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Judicial Jurisdiction in International Cases: The Supreme Court's Unfinished Business

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Introduction

While the shortcomings of the common law rules of private international law were being reformed by statute in England,[1] Canadian law, left to judicial development, remained mired in nineteenth-century thinking. A much overdue reassessment was finally undertaken by the Supreme Court earlier this decade. In *Morguard Investments Ltd.* v. *De Savoye*[2] and *Hunt* v. *T & N plc*[3] the Court recast the common law rules on jurisdiction and the enforcement of foreign judgments to conform with its perception of the "new world order" and Canadian federal structure. It then proceeded to endow these rules with constitutional authority. Although the Court's emerging restatements of private international law have generated a growing body of analysis, little attention has been paid to date to the Court's review of the law on *forum non conveniens* in *Amchem Products* v. *BCWCB*,[4] buried as it was in a case dealing with the more dramatic topic of anti-suit injunctions. The *forum non conveniens*

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1. See, in particular, *Civil Jurisdiction and Judgments Act 1982* (U.K.), 1982, c. 27; *Civil Jurisdiction and Judgments Act 1991* (U.K.), 1991, c. 12; *Contracts (Applicable Law) Act 1990* (U.K.), 1990, c. 36; *Family Law Act 1986* (U.K.), 1986, c. 55; *Foreign Limitation Periods Act 1984* (U.K.), 1984, c. 16; *Recognition of Trusts Act 1987* (U.K.), 1987, c. 14; and Bill 6, *Private International Law (Miscellaneous Provisions)* (U.K.), 1994, that includes a fundamental reform of choice of law in tort.

2. [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [hereinafter *Morguard* cited to S.C.R.].

3. [1993] 4 S.C.R. 289, 76 D.L.R. (4th) 256 [hereinafter *Hunt* cited to S.C.R.].

4. [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96, 3 W.W.R. 441 [hereinafter *Amchem* cited to S.C.R.]. To date, only three case comments have appeared, all of which concentrate on the anti-suit injunction aspect of the case: E. Edinger, (1993) 72 Can. Bar Rev. 366; H.P. Glenn, "The Supreme Court, Judicial Comity and Anti-Suit Injunctions" (1994) 28 U.B.C. L.Rev. 193 and J.P. McEvoy, "International Litigation: Canada, Forum Non Conveniens and the Anti-Suit Injunction" (1995) 17 Advocates' Q. 1. See also J.-G. Castel, *Canadian Conflict of Laws*, 3d ed. (Toronto: Butterworths, 1994) at 230ff; Castel includes only a summary statement of *Amchem* and passing reference to *Hunt* which was rendered too late for full treatment in the body of the text.

aspect of the case is, however, of greater importance if we are to judge by the burgeoning lower court jurisprudence on that issue alone.[5]

In *Amchem*, the Supreme Court formulated a Canadian version of the doctrine of *forum non conveniens*,[6] borrowing heavily from the House of Lords' decision in *Spiliada Maritime Corp.* v. *Cansulex*.[7] The two decisions part on the question of which party has the burden of proof on an application to stay an action based on *forum non conveniens*. In English law, the burden varies according to the location of service on the defendant. In contrast, the Supreme Court states that the burden should rest on the party requesting the stay, in most cases the defendant, on the basis of procedural differences between English and Canadian rules of international jurisdiction. This can, however, be varied by provincial rules of procedure.

