RECONSIDERING THE AUSTRALIAN *FORUM (NON) CONVENIENS* DOCTRINE

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Abstract A quarter of a century after the High Court of Australia's landmark ruling in *Voth v Manildra Flour Mills Pty Ltd*, this article examines the application of the modern-day *forum (non) conveniens* doctrine in Australia. It outlines the prevailing view in the academic literature which claims that the Australian doctrine is functionally different from its English counterpart, articulated in *Spiliada Maritime Corporation v Cansulex Ltd.* Through a detailed assessment of the case law and commentary, this article questions that widely accepted orthodoxy and demonstrates it to be unpersuasive and reconceptualizes our understanding of the *forum (non) conveniens* doctrine in Australia. Its main contention is that while, theoretically, there may be a narrow conceptual space between *Spiliada* and *Voth*, it is so narrow as to be practically non-existent.

Keywords: Australian *forum (non) conveniens* doctrine, discretionary (non-)exercise of jurisdiction, English *forum (non) conveniens* doctrine, jurisdiction, private international law.

I. INTRODUCTION

December 2015 marked the twenty-fifth anniversary of the High Court of Australia's landmark ruling in *Voth v Manildra Flour Mills Pty Ltd*.[1] This judgment, which has been widely regarded as the definitive pronouncement on the application of the *forum (non) conveniens* doctrine in Australia, was significant for two main reasons. First, it addressed some of the uncertainties[2] concerning the practice of discretionary (non-) exercise of jurisdiction in Australia which had been generated following the High Court's judgment in *Oceanic Sun Line Special Shipping Co Inc v Fay*.[3] The decision in *Voth* confirmed that the 'clearly-inappropriate-forum test', which had been first conceived of in Deane J's judgment in *Oceanic Sun*,[4] provided the basis for the Australian court's approach to the practice of discretionary staying of proceedings, and the related notion of service out of the jurisdiction.

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[1] (1990) 171 CLR 538.

[2] See L Collins, 'The High Court of Australia and forum conveniens: a further comment' (1989) 105 LQR 364, 366 and M Pryles, 'Forum Non Conveniens – the Next Chapter' (1991) 65 ALJ 442, 443.

[3] (1988) 165 CLR 197.

[4] ibid 247–8.

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Second, and more fundamentally, the judgment in *Voth* has been widely regarded as signifying a point of divergence in the Australian court's approach to the *forum (non) conveniens* doctrine from the position in England, following its restatement in 1986 in *Spiliada Maritime Corporation v Cansulex Ltd*.[5] Many private international law scholars and practitioners have observed that the *Voth* test 'is not the same as that propounded in the *Spiliada* [case]';[6] that it is, in fact, a 'unique approach'[7] which is 'stricter' than the English doctrine,[8] making it harder for a defendant to obtain a stay of proceedings in Australia than in England. In many ways, the prevailing view is that the *Voth* and *Spiliada* tests are *functionally* different doctrines.[9]

A quarter of a century on from the ruling in *Voth*, this article reconsiders the Australian *forum (non) conveniens* doctrine. The discussion is presented in three main parts. Part II outlines briefly the doctrine's origins and development in Australia. Part III sets out the orthodox understanding of the modern-day *forum (non) conveniens* doctrine in Australia. Part IV challenges the prevailing conception of the *Voth* test, based on a detailed analysis of the Australian *forum (non) conveniens* cases, concerning international-private-law (rather than interstate) disputes. It argues that the accounts pointing to differences between *Voth* and *Spiliada* are overstated and, hence, unpersuasive. Accordingly, the article's main argument is that while, theoretically, there may be a narrow conceptual space between *Spiliada* and *Voth*, it is so narrow as to be practically non-existent.

II. *FORUM (NON) CONVENIENS* DOCTRINE IN AUSTRALIA

A. The Doctrine's Historical Development

For much of the twentieth century, the Australian and English courts' approaches to discretionary (non-)exercise of jurisdiction were essentially identical. This similarity was largely due to the (mostly one-way) influence of English cases on the

[5] [1987] AC 460. Indeed, a few other common law jurisdictions, such as New Zealand, Hong Kong and Singapore, have followed the developments in English law.

[6] Pryles (n 2) 442, 449.

[7] RA Brand and SR Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (OUP 2007) 90.

[8] P Prince, 'Bhopal, Bougainville and Ok Tedi: Why Australia's *Forum Non Conveniens* Approach is Better' (1998) 47 ICLQ 573, 576 and 597.

[9] eg L Marasinghe, 'International Litigation: Choice of Forum' (1993) 23 UWALRev 264, 271–3; EL Hayes, '*Forum Non Conveniens* in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation' (1992) 26 UBCLawRev 41, 52–4; R Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23 MULR 30, 36 and 63–4; G Lindell, 'Choice of Law in Torts and Another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum Non Conveniens* in Australia' (2002) 3 Melbourne Journal of International Law 364, 376–8; M Keyes, 'Jurisdiction in International Family Litigation: A Critical Analysis' (2004) 27 UNSWLJ 42, 51 (fn 48); Lord Collins *et al.* (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) [12–011]; R Mortensen *et al., Private International Law in Australia* (2nd edn, LexisNexis Butterworths 2011) ch 4; M Davies *et al., Nygh's Conflict of Laws in Australia* (9th edn, LexisNexis Butterworths Australia 2014) ch 8; and, A Briggs, *Private International Law in English Courts* (OUP 2014) [4.414]–[4.415]; and, A Briggs, *Civil Jurisdiction and Judgments* (6th edn, Informa Law from Routledge 2015) [4.39].

development of this area of law in Australia.[10] For instance, in *Maritime Insurance Ltd v Geelong Harbor Trust Commissioners*,[11] Australian law's pre-*Voth locus classicus* in the context of staying of proceedings initiated as of right, the High Court embraced the 'vexatious-and-oppressive test', as had been applied in early twentieth-century English cases.[12] This trend continued well into the second half of the twentieth century.[13]

Similarly, English authorities shaped the Australian court's approach in service-out cases. Whether the proceedings were served on a defendant based in another Australian state[14] or another country,[15] Australian counsel (and judges) frequently referred to well-known English decisions[16] in arguing (and outlining their reasoning) on whether jurisdiction should be asserted in a given case.

