plaintiffs in England, as the Turkish shipowners had offered to provide security for the Cuban shipowner's counter-claim in the Turkish action.[45] A suggestion by the Cuban shipowners that they would have an advantage coming to England because of the great experience of the English Maritime court was vigorously disposed of, their Lordships steadfastly adhering to the principles of judicial comity espoused in *The El Amria* and in *Amin Rasheed* by refusing to be drawn into any comparisons between the relative merits of Turkish and English courts or procedures.[46]

It was concluded that as the requisite advantage had not been established by the Cuban shipowners, the additional inconvenience and expense of bringing an action in England had not been justified and that the English action should be stayed in favour of the proceedings in Turkey.

Significance of the Decision: Analysis and Comment

Generally, the *Abidin Daver* continues the trend of the English courts towards greater judicial comity through liberalization of the rules governing exercise of discretion to grant a stay of English proceedings. Like *MacShannon, Abidin Daver* advocates that an English Court, instead of automatically assuming jurisdiction where competent, should exercise its discretion by granting a stay of English proceedings if there is another more appropriate forum in which the action can be heard. This approach is desirable because it is consistent with the spirit of international legal cohesion and integration of the twentieth century, it avoids local parochialism, and it promotes greater efficiency by empowering courts to decline to hear cases having little connection with the forum.

Lis Alibi Pendens

The Abidin Daver clears up the confusion that existed concerning the weight to be given by a judge, in deciding whether to stay English proceedings, to the fact that there were proceedings pending in another forum on the same subject matter.

While *St. Pierre* dominated, little weight was given to the existence of *a lis alibi pendens.* The fact that proceedings were already pending in another forum was not seen as sufficiently vexatious or oppressive to the defendant to deprive the plaintiff of his "advantage" of suing in England.[47]

There was confusion about the extent to which this situation had been altered by the liberalization of the *St. Pierre* rules in the *Atlantic Star* and *MacShannon.* Neither of these cases directly answered the question: *MacShannon* did not involve a *lis alibi pendens* and *The Atlantic*

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[44] *Id.* at 410.

[45] *Ibid.*

[46] *Id.* at 410 (*per* Lord Diplock); 424 (*per* Lord Brandon).

[47] See the following cases as examples of refusal to grant a stay on the basis of *lis alibi pendens: The Janera* [1928] P. 55; *The Soya Margareta* [1961] 1 W.L.R. 709; *The Quo Vadis* [1957] 1 Lloyd's Rep. 425.

Star was not treated as a *lis alibi pendens* case, although technically the plaintiffs in the English action had taken a precautionary step in a Belgian court to forestall a time bar.

It is now clear from the judgments of Lord Diplock and Lord Brandon in *The Abidin Daver* that *lis alibi pendens* is to be given substantial weight.[48] If litigation is already pending in its natural forum it will be necessary for the plaintiff in England to demonstrate weighty advantages to resist an application for a stay.[49] This development is to be welcomed because it reduces the risk of conflicting judgments and avoids unnecessary waste of time and resources by courts.

The Onus of Proof Problems in MacShannon

It was agreed generally by the House of Lords in *MacShannon* that the defendant bore the onus of proof in relation to the first part of Lord Diplock's test.[50] The law lords were divided, however, about which party bore the onus of proving the second part—that a stay would not deprive the plaintiff of a legitimate personal or juridical advantage which would be available in an English court. Lord Diplock claimed the onus shifted to the plaintiff here,[51] whereas Lords Russell, Salmon and Fraser thought it stayed with the defendant.[52] There appears to be some clarification of this issue in *The Abidin Daver*. Lord Diplock strongly reiterates the view he took in *MacShannon*[53]—that the plaintiff as the party seeking to rely on the advantage bears the onus of proving that the advantage exists. Lord Keith also appears to support this view,[54] although the other law lords are silent on the issue.