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5. McEvoy, *ibid.* at 20–29, discusses the thirteen cases that applied the *Amchem* rule, reported as of May 1994. Since then, as of March 1995, the following cases have referred to *Amchem*'s statements regarding *forum non conveniens*: *Webb* v. *Hooper* (1994), 19 Alta L.R. (3d) 269, 7 W.W.R. 324 (Q.B.); *B.C. Rail Ltd.* v. *Call-Net Telecommunications Ltd*, [1994] B.C.J. No. 1064 (S.C.); *Kelly* v. *KMart Canada*, [1994] B.C.J. No. 1098 (S.C.); *Frymer* v. *Brettschneider* (1994), 19 O.R. (3d) 60; *Discreet Logic Inc.* v. *Canada (Registrar of Copyrights)* (1994), 55 C.P.R. (3d) 167 (F.C.A.); *Provident Life & Accident* v. *Walton*, [1994] O.J. No. 1909 (Gen. Div.); *Cytoven Int. NV* v. *Cytomed Peptos*, [1994] F.C.J./A.C.F. No. 1572; *Mannai Properties* v. *Horsham Corp.*, [1994] O.J. No. 2038 (Gen. Div.); *SDI Simulation Group Inc.* v. *Chameleon Technologies Inc.*, [1994] O.J. No. 2195 (Gen. Div.); *Macdonald* v. *Lasnier* (1994), 21 O.R. (3d) 177 (Gen. Div.); *Metis National Council* v. *Evans*, [1994] O.J. No. 2341 (Gen. Div.); *Tortel Communications* v. *Suntel*, [1995] 1 W.W.R. 457 (Man. C.A.); *Lehndorff Management Ltd.* v. *Gentra Canada Investments Inc.*, [1994] O.J. No. 3032 (Gen. Div.). The only case applying the anti-suit injunction test appears to be *Re Cadillac Fairview Inc.*, [1995] O.J. No. 138 (Gen. Div.) where a request to issue an anti-suit injunction against the plaintiff in Chicago proceedings, because of connected reorganization proceedings in Toronto, was dismissed.

6. The common law source of this doctrine suggests that *Amchem* is not relevant for Quebec. Moreover, rules of judicial competence in that province are not service-based but depend upon the nature of the case; the transformation of procedural rules of service into substantive rules governing jurisdiction is a peculiarity of the common law. Prior to the reform of its Civil code, Quebec law on judicial jurisdiction in international cases was simply an extension of its rules for domestic cases (Code of Civil Procedure, art. 68–75) and did not include any discretion in the nature of a *forum non conveniens* doctrine. See generally E. Groffier, *Précis de droit international privé québécois*, 4th ed. (Montreal: Yvon Blais, 1990) at 244–46. Some decisions had indicated a desire for flexibility in the assumption of jurisdiction and this has been reflected in the new rules on private international law that have been comprehensively codified in Title Three of the Quebec Civil Code. The competence of Quebec courts in international matters is now regulated separately from domestic matters. While it is not within the ambit of this paper to discuss this reform, the inclusion of a discretion to decline jurisdiction is of direct concern. Although article 3135 does not use the expression *forum non conveniens*, it is clearly intended to adopt the doctrine: see H.P. Glenn, "La Réforme du Code civil: Droit international privé" in *Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec* (Québec: Presses de l'Université Laval, 1993) 669 at 744; J.A. Talpis & J.-G. Castel, "Interprétation des règles du droit international privé" in *ibid.* 801 at 900. As a result, the comments of the Supreme Court regarding *forum non conveniens* are relevant to the application of the Quebec provision, at least in so far as they reflect constitutional limitations on judicial jurisdiction expressed in *Morguard* and *Hunt*.

7. [1987] 1 A.C. 461, [1986] 3 All E.R. 843 [hereinafter *Spiliada* cited to A.C.].

According to the majority of the Ontario Court of Appeal in *Frymer* v. *Brettschneider*,[8] this provincial power to determine the burden of proof in stay proceedings has been exercised in the Ontario Rules of Civil Procedure. Implicitly overturning previous lower court decisions that had followed *Amchem*'s general rule,[9] the Ontario court put forward a variation of the English rule allocating the burden of proof according to the residence of the defendant as opposed to the location of service.

This paper focusses on the reasoning in both *Amchem* and *Frymer* on the burden of proof issue. Despite its apparent innocuity, this issue provides an interesting perspective for an appraisal of the current state of Canadian law of international jurisdiction. This approach illustrates how the failure of appellate courts to address adequately the implications of *Morguard* and *Hunt*[10] on the burden issue is symptomatic of a more general failure to articulate an integrated approach to jurisdiction in international cases. Until the Supreme Court confronts this more complex issue, its attempts to rationalize Canadian private international law are unlikely to progress or succeed. The paper is divided into five parts: the first three examine the doctrine of *forum non conveniens* including the burden of proof issue as it moves from England to the Supreme Court and then to other Canadian courts; the fourth part presents an alternative approach to the burden of proof issue and the fifth suggests a methodology for the assessment of judicial jurisdiction in international cases that integrates the constitutive elements of jurisdiction and conforms to the Supreme Court's general statements about Canadian private international law.