In *The Atlantic Star*,[17] in 1973, the English court began gradually to transform its approach to discretionary staying of proceedings by relaxing its conception of the vexatious-and-oppressive test. This significant development did not go unnoticed in Australia; Australian counsel and judges were quick in employing the liberalized test in their submissions and judgments.[18] Indeed, shortly after Lord Diplock's reformulation of the liberalized vexatious-and-oppressive test in *MacShannon v Rockware Glass Ltd*[19] courts in Australia appeared, almost as a matter of course, to modify their approach accordingly. Noteworthy in this respect is the 1980 decision in *In the Marriage of Takach (No 2)*.[20] This was a *lis alibi pendens* case, concerning, *inter alia*, two sets of divorce proceedings in Hong Kong and 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.[21] Similarly, the *MacShannon* test formed the basis for granting stays of proceedings in interstate cases. For instance, in *Garseabo Nominees Pty Ltd v Taub Pty Ltd*, where the defendant had sought to stay the

[10] The Australian court relied on the English cases, even though it was not generally bound to do so. Traditionally, courts in Australia were only bound to follow the decisions of the Privy Council, which used to act as their final appellate court. This aspect of the Privy Council's role was gradually confined—following the enactment of the Privy Council (Limitation of Appeals) Act 1968 and Privy Council (Appeals from the High Court) Act 1975—and, subsequently, completely abolished—after the Australian Act 1986 came into force.

[11] (1908) 6 CLR 194.

[12] Particularly, *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141 and *Egbert v Short* [1907] 2 Ch 205. Scott LJ consolidated the pronouncements in these (and various other) cases into a test in *St Pierre v South American Stones (Gath & Chaves) Ltd* [1936] 1 KB 382, which became English law's *locus classicus* in the context of staying of as-of-right proceedings.

[13] *Cope Allman (Australia) Ltd v Celermajer* [1968] 11 FLR 488 and *Telford Panel and Engineering Works v Elder Smith Goldsborough* (1969) VR 193 (both interstate cases).

[14] *WA Dewhurst & Co Pty Ltd v Cawrse* [1960] VR 278; *Richardson v Tiver* [1960] VR 578 and *Earthworks & Quarries Ltd v FT Eastment & Sons Pty Ltd* [1966] VR 24.

[15] *Lewis Construction Co Pty Ltd v Tichauer S/A* [1966] VR 341 and *Hayel Saeed Anam & Co v Eastern Sea Freighters Pty Ltd* (1973) 7 SASR 200.

[16] *Société Générale De Paris v Dreyfus Brothers* (1887) 37 Ch D 215; *The Hagen* [1908] P 189; *Rosler v Hilbery* [1925] Ch 250; *In Re Schintz* [1926] Ch 710; and, *The Fehmarn* [1957] 2 Lloyd's Rep 551.

[17] [1974] AC 436.

[18] eg *Clutha Developments Pty Ltd v Marion Power Shovel Co Inc* [1973] 2 NSWLR 173; *Keenco v South Australian and Territory Air Service Ltd* [1974] 23 FLR 155; and, *Maple v David Syme & Co Ltd* [1975] 1 NSWLR 97: discussed in P Nygh, 'Recent Developments in Private International Law' (1974–1975) 6 Australian International Law Journal 172, 172.

[19] [1978] AC 795.

[20] [1980] 47 FLR 441.

[21] ibid 447–8.

proceedings in New South Wales in favour of the Queensland court, Yeldham J considered that the Australian High Court's ruling in the *Maritime Insurance* case did not stop him from applying the *MacShannon* test.[22] After a detailed discussion of the various speeches in the *MacShannon* case[23] Yeldham J ordered a stay of proceedings in New South Wales.[24]

In 1986 the transformation of the English court's approach to the practice of discretionary staying of proceedings was completed in the House of Lords' landmark ruling in *Spiliada*. Under the *Spiliada* test, which is also known as the 'more-appropriate-forum test', in order to obtain a stay of as-of-right proceedings, the defendant has to persuade the English 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 closer connection than it has with the English court.[25] If these hurdles are overcome it would then be for the claimant 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 the more closely connected forum.[26]

B. *The* Oceanic Sun *Case*

Given that for nearly a century courts in Australia had incorporated into Australian law the changes in the English approach to discretionary (non-)exercise of jurisdiction, it was reasonable to assume that,[27] when presented with the opportunity, they would do the same in relation to 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*. Rather surprisingly though, in a three-to-two majority ruling,[28] the High Court refused to adopt the *Spiliada* doctrine.

The facts of the case are well known.[29] For our purposes, therefore, it is only necessary to revisit the majority Justices' rationale for resisting the adoption of the *Spiliada* doctrine. The majority Justices' stance, in opposition to *Spiliada*, was premised on two main considerations. First, they regarded that the scope for the court's discretion under the more-appropriate-forum test was unduly broad and 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*]'.[30] Similarly, Deane J deemed undesirable the post-*Spiliada* expansion in the scope of the court's discretion to stay its proceedings.[31] Second, the majority regarded the *Spiliada* test to be out of step with earlier Australian authorities—specifically, the *Maritime Insurance* case. According to Brennan J, 'the function which the courts of [Australia] would be required to perform if

[22] [1979] 1 NSWLR 663, 667. [23] ibid 668–70.

[24] See also *A v B* [1979] 1 NSWLR 57 and *Ranger Uranium Mines Pty v BTR Trading (Q) Pty Ltd* [1985] 75 FLR 422.

[25] *Spiliada* (n 5) 476. The same test applies in service-out cases, though claimant bears the burden of proof. [26] ibid 478.

[27] There was certainly no indication to the contrary in the Australian literature at the time: P Nygh, *Conflict of Laws in Australia* (4th edn, Butterworths 1984) 63–4.

[28] Brennan, Deane and Gaudron JJ; Wilson and Toohey JJ dissenting.

[29] See, mainly, M Pryles, 'Judicial Darkness on the Oceanic Sun' (1988) 62 ALJ 774; FMB Reynolds, 'Forum non conveniens in Australia' (1989) 105 LQR 40; and, A Briggs, 'Wider still and wider: the bounds of Australian exorbitant jurisdiction' [1989] LMCLQ 216.