Forum Non Conveniens

The major significance of *The Abidin Daver* lies in Lord Diplock's recognition of *forum non conveniens* and his formulation of a more liberal test to give effect to this doctrine.[55] Lord Diplock's test represents a distinct progression from his *MacShannon* test in two ways.

Firstly, it is easier under the *Abidin Daver* test to show that another forum is the natural and appropriate one. As discussed earlier, the test in *MacShannon* required that there be another forum where justice could be done at "*substantially*" less inconvenience and expense. Thus, there was still a slight bias in favour of the English forum: to qualify as the natural and appropriate forum a non-English forum had to be overwhelmingly more appropriate. A mere balance of convenience would not suffice. Under the *Abidin Daver* formulation, however, all that is required in cases involving the co-existence of proceedings abroad is that the foreign forum

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[48] [1984] A.C. 396 at 413 (*per* Lord Diplock); at 423 (*per* Lord Brandon).

[49] *Supra* n. 42.

[50] *Supra* n. 15.

[51] *Id.* at 812.

[52] *Id.* at 823 (*per* Lord Russell); 819 (*per* Lord Salmon); 822 (*per* Lord Fraser). See also Carter, (1978) *B.Y.B.I.L.* 291 where the suggestion is made at 293 that the plaintiff bears an evidential burden in respect of the second limb of *MacShannon*.

[53] [1984] A.C. 396 at 411-412.

[54] *Id.* at 416.

[55] *Id.* at 411-412.

be "a natural and appropriate one".[56] There is no indication that it has to be substantially more appropriate than the English forum.

Secondly, the *Abidin Daver* formulation makes it more difficult for the plaintiff to resist a stay on the ground that he would be deprived of a legitimate personal and juridical advantage available only in England. To resist a stay under *MacShannon* principles it was only necessary for the plaintiff to show deprivation of a real advantage objectively established.[57] Under the *Abidin Daver* test, however, the plaintiff also has to establish that the advantage is "of such importance it would cause injustice to him to deprive him of it".[58] Lord Diplock cites as examples of such decisive advantages avoidance of political prejudice against the plaintiff or excessive delay.[59] These types of advantages would obviously be much harder to establish than those required by the *MacShannon* test.

The combined effect of the above two factors is to make it easier to obtain a stay of proceedings under the *Abidin Daver* test than under the *MacShannon* test. Lord Diplock's test in *The Abidin Daver* rests on a basic *forum non conveniens* principle that allows proceedings to be stayed simply because there is a more appropriate forum.[60]

Is this more liberal "forum non conveniens" test to be applied in cases where there are no concurrent proceedings abroad?

Lord Diplock clearly intended that his *forum non conveniens* type test be confined to cases involving a *lis alibi pendens.* Although he spoke generally about the changes in the discretion to grant a stay that had occurred over the last decade, he was careful to confine his remarks about *forum non conveniens* to the field of law with which the appeal was concerned, namely *lis alibi pendens.*[61] According to Fawcett,[62] Lord Diplock appears to regard *lis alibi pendens* cases as posing a special problem because of the serious consequences that may result if two actions concerning the same subject matter are allowed to proceed to conclusion in different jurisdictions. Because of this, his Lordship appears to think it necessary to invoke a special test that makes it easier to obtain a stay of English proceedings where proceedings are already pending in a natural and appropriate forum abroad. So far as cases involving no *lis alibi pendens* are concerned, Lord Diplock seems to contemplate that *MacShannon* principles still apply.

It is submitted that there are strong arguments favouring the adoption of Lord Diplock's *Abidin Daver* test in cases where there is no pending litigation. There appears to be no logical reason for giving less weight to the natural and appropriate forum simply because there is no multiplicity of proceedings. Barma and Elvin[63] argue cogently that the policy reasons

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[56] *Ibid.*

[57] *Supra* n. 19.

[58] *Supra* n. 42.

[59] *Id.* at 411.

[60] Note that "*forum non conveniens*" does not apply in a "single forum" case where there is no possibility of argument over the ascertainment of the natural forum. See *British Airways Board* v. *Laker Airways Ltd.* [1984] 3 W.L.R. 413, 423-421.