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8. (1994), 19 O.R. (3d) 60 (C.A.) [hereinafter *Frymer*].

9. *Upper Lakes Shipping Ltd.* v. *Foster Yeoman Ltd.* (1993), 14 O.R. (3d) 548, 17 C.P.C. (3d) 150 (Gen. Div.) and *Applied Processes Inc.* v. *Crane Co.* (1993), 15 O.R. (3d) 166 (Gen. Div.).

10. *Supra* note 3. In *Morguard*, the Supreme Court revised the common law rules on recognition of foreign judgments. A successful plaintiff was seeking to enforce an Alberta default judgment in British Columbia. The Court held that the federal structure of Canada warranted a broadening of the common law rules of recognition, at least between provinces, akin to the full faith and credit clauses in the American and Australian constitutions. Because the case had not been argued in constitutional terms, the decision left open the possibility that provincial legislatures could enact stricter rules. Two years later, in *Hunt*, the Supreme Court was confronted with a Quebec blocking statute that sought to prevent the enforcement of an order for the production of documents for discovery in a British Columbia case. The plaintiff argued that the Quebec statute was unconstitutional in that it interfered with litigation in another province and resulted in the refusal to enforce the British Columbia Court's order. The Supreme Court seized the opportunity to give a constitutional grounding to its decision in *Morguard*, holding that the Canadian federal structure required that provincial judgments be recognized and enforced throughout the country *if the rendering court had appropriately assumed jurisdiction*. This latter condition was expressed in terms of a "real and substantial connection" between the forum and the case, similar to that articulated by the House of Lords in *Indyka* v. *Indyka*, [1969] 1 A.C. 33.

I. *Forum non conveniens and the Burden of Proof in English Law*

At common law, English courts have jurisdiction "as of right" over defendants who can be served with a writ within the territory, regardless of the lack of any further connection between the defendant, the case and the chosen forum. As a result, English courts originally had no jurisdiction to hear a case concerning a tort committed in England or a breach of contract occurring therein, so long as the defendant remained abroad (unless the defendant submitted to the jurisdiction of the court). To remedy this weakness in the common law rule, legislation was enacted to confer judicial competence over defendants outside the territory at the time of service (also called "assumed jurisdiction"). From 1852 on, it became possible to effect service of an English writ outside the territorial jurisdiction of the courts, with leave of the court.[11] This system persists to this day, maintaining the distinction between service within (*in juris*) and service outside (*ex juris*) the jurisdiction. Under the current English procedure of Order 11, a plaintiff wishing to serve a defendant abroad must convince the English court that the case is one which is "proper for service out of the jurisdiction." In addition to demonstrating that the claim falls within an enumerated category in the statute, the plaintiff must also show "not merely . . . that England is the appropriate forum for the trial of the action, but that . . . this is clearly so."[12]

This control of the assertion of English jurisdiction over foreign defendants arises from the common law's traditional concern with state sovereignty. The service of an English writ in a foreign country was analogous to an invasion of that country's sovereignty, thus warranting permission of the court coupled with a heavy burden on the plaintiff seeking leave. This understanding of exclusive territorial sovereignty

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11. Service *ex juris* was first introduced in England in 1852 with the *Common Law Procedure Act* (now Order 11 of the Supreme Court) to temper the strictures of the common law rule. At common law, power over the defendant was the foundation of jurisdiction. By entering into the territory of the sovereign, the defendant was subjecting him or herself to that power. In addition, a presence-based rule ensured that a single court would be competent to try a case, in conformity with the notion of exclusivity of jurisdiction. It followed that residence or even domicile within the jurisdiction was insufficient to establish judicial competence even where the cause of action was purely domestic, such as a tort committed on the territory. See *Cheshire & North's Private International Law*, 12th ed. (London: Butterworths, 1922) at 183–84 and 190 [hereinafter *Cheshire & North*].