[30] *Oceanic Sun* (n 3) 238. [31] ibid 254. Gaudron J alluded to similar concerns: 265.

the new English approach were adopted would … be inconsistent with what we have hitherto understood to be the function and duty of the courts'.[32] Deane and Gaudron JJ broadly shared the same sentiment and, hence, were unwilling to embrace the *Spiliada* test.[33]

While united in their rejection of the *Spiliada* doctrine, the majority Justices were divided on the doctrinal framework for the court's application of the *forum (non) conveniens* doctrine in Australia. Brennen J favoured an approach which afforded the court a narrow scope for exercising its discretion.[34] Therefore, he considered that the vexatious-and-oppressive test, as outlined in the *Maritime Insurance* case, should continue to provide the basis for the court's discretionary (non-)exercise of jurisdiction.[35] Deane and Gaudron JJ, however, preferred a *forum (non) conveniens* doctrine which gave the court more room for manoeuvre. Thus Deane J, who had the support of Gaudron J,[36] proposed that, in the context of as-of-right proceedings, 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'.[37]

Deane and Gaudron JJ were adamant in distinguishing between their approach and that outlined in *Spiliada*. They emphasized that under the clearly-inappropriate-forum test the court was concerned with establishing *its own* (in)appropriateness to entertain the dispute. Under the *Spiliada* test, though, the question is whether the available *foreign forum* is (in)appropriate. 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'.[38]

The High Court's decision in the *Oceanic Sun* case was criticized on three main bases. First, it was considered that the High Court had applied the wrong test to the facts of the case. *Oceanic Sun* was a service-out case. However, virtually all the submissions and reasoning in the case suggested that it had been commenced as of right. Consequently, the critics have argued that the decision in *Oceanic Sun* broke with long-standing precedent and, thereby, made it more difficult for a defendant to resist the court's jurisdiction in a service-out case.[39] Second, the majority Justices' opposition to *Spiliada* was criticized as it rendered the Australian approach to discretionary (non-)exercise of jurisdiction out of step with the doctrine in the United States and England.[40] Finally, and most significantly, the division in the majority Justices' pronouncements on the application of the *forum (non) conveniens* doctrine was criticized as it created doctrinal incoherence in this aspect of Australian law.

C. *The* Voth *Ruling*

Less than three years after its ruling in the *Oceanic Sun* case, the Australian High Court was invited to respond to these criticisms in the *Voth* case. As the facts of *Voth* have been widely

[32] ibid 238. [33] ibid 253 (Deane J) and 265 (Gaudron J). [34] ibid 238–9.
[35] ibid 241. [36] ibid 266. [37] ibid 248. [38] ibid 248 (Deane J) and 266 (Gaudron J).
[39] A Briggs, 'Forum non conveniens in Australia' (1989) 105 LQR 200, 200; Collins (n 2) 364, 364–5; and, Briggs (n 29) 216, 221–2. [40] Pryles (n 29) 774, 784–5.

considered in the existing academic commentary,[41] the discussion in this section only focuses on the High Court's pronouncements on the application of the *forum (non) conveniens* doctrine.

The court acknowledged that the divergences in the judgments in *Oceanic Sun* had led to confusion in the understanding of the Australian court's approach to discretionary (non-)exercise of jurisdiction.[42] In response to this problem, and in order to arrive at a more settled and authoritative position, all but one of the Justices[43] endorsed the clearly-inappropriate-forum test as the basis for applying the *forum (non) conveniens* doctrine. Therefore, the traditional vexatious-and-oppressive test was formally abandoned.

Moreover, 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 modern-day *locus classicus* on the application of the Australian *forum (non) conveniens*, the Justices were critical of *Spiliada* because, in their view, it allowed the English court to engage in the assessment of the (un) suitability of a *foreign* court.[44] Instead, they regarded the clearly-inappropriate-forum test to be much more defensible as it concentrated on the determination of the (in) appropriateness of the *local* forum by an Australian judge, who would be best placed to make such a pronouncement.[45] 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*.[46] Accordingly, it set out that, regardless of the availability of another foreign forum with closer connection to the dispute (than the local forum), the *Voth* test enables the Australian court to sustain its proceedings if it is not a clearly inappropriate forum.[47]

Nevertheless, in the joint judgment, the Justices adopted a much more emollient tone when discussing the *Spiliada* test. In the *Oceanic Sun* ruling, when outlining the clearly-inappropriate-forum test, Deane and Gaudron JJ had drawn no support from the English doctrine. In *Voth*, though, Mason CJ, Deane, Dawson and Gaudron JJ stated that the factors at the heart of the application of the *Spiliada* test, as outlined in Lord Goff of Chieveley's speech, provided 'valuable assistance' for the exercise of the clearly-inappropriate-forum test.[48] Indeed, they relied on those very considerations in finding that, on the facts in *Voth*, Australia was a clearly inappropriate forum for entertaining the dispute. The joint judgment emphasised that there was little difference between the approaches in the *Voth* and *Spiliada* tests and that they were 'likely to yield the same result … in the majority of cases'.[49] Furthermore, and similar to the position under English law, it made it plain that the clearly-inappropriate-forum test provided the basis for the application of the court's discretion in service-out cases. In these cases, the onus would remain on the plaintiff to show that the Australian forum is not clearly inappropriate.[50]

[41] eg L Collins, 'The High Court of Australia and *forum conveniens*: the last word?' (1991) 107 LQR 182; Pryles (n 2); P Brereton, '*Forum Non Conveniens* in Australia: A Case Note on *Voth v Manildra Flour Mills*' (1991) 40 ICLQ 895; and, Garnett (n 9) 30, 33–6.

[42] *Voth* (n 1) 552 (Mason CJ, Deane, Dawson, Gaudron JJ, who handed down a joint judgment) and 572 (Brennan J).

[43] Toohey J maintained his stance in the *Oceanic Sun* and applied the *Spiliada* test.

[44] *Voth* (n 1) 558–9.

[45] ibid 560. [46] ibid 558–62. [47] ibid 559. [48] ibid 566. [49] ibid 559.

[50] ibid 565. See also Mortensen (n 9) [2.42]. The defendant bears the burden in as-of-right proceedings.

III. THE ORTHODOX UNDERSTANDING OF THE MODERN-DAY AUSTRALIAN *FORUM (NON) CONVENIENS* DOCTRINE

Notwithstanding these observations, and the High Court's more conciliatory tone towards *Spiliada*, the orthodox understanding of the modern-day *forum (non) conveniens* doctrine in Australia is that the English and Australian approaches to discretionary (non-)exercise of jurisdiction are *functionally* different. According to the prevailing view, as reflected in the Australian legal literature, it is more difficult to obtain a stay of proceedings in Australia than is the case under the *Spiliada* doctrine in England. For instance, the editors of *Private International Law in Australia* have advanced the view that the *Voth* test is 'a narrower one than that of *Spiliada*',[51] and 'has not provided defendants much opportunity to have proceedings in Australia restrained'.[52] Professor Keyes has also pointed to the doctrinal divergence between *Voth* and *Spiliada*, observing that, while *Voth* is a 'heavily forum-centric' doctrine, the *Spiliada* test is more outward looking and hence 'more likely to lead to fair results in international disputes'.[53]