[61] *Id.* at 411.

[62] See Fawcett, "Lis Alibi Pendens and the Discretion to Stay", (1984) 47 *Mod. L.R.* 481-486.

[63] A. Barma and D. Elvin, "Forum non conveniens: where to from here?" (1985) 101 *L.Q.R.* 56-58.

underlying the need to give increase significance to the natural forum (namely the desirability of decreasing judicial chauvinism and having the issue tried at less inconvenience and expense) apply just as much in cases where the action is brought in England alone as they do in *lis alibi pendens* cases.

Moreover, the test applied in *Abidin Daver* poses fewer practical problems than the corresponding *MacShannon* test because it gives less weight to the problematic "personal or juridical advantage" factor. Under the *MacShannon* test the existence of a "legitimate personal or juridical advantage" available only in England is able conclusively to outweigh a foreign forum even if such forum is the natural and appropriate one. Under *The Abidin Daver* test this will only happen if the advantage is of such a fundamental nature that its deprivation would cause injustice. Much academic criticism has been directed at the "advantage" factor;[64] it has been argued that any attempt to establish that proceedings in one country have advantages over proceedings in another necessarily involves a comparison of the relative merits of the two procedural systems which flies in the face of *The El Amria* and *Amin Rasheed.* Moreover, the proof that a particular advantage is "legitimate" can cause problems as judges tend to take different views about what advantages qualify as "legitimate". For example, in *Castanho* v. *Brown and Root (U.K.) Ltd*,[65] the prospect of recovering higher damages in a tort action in the United States was seen as an advantage. By contrast, in *Smith Kline* v. *Bloch*[66] it was not considered to be so. Barma and Elvin argue that the epithet "legitimate" could become a "mask" for a narrower form of judicial chauvinism—an expression of disapproval of the way things are done in other legal systems.[67]

Although the *Abidin Daver* test still uses the advantage factor it limits its operation to extreme cases and is thus to be preferred.

Developments in Australia

The Diplock test in *MacShannon* has been accepted and applied in *Garseabo Nominees Pty. Ltd.* v. *Taub Pty. Ltd.*[68] and *A.* v. *B.*[69] As yet, however, there does not appear to have been any recognition of *The Abidin Daver* by Australian courts.

In a recent, unreported decision in the New South Wales Supreme Court, *Batchelor* v. *Dahlie Mining Co. Ltd.*,[70] Lusher, J. applied the Diplock formulation in *MacShannon* and, in his discretion, granted a stay of an action in New South Wales where, in his opinion, the appropriate forum was Tasmania. Although this case was decided ten months after *The Abidin Daver* no mention is made of the latter case in the judgment. This could be because, as there was no *lis alibi pendens* involved, Lusher, J. did not think *The Abidin Daver* relevant. A more probable explanation

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[64] See A. Briggs (1982) 31 *I.C.L.Q.*
[65] [1981] A.C. 557.
[66] [1983] 1 W.L.R. 730.
[67] *Supra* n. 63 at 59.
[68] [1979] N.S.W.L.R. 663.
[69] [1979] N.S.W.L.R. 37.
[70] Supreme Court Library. No. 15578 of 1983. This case is currently on appeal to the Court of Appeal.

is that Australian courts are as yet unaware of the significance of *The Abidin Daver.*

Conclusion

The adoption of "forum non conveniens" in *The Abidin Daver* is a welcome development of the law. It embodies the desirable principles of judicial comity espoused in *The El Amria* and *Amin Rasheed* by giving maximum weight to the more appropriate and convenient forum. At the same time, however, the doctrine is sufficiently flexible to prevent a plaintiff being forced to sue in this forum in cases where he would suffer extreme injustice. It is to be hoped that "*forum non conveniens*" will not be confined to *lis alibi pendens* cases, but will, instead, be eventually recognized as the fundamental principle governing *all* cases involving exercise of discretion to grant a stay of proceedings.

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