12. *Spiliada*, *supra* note 7 at 481. For an English court, the categories under Order 11 include: a claim on a contract made in England or governed by English law (Rule 1(1)(d)); a claim on a tort committed in England or causing damage therein (Rule 1(1)(f)); a claim of unjust enrichment where the liability is said to arise out of acts committed in England (Rule 1(1)(t)); a claim related to land situated in England (Rule 1(1)(g)). See generally *Cheshire & North*, *ibid.* at 191–203.

also informed the common law rules on recognition and enforcement of foreign *in personam* judgments. Paralleling the common law jurisdictional rules for foreign defendants, the English common law rules regarding enforcement of foreign judgments essentially require that the foreign court be considered to have had jurisdiction "as of right" over the defendant for its judgment to be given effect by an English court.[13] According to the "theory of obligation" that is held to justify recognition and enforcement of foreign judgments, it is only where jurisdiction was legitimately exercised by the foreign court that the "debt" created by the foreign judgment can be enforced, by the judgment creditor against the judgment debtor, in an English court. The statute-based competence of English courts over foreign defendants does not extend by analogy to foreign courts. Assumed jurisdiction under Order 11 continues to be seen as exorbitant and an English court will not recognize a similar assumption of jurisdiction by a foreign court.[14] The fact that the English court would have considered itself competent *mutatis mutandis*, or that the foreign court would have recognized the English courts' assumption of jurisdiction, is insufficient to justify giving direct effect to a foreign judgment. This follows from the fact that the common law rules of "international jurisdiction" are not based on reciprocity or comity.

In certain legal systems, a court competent to hear a dispute may nonetheless grant a stay of proceedings and decline to exercise its jurisdiction on the basis that it is not the most appropriate forum to decide the case. The doctrine governing the discretion to decline jurisdiction is commonly referred to as the doctrine of *forum non conveniens*. The classic formulation of the doctrine derives from Scots law and seeks to direct the case to be decided by the forum where "the interest of all parties and . . . the ends of justice"[15] would best be served.

Traditionally, English courts had refused to consider arguments of convenience or appropriateness as grounds for declining to exercise jurisdiction. Stays of proceedings were extremely rare, save in situations of *lis alibi pendens* or where there had been some abuse of process by the

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13. The recognition and enforcement in England of judgments from most European countries is governed by the *Civil Jurisdiction and Judgments Act 1982* and *1991* that enact the European conventions on recognition and enforcement currently in force within the European Union and EFTA. The traditional common law rules remain applicable to non-contracting states in the absence of a bilateral convention dealing with foreign judgments, for eg. the *Convention Between Canada and the United Kingdom for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1984*, R.S.C. 1985, c. 30, in force in most Canadian provinces.

14. See generally, *Cheshire & North*, *supra* note 11 at 346.

15. *Sim* v. *Robinow* (1892), 19 R. 665 at 668, per Lord Kinnear. See A. Briggs, "Forum Non Conveniens—Now We Are Ten?" (1983) 3 Legal Studies 74 at 80.

plaintiff. This required the demonstration that "the continuation of the action would work an injustice because it would be oppressive or vexatious to" the defendant.[16] However, no stay would be granted if it would cause injustice to the plaintiff, often defined in terms of the loss of a juridical advantage available in the forum.[17] In a series of cases since the 1970s, this restrictive approach was broadened and the first branch of the test was gradually transformed into one based on *forum non conveniens*, eschewing the abuse of process aspect.[18] Although the revised English doctrine was originally established in *MacShannon* v. *Rockware Glass*,[19] the House of Lords refused to expressly equate it with the Scottish doctrine; it was only in *The Abidin Daver*[20] that the patent indistinguishability between the English test of appropriateness and the doctrine of *forum non conveniens* was finally admitted.