A similar view, confirming the difference in the *forum (non) conveniens* doctrines in England and Australia, is also prevalent across the common law world. In England, for instance, the editors of *Dicey, Morris and Collins* have observed that the discretion afforded to the court under the *Voth* test is of 'a much more restricted form' than the one under the *Spiliada* doctrine and 'continues to invoke the notions of vexation and oppression'.[54] Similarly, Professor Briggs has stated that the differences in the application of the doctrines in England and Australia are greater in practice than had been predicted in *Voth*.[55] In Canada, it has also been suggested that it is more onerous for a defendant to obtain a stay under the *Voth* test than under *Spiliada* because 'it may be that very tenuous connections with Australia will be sufficient to justify a finding that the Australian court is not "clearly inappropriate"'.[56]

Given the *Voth* test's perceived plaintiff-friendly nature in as-of-right proceedings, it has been considered that the doctrinal gap between the English and Australian *forum (non) conveniens* doctrines is even wider in the context of service-out cases. For instance, Professor Briggs has suggested that, in service-out cases, it is much easier for a claimant to persuade the Australian court to sustain its proceedings than it is the case for a claimant in the same context in England.[57] Likewise, Mr Brereton SC has stated that 'arguably the test in *Voth* will too readily lead to the exercising of jurisdiction over non-residents'.[58] In this regard, the principles on which proceedings can be commenced against a foreign-based defendant have been considered to be more favourable for plaintiffs in Australia than anywhere else which recognizes service-out jurisdiction.[59]

[51] Mortensen (n 9) [4.21].
[52] ibid [4.22].
[53] Keyes (n 9) 42, 63 (citations omitted). See also Pryles (n 2); Marasinghe (n 9); Prince (n 8); and, Lindell (n 9).
[54] *Dicey, Morris & Collins* (n 9) [12–011].
[55] Briggs (n 9) [4.39]. See also Private International Law in English Courts (n 9) [4.414]–[4.415].
[56] Hayes (n 9) 41, 54.
[57] Briggs (n 9) [4.39].
[58] Brereton (n 41) 895, 900. See also Hayes (n 9) 41, 52.
[59] Collins (n 41) 182, 187.

An assessment of the various legal sources highlights that the prevailing understanding of *Voth* is broadly founded on two main considerations. The first (and by far the most significant) one is the *dicta* in the joint judgment in *Voth*. As discussed earlier, Mason CJ, Deane, Dawson and Gaudron JJ had stated that the English and Australian *forum (non) conveniens* doctrines were different because under the clearly-inappropriate-forum test the Australian court would assess *its* (un)suitability as opposed to that of *another foreign forum*. In other words, the Australian court's discretionary (non-)exercise of jurisdiction did not hinge on the availability of another more appropriate forum elsewhere. This conceptual gap has provided the bedrock for the proponents of the orthodox understanding of the *Voth* test to argue that the English and Australian doctrines are different.[60] Put simply, they have been persuaded that the apparent difference of focus in the Australian and English courts' application of *Voth* and *Spiliada* necessarily denotes that the two doctrines are *functionally* different. The second consideration, on which the prevalent view of *Voth* is founded, is that, despite long-running criticisms of it,[61] the Australian High Court has continued to endorse the clearly-inappropriate-forum test. *Regie Nationale des Usines Renault SA v Zhang*[62] and *Puttick v Tenon Ltd*[63] were two of the most recent cases in which the High Court reaffirmed the *Voth* test. The High Court's refusal in *Puttick* to replace the *Voth* test with *Spiliada*, prompted the editors of *Nygh's Conflict of Laws in Australia* to observe that 'the test is entrenched in Australian law' and that it is only through legislation that it could be reformed.[64]

Against this backdrop, almost any instance in which, in the face of a *forum (non) conveniens* application, the Australian court has chosen to assert jurisdiction over a private international law dispute has been regarded as an example of *Voth*'s more restrictive scope of operation, relative to its English counterpart. Consider, for example, the decision in *Zhang*. In this service-out case, the plaintiff, an Australian resident, suffered serious personal injuries while driving a hired car which had been manufactured by the French defendants during his visit to New Caledonia, a French overseas territory in the Pacific. He argued that his injuries had been caused by the defendant's negligence. One of the main questions for consideration concerned the application of the *forum (non) conveniens* doctrine. By a five-to-two majority decision[65] the High Court ruled that the Australian proceedings should be sustained. Although some (though certainly not all) of the factors in the case—such as the *lex causae* and the location of the witnesses—pointed to France, the court concluded that Australia was not a clearly inappropriate forum and, consequently, chose to sustain the Australian proceedings. Commenting on the case in its immediate aftermath, Professor Lindell regarded the decision in *Zhang* as illustrative of the practical differences between the Australian and English approaches to the application of the *forum (non) conveniens* doctrine.[66] Similarly, in a case note in the *Law Quarterly Review*, Professor Smart stated that '*Zhang* confirms that extended jurisdiction may be exercised by the Australian courts despite the fact that the dispute has a closer connection

[60] eg Lindell (n 9) 364, 378.
[61] eg P Nygh, *Conflict of Laws in Australia* (6th edn, Butterworth 1995) 108 and Garnett (n 9).
[62] (2002) 210 CLR 491. [63] (2008) 238 CLR 265. [64] Davies (n 9) [8.23]–[8.24].
[65] Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; Kirby and Callinan JJ dissenting.
[66] Lindell (n 9) 364, 381.

to a foreign forum'.[67] In short, these observations suggest that had the Australian court employed the more-appropriate-forum test, it would have granted a stay of its proceedings.

In light of the foregoing discussion, it is understandable why many have concluded that *Voth* and *Spiliada* are practically different doctrines. However, it is argued that the almost exclusive reliance on the *dicta* in *Voth* (and its endorsement in subsequent cases) renders the prevailing conception of the Australian doctrine open to question. Surely, a much more telling (and convincing) understanding of the functional (dis) similarities between *Voth* and *Spiliada* can be formed if it is, in fact, supported by the post-*Voth* case law in Australia. In this regard, the (un)persuasiveness of the common wisdom concerning the operation of the *Voth* test depends on whether there exists *a body of precedent*—rather than a number of disparate, individual cases—which clearly evidences that the conceptual gap between the English and Australian doctrines is wide enough to *functionally* render *Voth, mutatis mutandis*, a more plaintiff-friendly doctrine than *Spiliada*. The discussion in the next section seeks to address this issue.

IV. ARE THE ENGLISH AND AUSTRALIAN APPROACHES TO *FORUM (NON) CONVENIENS FUNCTIONALLY* DIFFERENT?

There are different analytical methods which can be employed in assessing whether the *Voth* test is, in practice, a narrower and stricter test than *Spiliada*. One seemingly obvious approach is to quantify the number of instances in which the Australian and English courts have decided not to assume jurisdiction over a dispute.[68] Such an exercise would be illuminating as it would provide a general sense of the ease (or difficulty) with which stays of proceedings are granted in both jurisdictions. However, it is questionable whether a comparison between the proportion of cases in Australia and England where the courts have chosen not to exercise jurisdiction is as useful an indicator of the differences between *Voth* and *Spiliada* as it may first appear. After all, a practice of this nature can only help to establish a clear picture of the respective practical differences in the application of the two doctrines if the tests are applied to exactly the same factual and legal scenarios.