This evolution culminated with the House of Lords' decision in *Spiliada Maritime Corp.* v. *Cansulex*.[21] While recognizing its Scottish source, Lord Goff sought to preserve the peculiarities of the doctrine's historical development within English law. To this end, he maintained an exception to the primary principle of appropriateness where "justice requires that the trial should nevertheless take place in this country."[22] The test for a stay under *Spiliada* consists, therefore, of a general rule based on the identification of the more appropriate forum to hear the case, coupled with an exception in favour of the plaintiff. Lord Goff specified that the criteria relevant to appropriateness were of the nature of connecting factors that would enable the court to identify the forum with the "most real and substantial connection" to the action; these were said to include

> not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant

16. *St Pierre* v. *South American Stores*, [1936] 1 K.B. 382, per Scott L.J.
17. Juridical advantages can be either substantive or procedural. The former refers to an advantage flowing from the substantive law that would be applied by the forum; this depends on the choice-of-law rules applicable in the forum and therefore may differ from one country to another. More common are claims regarding procedural advantages such as speed of trial, higher damages, awards of interest or costs, extent of discovery process, availability of contingency fees, etc. See *Cheshire & North* at 227–230, *supra* note 11 and cases cited therein.
18. For enlightening discussion on this development see A. Briggs, *supra* note 15 and "The Staying of Actions on the Ground of 'Forum Non Conveniens' in England Today" (1984) L.M.C.L.Q. 227; R. Schuz, "Controlling Forum Shopping" (1986) 35 I.C.L.Q. 374.
19. [1978] A.C. 795 (H.L.).
20. [1984] A.C. 398 (H.L.).
21. For a commentary on *Spiliada*, see P.B. Carter, (1989) B.Y.B.I.L. 342.
22. *Supra* note 7 at 476.

> transaction . . . and the places where the parties respectively reside or carry on business.[23]

Judicial discretion operates in both instances, first in balancing these criteria and second in assessing any injustice to the plaintiff denied the opportunity of pursuing the case in the forum.

As to the burden of proof, its allocation continues to depend on the nature of service on the defendant. Where jurisdiction is founded "as of right" (service *in juris*), that is, where the court's competence is unquestioned, the defendant challenging the jurisdiction carries the onus of designating the clearly more appropriate foreign court, thereby showing that the domestic court is *forum non conveniens*. It is because of the *a priori* competence of the court that the defendant faces a heavy burden, being required to impugn the appropriateness of the domestic forum and to identify the foreign court "which is clearly or distinctly more appropriate than the English forum."[24]

On the other hand, where the defendant is served out of the jurisdiction (*ex juris*), the plaintiff must initially have obtained leave of the court. To this end, he must have satisfied the court that it was clearly the more appropriate forum. Therefore, in a challenge to the jurisdiction by the defendant, the motion is to set aside service *ex juris*. As a result, the burden remains on the plaintiff to demonstrate that the court's discretion was properly exercised in the original leave application, that is to say, that the English court was and remains the *forum conveniens*. Indeed, in the case of service *ex juris*, the court is only competent pursuant to a justified exercise of its discretion to grant leave to serve abroad; hence the motion to set aside the writ attacks the very jurisdictional competence of the court.

In *Spiliada* the Canadian defendant was contesting *ex juris* service of process in British Columbia. The case was not, therefore, concerned with a motion for a stay of English proceedings, but it involved instead a challenge to the exercise of the English court's discretion to allow service out of the jurisdiction. One of the major contributions of *Spiliada*, besides its refinement of the *forum non conveniens* doctrine, remains its conclusion that the doctrine governs the exercise of discretion over international jurisdiction in all cases, regardless of the type of service. This resolved the apparent divergence between speeches by Lord Diplock and Lord

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23. *Ibid.* at 478. As to the exception, Briggs, *supra* note 15 at 82–83, suggests that the second tier of the test is an English peculiarity not found in the Scottish doctrine and probably "grafted onto the English rule with a view to distancing [it] . . . from the Scottish rule."
24. *Spiliada*, *supra* note 7 at 477.