It is argued that a much more appealing course of action would be to adopt an analytical approach which highlights, in a fact-neutral manner, any functional (dis) similarities in the application of the *Voth* and *Spiliada* doctrines. Based on this approach, the Australian *forum (non) conveniens* case law should be analysed from three perspectives. The first is specific in focus: it seeks to identify the factors at the heart of the operation of the *Voth* test and examine the Australian court's application of them. The second, which is rather more general in emphasis, intends to map out the Australian court's broader methodological framework for reasoning in *forum (non) conveniens* cases. The third builds on the other two. It engages in a comparative examination of the wider implications arising from the application of *Voth* and

[67] PStJ Smart, 'Foreign torts and the High Court of Australia' (2002) 118 LQR 512, 515.

[68] See eg M Keyes, *Jurisdiction in International Litigation* (Federation Press 2005) ch 5 who examines, *inter alia*, the application of *Voth* in Australia through a quantification of all the instances in which the Australian superior courts (including the Family Court of Australia) applied the *forum (non) conveniens* doctrine between 1991 and 2001.

Spiliada. This aspect of the analysis thereby seeks to bolster our understanding of any practical (dis)similarities between the tests. These analyses, it is argued, will serve to illustrate the extent to which (if at all) the theoretical gap between *Voth* and *Spiliada* is sufficiently wide to support the conventional conception of the two doctrines.

A. The Factors Considered Under Voth

As stated earlier, the Justices who delivered the joint judgment in *Voth* observed that the factors referred to when applying the *Spiliada* test were of 'valuable assistance' in the exercise of the discretionary power under the clearly-inappropriate-forum test. Indeed, as discussed in *Nygh's Conflict of Laws in Australia*, the application of the *Voth* test is premised on identical considerations to those at the heart of *Spiliada*'s operation.[69] When asked to give up its jurisdiction, whether in as-of-right or service-out cases, the Australian court enquires, *inter alia*, into the availability of the foreign forum, the dispute's governing law, the existence of foreign parallel proceedings and the location of witnesses and evidence. The assessment of how these factors are applied in Australia, through an analysis of the case law, could highlight whether the *Voth* test is, in fact, as inward-looking and plaintiff-friendly as it is widely claimed to be.

An evaluation of the post-*Voth forum (non) conveniens* cases in Australia indicates that, not only does the Australian court employ the same factors as those which determine *Spiliada*'s application, but it has also, for the most part, conceived of them in effectively the same way. Consider, for instance, how the dispute's governing law is treated under the two tests. Under the *Voth* doctrine, the law applying to the dispute is one of a number of elements which can influence the court's decision whether to sustain its proceedings.[70] The fact that a foreign law governs the dispute does not, *ipso facto*, render the Australian court a clearly inappropriate forum.[71] Nevertheless, as highlighted in *Nygh's Conflict of Laws in Australia*,[72] cases such as *Seereederei Baco Liner GmbH v Al Aliyu*[73] and *El-Kharouf v El-Kharouf*[74] illustrate that the Australian court is more likely to relinquish its jurisdiction if it concludes that the foreign governing law is too difficult to prove.

Notwithstanding the perception in Australia that the English test 'tends to push litigation back to the same place whose law will govern the outcome of the dispute',[75] the *lex causae* is ascribed the same significance in the stay-of-proceedings analysis under *Spiliada*. The following passage in *Dicey, Morris and Collins* provides a helpful distillation of the treatment of the governing law under the *Spiliada* doctrine:

> if the legal issues [at the heart of the dispute] are straightforward, or if the competing fora have domestic laws which are substantially similar, the identity of the governing law will be of rather little significance. But if the legal issues are complex, or the legal systems very

[69] Davies (n 9) [8.26]–[8.56].

[70] *Voth* case (n 1) 566. See also *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 521; *El-Kharouf v El-Kharouf* [2004] NSWSC 187, [23]; and, *Fleming v Marshall* (2011) 279 ALR 737, [104]: cited in Davies (n 9) [8.38]–[8.43].

[71] Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Zhang* (n 62) 521.

[72] Davies (n 9) [8.39].

[73] [2000] FCA 656 (Guinean governing law).

[74] (n 70) (Jordanian applicable law).

[75] A Bell, 'Symposium Paper: The Future of Private International Law in Australia' (2012) 19 AustILJ 11, 14 at <http://www.austlii.edu.au/au/journals/AUIntLawJl/2012/2.pdf>.

> different, the general principle that a court applies its own law more readily than does a foreign court will help to point to the more appropriate forum, whether English or foreign.[76]

Accordingly, similar to the position in *Voth*, under the *Spiliada* test, an Arcadian governing law may only lead to the finding that Arcadia is more appropriate to entertain the case if 'issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues' in England and Arcadia.[77] Otherwise, little weight would be attached to the choice of Arcadian law.

There are also similarities in the English and Australian courts' treatment of pending parallel (or related) proceedings in a foreign forum. Under *Voth* and *Spiliada*, the existence of these proceedings is an important (though not dispositive) factor in the courts' decision whether to exercise its jurisdiction.[78] Hence, in these instances, the consideration of a broad range of factors enables the English and Australian courts to decide whether to stay or sustain their proceedings. The courts look, *inter alia*, into the costs incurred by the parties in the foreign proceedings and the stage which those proceedings have reached. There is, *prima facie*, more likelihood of obtaining a stay, under both doctrines, if the foreign proceedings are at an advanced stage and the parties have incurred considerable costs in the process.[79] Additionally, the English and Australian courts are more likely to stay their proceedings if there is a stronger connection between the dispute and the foreign forum in which the parallel (or related) proceedings are ongoing. It was, in part, for this reason that the English and Australian courts decided not to exercise jurisdiction in *The Abidin Daver*[80] and in *Navarro v Jurado*[81] respectively. Finally, the application of both *Voth*[82] and *Spiliada*[83] has highlighted that in a *lis alibi pendens* case there would be a weaker prospect of obtaining a stay if the foreign court is unlikely to assume jurisdiction over the dispute. In summary, and like the position regarding the dispute's applicable law, the case law on the treatment of *lis alibi pendens* cases signifies very little difference in approach in England and Australia.

These similarities in approach are also detectable in the way in which the Australian and English courts take into account availability of witnesses and other evidence when applying *Voth* and *Spiliada*.[84] For instance, in *PCH Offshore v Dunn (No 2)*[85] a service-out case commenced by an Australian company against a Scotsman, who was resident in Azerbaijan, the Australian court decided not to exercise jurisdiction because the majority of the witnesses and evidence in the case were based in Azerbaijan. Likewise, in *Limit (No 3) Ltd v PDV Insurance Co Ltd*, also a service-out case, the English court refused to

[76] *Dicey, Morris & Collins* (n 9) [12–034] (citations omitted). See also Briggs (n 9) [4.26].

[77] Lord Mance JSC in *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5; [2013] 2 AC 337, 368.

[78] In Australia, see eg *Henry v Henry* (1996) 185 CLR 571 and *CSR Ltd v Cigna Insurance Ltd* (1997) 189 CLR 345 (where the Australian proceedings were stayed in favour of the ongoing proceedings in Monaco and New Jersey, respectively), further discussed in Davies (n 9) [8.45]–[8.46]. In England, see Lord Diplock's speech in *The Abidin Daver* [1984] AC 398, 409–10 and the commentary in *Dicey, Morris & Collins* (n 9) [12–043].

[79] *Henry* (n 78) 580. In England, see Lord Goff in *de Dampierre v de Dampierre* [1988] AC 92, 108 and Hirst J in *Cleveland Museum of Art v Capricorn Art International SA* [1990] 2 Lloyd's Rep 166, 173.

[80] (n 78) 409–10 (proceedings pending in Turkey).

[81] [2010] 247 FLR 374 (litigation pending in Costa Rica). See also *Henry* (n 78) 592–3.

[82] See *Henry* (n 78) 590.

[83] See eg *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361.

[84] More generally, see the similarity in the Australian and English courts' approaches to the issue of location of witnesses and evidence, as highlighted in Davies (n 9) [8.54]–[8.56] and Briggs (n 9) [4.24]–[4.25].

[85] [2010] FCA 897.

assume jurisdiction over the Venezuela-based defendant company, *inter alia*, on the basis that the dispute had a strong connection with Venezuela.[86]

Perhaps the only context in which there is some difference between the weight attributed to the relevant factors is in relation to the way in which the availability of an alternative foreign forum is defined under *Spiliada* and *Voth*. The availability of the foreign forum is one of the key elements within *Spiliada*'s first limb and is narrowly defined: the alternative foreign forum is available if it would assume jurisdiction over the dispute.[87] Under the *Voth* test, though, availability appears to have a broader scope; it could include situations where the plaintiff's claim has become time-barred in the alternative foreign forum.[88] Furthermore, over the years, there have been a handful of Australian cases in which judges have made passing remarks, suggesting that the Australian court could stay its proceedings regardless of the availability of another foreign forum to entertain the dispute.[89] Notwithstanding these pronouncements, and the wider scope ascribed to availability in Australia, it is impossible to identify a reported case in which the Australian court has found itself to be a clearly inappropriate forum, even though no other foreign forum is available to entertain the dispute. Indeed, in her extensive analysis of staying of proceedings in Australia between 1991 and 2001, Professor Keyes found that the Australian court chose to sustain its proceedings where another available foreign forum could not be identified.[90] In practice, therefore, the English and Australian courts have tended to adopt a similar conception of the availability of the foreign forum: their (non-)exercise of jurisdiction depends, in part, on the existence of another foreign forum which would entertain the dispute.[91]

The discussion in this subsection has highlighted that there are many *similarities* in the English and Australian courts' practice of discretionary (non-)exercise of jurisdiction. In applying the *Spiliada* and *Voth* tests the courts consult effectively the same factors. Moreover, they generally ascribe the same weight to these factors. In other words, the courts follow virtually an identical set of analysis in deciding whether to assume jurisdiction over a dispute. Consequently, *ceteris paribus*, the English and Australian courts tend to sustain (or relinquish) their proceedings in similar instances.

B. The Australian Court's Broader Methodological Framework for Reasoning under Voth

Nevertheless, it might be argued that there are other considerations which render the two doctrines different. Indeed, in their joint judgment in *Voth*, the Justices considered that, under *Spiliada*, the English court decides on whether to exercise jurisdiction by comparing the advantages of entertaining the dispute in England or remitting it to the more appropriate foreign forum.[92] They did not, however, favour this approach,

[86] [2003] EWHC 2632 (Comm), affirmed by the Court of Appeal [2005] EWCA Civ 383; [2005] 1 CLC 515.

[87] *Spiliada* (n 5) 476 and *Connelly v RTZ Corporation (No 2)* [1998] AC 854.

[88] *Fleming v Marshall* (n 70).

[89] Campbell JA in *Garsec Pty Ltd v His Majesty the Sultan of Brunei* [2008] NSWCA 211, [141], discussed in Davies (n 9) [8.33]–[8.35].

[90] Keyes (n 68) 173.

[91] eg *Reinsurance Australia Corp Ltd v HIH Casualty and General Insurance Ltd* [2003] FCA 56, discussed in Davies (n 9) [8.35]–[8.36].

[92] *Voth* (n 1) 558.

stating that the more-appropriate-forum test 'necessarily involves assumptions or findings about the comparative claims of the competing foreign tribunal, including the standards and impartiality of its members'.[93] Instead, they preferred a doctrinal formulation which would enable the Australian court to apply its discretion based on *its* (in)appropriateness, rather than that of a foreign forum.[94]

Prima facie, the rejection of *Spiliada*, and articulation of the clearly-inappropriate-forum test, point to differences in methodological frameworks within which the *forum (non) conveniens* doctrine is applied in England and Australia. For instance, in an article in the *Melbourne University Law Review* Professor Garnett observed that the clearly-inappropriate-forum test 'focuses only upon the suitability of the local jurisdiction'[95] and, hence, 'is unlikely to yield the same results as [the *Spiliada* test] which takes into account, on a relatively equal basis, the claims of both jurisdictions'.[96] Similarly, and more recently, Professor Briggs has stated that 'the Australian courts appear to be of the opinion that it is not appropriate for an Australian court to undertake a comparative evaluation of two courts'.[97]

It is, therefore, important to consider whether there is, indeed, a difference in the broader methodologies which English and Australian judges employ when applying the *forum (non) conveniens* doctrine. The persuasiveness of the prevailing conception of the *Voth* test, as being functionally a more restrictive and inward-looking doctrine than its English counterpart, depends on the answer to this question.

The wider methodological setting within which the *Spiliada* analysis is conducted is, of course, comparative in nature.[98] In a *forum (non) conveniens* case the English court is essentially asked to rule on whether it (or another available foreign forum) is more suitable to entertain the parties' dispute. In responding to this question the English court is reliant on the parties' submissions. On the one hand, the defendant would seek to convince the English court of the appropriateness of the available foreign forum. On the other hand, the claimant would argue that England is better placed to determine the dispute. In *forum conveniens* cases the English court is effectively asked to rule on whether it is a clearly (in)appropriate forum for hearing the dispute.[99] In *forum non conveniens cases*, the English court is, on the face of things, preoccupied with the assessment of the alternative foreign forum's appropriateness. However, that exercise is conducted relative to the English court's *own* appropriateness. In this respect, therefore, the English court is inescapably engaged in evaluating the suitability of the available foreign forum *and* that of its own. Thus, in *The Lakhta*, for instance, Sheen J's conclusion that Russia was more closely connected to the dispute than England is another way of saying that England was not the claim's centre of gravity and, consequently, was unsuitable to entertain it.[100]

As discussed earlier, ostensibly, the Australian court has always insisted that under the *Voth* test its sole concern is to evaluate *its* suitability in asserting jurisdiction over an international-private-law dispute.[101] Nevertheless, in practice, the Australian court's analysis of its appropriateness is not carried out in a vacuum. For instance, in *James Harding and Coy Pty v Grigor* Spigelman CJ observed, tellingly, that it was going 'too

[93] ibid 559. [94] ibid. [95] Garnett (n 9) 30, 34. [96] ibid 36.
[97] Private International Law in English Courts (n 9) [4.415].
[98] *Spiliada* (n 5). [99] eg *VTB* (n 77).
[100] [1992] 2 Lloyd's Rep 269, 272. See also *Cleveland Museum* (n 79) and *Chase v Ram Technical Services Ltd* [2000] 2 Lloyd's Rep 418. [101] *Zhang* (n 62) 520–1.

far' to say that under the *Voth* test 'in determining inappropriateness of the local forum no process of comparison with the foreign forum should be made'.[102] Moreover, in the context of *lis alibi pendens* cases such as *Henry v Henry* and *CSR Ltd v Cigna Insurance Ltd*, it has been stated that the Australian court's assessment of whether it is clearly appropriate is premised on a comparison between the local and foreign forums.[103] Accordingly, the considerations of the (dis)advantages of litigation in the alternative *foreign* forum are inevitably influential in informing the court's decision on its *own* suitability to entertain the dispute.

The analysis of the Australian *forum (non) conveniens* cases supports the argument that, despite pronouncements to the contrary, there are evident comparative elements in the court's methodology for applying the doctrine. In the *Voth* case itself, for example, it was not until it had entertained and analysed the parties' competing submissions on the respective (dis)advantages of litigation in Australia and Missouri[104] that the High Court ruled that the Australian court was clearly inappropriate. In *Toop v Mobil Oil New Guinea* the Australian court decided to sustain its proceedings after examining the litigants' competing accounts of the (in) appropriateness of Australia and Papua New Guinea.[105] Likewise, in *Garsec v His Majesty The Sultan of Brunei*, a service-out case, McDougall J devoted a sizeable part of his judgment to comparing the (dis)advantages of having the trial in Australia or Brunei before deciding not to exercise jurisdiction.[106]

It is, therefore, difficult to be persuaded that the framework within which the Australian *forum (non) conveniens* doctrine is applied is not comparative in nature. This conclusion is consistent with Professor Keyes's assessment of the High Court's approach to the application of the *forum (non) conveniens* doctrine in cases such as *Oceanic Sun, Voth* and *Zhang*.[107] As she observed, when faced with a *forum (non) conveniens* application lower courts in Australia embark on 'a comparative balancing exercise in which the connections to the local and foreign forums are listed'.[108] Consequently, the inescapable conclusion must be that, essentially, the same methodological approach underpins the application of the *forum (non) conveniens* doctrine in Australia and England.

C. *The Implications of Applying the* Voth *Test*

The foregoing discussion has sought to show that there is no clear blue water separating the specific factors based on which the English and Australian courts perform their analysis of the *forum (non) conveniens* doctrine. Furthermore, the examination of the cases indicates that the broader methodological frameworks within which the Australian and English courts exercise their discretion are hardly distinguishable. They both have comparative elements: under *Spiliada*, the English court assesses the appropriateness of the available

[102] [1998] 45 NSWLR 20, 33–4.
[103] Keyes (n 68) 118.
[104] *Voth* (n 1) 540–3.
[105] [1999] VSC 11, [27]-[29].
[106] [2007] NSWSC 882, [112]–[124] (upheld on appeal: [2008] NSWCA 211). See also *McGregor v Potts* [2005] 68 NSWLR 109, [52]-[83], a service-out case, in which the Australian court decided not to exercise jurisdiction following a detailed comparison of the (dis)advantages of trial in Australia and England; and, *CMA CGM SA v Chou Shan*, where, before ordering a stay, the Australian court had heard competing arguments about the (un)suitability of having the trial in Australia or China: [2014] FCA 74, [115]–[123] (upheld on appeal: [2014] FCAFC 90).
[107] Keyes (n 68) 138.
[108] ibid 140.

foreign forum to hear the case relative to its own suitability; under *Voth*, despite insisting otherwise, the Australian court effectively evaluates its own suitability in comparison to that of another available foreign forum.

In these circumstances, it is argued that the Australian court's approach to discretionary (non-)exercise of jurisdiction resembles, *mutatis mutandis*, that of its English counterpart under *Spiliada*. In other words, the tests tend to lead to similar outcomes when applied to broadly analogous cases. For example, prior to the Court of Justice's ruling in *Owusu v Jackson*,[109] the English court had demonstrated, in *In Re Harrods (Buenos Aires) Ltd*,[110] that it would grant a stay in a case brought against an English domiciliary if another available foreign forum was shown to be a more appropriate forum for hearing the dispute. If, as it has been widely accepted, the conceptual gap between the Australian and English doctrines is considered to be so wide as to functionally make *Voth* a narrower doctrine than *Spiliada*, then it might be reasonably expected that a case like *Harrods* would be decided differently in Australia. The decision in *Strohschneider v Ehlert (the Estate of Ehlert)*,[111] however, suggests otherwise. In this case, a German resident had commenced *in personam* proceedings against an Australian resident concerning a plot of land in Germany. Notwithstanding the defendant's residence in Australia, and that the court could have heard the case if it had really so wished, the court stayed the proceedings because it did not regard Australia as the most closely connected venue to the dispute (thereby regarding Germany to be that forum).

Consider, also, the Australian court's decision in *O'Reilly v Western Sussex Hospitals NHS Trust*.[112] In this service-out case an Australian resident commenced litigation in Australia against a number of English defendants. She alleged that her husband's death from cancer had been caused by the defendants' negligence in the course of his diagnosis and treatment in England. The plaintiff's limited financial resources, together with the fact that she was caring for her severely disabled son, meant that, on the facts of the case, it was only possible for her to seek redress against the defendants in Australia. These were significant considerations in persuading Studdert AJ to sustain the Australian proceedings, despite the case's *prima facie* connections with England. If it is indeed the case that *Voth* is more plaintiff-friendly than its English counterpart, then it should not be unreasonable to expect that a case broadly resembling *O'Reilly* would be decided differently under *Spiliada*. This observation, though, is not supported by decisions such as *Connelly v RTZ Corporation (No 2)*.[113] While *Connelly* concerned different matters to those in *O'Reilly*, they are similar in at least one fundamental respect. Not unlike *O'Reilly*, the plaintiffs in *Connelly* lacked adequate financial resources to sue the defendants in Namibia, which was the dispute's centre of gravity. This absence of means, *inter alia*, played a significant role in convincing the English court that it should sustain its proceedings as England was practically the only forum in which the plaintiffs could bring their claims.

In light of the assessment of the sizeable post-*Voth* case law it is difficult to accept that the apparent conceptual difference between *Voth* and *Spiliada*—with the Australian doctrine focusing on the *local* court's (un)suitability and its English equivalent examining the (in)appropriateness of the *foreign* court—is wide enough to warrant for

[109] Case 281/02 [2005] ECR I–1383. [110] [1992] Ch 72. [111] [2008] SADC 54.
[112] [2010] NSWSC 909. cf *McGregor* (n 106).
[113] (n 87). See also *Lubbe v Cape* [2000] 1 WLR 1545.

the doctrines to be regarded as practically different. Therefore, it is argued that the dominant view within the literature, which considers *Spiliada* and *Voth* to be functionally different tests, is unpersuasive.

An assessment of the implications of applying the *forum (non) conveniens* doctrine in Australia further supports this argument as it illustrates that the application of the *Voth* and *Spiliada* tests tends to give rise to broadly similar shortcomings. In particular, and not unlike its English counterpart, *Voth* has been criticized for its tendency to lead to drawn-out and expensive litigation.

If, in practical terms, the Australian court's discretion under the *Voth* test had been, in fact, more limited in scope than the English court's under *Spiliada*, then it would have been reasonable to expect that there would be quicker and more resource-efficient resolutions to Australian *forum (non) conveniens* disputes. Indeed, when reinforcing the clearly-inappropriate-forum test in their joint judgment, the Justices had predicted that, typically, the first-instance judge would apply the *Voth* test swiftly, following the counsel's 'short, written (preferably agreed) summary identification of relevant connecting factors and by oral submissions measured in minutes rather than hours'.[114]

In practice, though, what was foreshadowed by Mason CJ, Deane, Dawson and Gaudron JJ in their joint judgment has not materialized. For example, in *Colosseum Investment Holdings Pty Ltd v Vanguard Logistics Services Pty Ltd*, commenting on their prediction in *Voth*, Palmer J stated that,

> a first instance judge should be permitted a wry smile at the advice given by the High Court as to the permissible extent and content of a judgment in 'an ordinary case': in the present judicial climate, a judge following that advice would receive a frosty welcome in the Court of Appeal.[115]

Likewise, in *Suzlon Energy Ltd v Bangad (No 3)* Rares J made the following telling observation on the extent of resources expended in the course of a *forum (non) conveniens* case:

> These applications have involved one day's hearing on preliminary issues culminating in my judgment and orders of 7 October 2011, two days of hearing, about 100 pages of submissions and over 2,000 pages of evidence about which I must now decide.[116]

These are far from isolated examples of lengthy and expensive *forum (non) conveniens* litigation in Australia.[117] Strikingly, judges and commentators in England have pointed to identical problems with respect to the operation of the *Spiliada* doctrine.[118] It is, therefore, argued that if *Voth* had in fact had a narrower doctrinal scope than *Spiliada*, these problems with its application would not have arisen to the same extent (or at all).

[114] *Voth* (n 1) 565. In his concurring speech in *Spiliada*, Lord Templeman had made a very similar prediction: (n 5) 465.

[115] [2005] NSWSC 803, [72]. See also Giles J's comments in *News Corporation Ltd v Lenfest Communications Inc* (1996) 40 NSWLR 250, [72]: cited in Davies (n 9) 197 (fn 89).

[116] [2012] FCA 123, [51] (citation omitted).

[117] See also *Whung v Whung* (2011) 45 Fam LR 269, *Telesto Investments Ltd v USB AG* (2012) 262 FLR 119 and *Chen v Tan* [2012] FamCA 225: cited in Davies (n 9) [8.27] (fn 93).

[118] eg Lord Collins of Mapesbury in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, 1808 and Lord Neuberger of Abbotsbury PSC in *VTB* (n 77) 375–7. See also J Hill, 'Jurisdiction in Civil and Commercial Matters: Is There a Third Way?' [2001] CLP 439, 449–50 and A Arzandeh, 'Should the *Spiliada* Test Be Revised?' (2014) 10 JPrivIntL 89, 96–7.

V. CONCLUSION

In their joint judgment in *Voth*, almost immediately after endorsing the clearly-inappropriate-forum test, the Justices emphasized that the conceptual difference between it and the *Spiliada* doctrine would manifest itself in those instances where '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'.[119] Since then, a literal reading of this passage by judges and commentators (in Australia and other common law jurisdictions) has come to define the Australian *forum (non) conveniens* doctrine as being functionally different from its English counterpart. However, this prevailing conception is not only open to question but is also, on closer inspection, ultimately unpersuasive.

As the analysis in this article has sought to demonstrate, the application of the *Voth* test has not led to the emergence of a body of precedent which denotes significant practical divergences in the English and Australian courts' application of the *forum (non) conveniens* doctrine. In deciding whether to exercise jurisdiction both courts consider and analyse the same factors, ascribing to them the same weight. Moreover they perform this analysis within comparative methodological frameworks which are virtually indistinguishable. The lack of practical difference between *Voth* and *Spiliada* is further supported by the fact that their application exposes almost identical shortcomings in the two doctrines.

In sum, judges and commentators have been too quick to adopt a literal reading of the judgment in *Voth*. Conceptually, there may be a narrow difference between the assessment of the appropriateness of the local forum under *Voth*, on the one hand, and the foreign forum under *Spiliada*, on the other. Nevertheless, this difference—in the theoretical case in which the foreign forum is more appropriate, but the local forum is not clearly inappropriate—is so small that it is *practically* non-existent, essentially, rendering *Voth* and *Spiliada* two sides of the same coin.

[119] *Voth* (n 1) 558.