Wilberforce in *Amin Rasheed Shipping Corporation* v. *Kuwait Insurance*, on the test applicable for challenges to service *ex juris*.[25]

In so concluding, the House of Lords emphasized that the identical nature of the tests did not remove all matters of distinction between the two situations: service *in juris* and *ex juris* remained distinct in terms of the object and the burden of proof.[26] Thus, while *Spiliada* confirmed that in both the *in juris* and *ex juris* cases the central consideration is the appropriateness of the forum, Lord Goff specified that the forum under scrutiny in a given case reflects the burden of proof allocation: the plaintiff must justify the local forum while the defendant must defend a foreign choice. And while the plaintiff always has the burden of establishing jurisdiction, either the plaintiff or the defendant may have the onus on a challenge to the exercise of jurisdiction.[27] This onus is certainly heavier than a typical civil burden since it requires a demonstration that the preferred forum is *clearly and distinctly more appropriate* than the alternative one.

The main reason for retaining the variable burden lies in the limitation on the English court's authority to allow leave to serve *ex juris* under Order 11.[28] This in turn stems from the perception that jurisdiction assumed under these provisions is of an exorbitant nature.[29] Caution in the assumption of long-arm jurisdiction over foreign defendants is therefore warranted. The same principles are said to justify the narrow rules of recognition and enforcement of foreign judgments. The interaction between the various elements of judicial jurisdiction—common law, statutory and international—gives rise to this complex structure in English law.

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25. [1984] A.C. 50 (H.L.). See Schuz, *supra* note 18 at 407.
26. *Spiliada*, *supra* note 7 at 480.
27. This is equally applicable to service *in juris* since the plaintiff must allege and prove that the defendant was validly served.
28. Service of process on a defendant outside of England (and Wales) with leave of the court is governed by the Rules of the Supreme Court, more precisely, rule 1(1) of Order 11. Service without leave is governed by rule 1(2) and is mainly confined to cases covered by the *Civil Jurisdiction and Judgments Act*, *supra* note 1 where the defendant is domiciled in a contracting State of the Brussels (EU) or Lugano (EU/EFTA) *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*. See generally *Cheshire & North*, *supra* note 11 at c.11.
29. In *Spiliada* Lord Goff prefers to speak of "extraordinary jurisdiction", considering that exorbitant "is . . . an old-fashioned word which perhaps carries unfortunate overtones." *Supra* note 7 at 481.

II. *Forum Non Conveniens and the Burden of Proof in Amchem*

In *Amchem*, Sopinka J., writing for a unanimous court, reviewed the Canadian cases and concluded that courts in the common law jurisdictions had generally applied the doctrine of *forum non conveniens* when considering motions to stay proceedings. In restating the rule for Canada,[30] the Supreme Court basically adopted the *Spiliada* formulation though modifying it in two important respects.

First, Sopinka J. subsumed the exception based on injustice to the plaintiff into the general principle governing the identification of the appropriate forum. In his view, the exception had evolved within the particular historical development of the *forum non conveniens* doctrine in English law, "which started with two branches at a time when oppression to the defendant and injustice to the plaintiff were the dual bases for granting . . . a stay."[31] Absent similar circumstances in Canada, Sopinka J. held that "there is no reason in principle why the loss of juridical advantage [to the plaintiff] should be treated as a separate and distinct condition."[32]

The argument that a party should be allowed to benefit from juridical advantages available in an appropriate forum is, on its face, unobjectionable. The Supreme Court went beyond this, however, by holding that juridical advantages could play a role in the determination of the appropriate forum. The weight attributed to any such advantage was said to

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30. On the impact of the case for Quebec, see *supra* note 6. The court in *Amchem* was being asked to grant an anti-suit injunction against plaintiffs in Texas proceedings. The defendants were manufacturers of asbestos products, with various levels of commercial presence in Texas, facing a products liability claim by British Columbia workers. The defendants preferred the suit to proceed in British Columbia instead of Texas, mainly in an attempt to avoid the potentially higher damage awards in the American state. The Supreme Court refused to grant the injunction, primarily on the basis that the Texas court was not a *forum non conveniens*.

31. See *supra* at notes 18–20.

32. *Amchem*, *supra* note 4 at 919–20. The Court also looked to *Antares Shipping* v. *The Ship "Capricorn"* (1976), [1977] 2 S.C.R. 422, 65 D.L.R. (3d) 105, for support. In that case, the Supreme Court was considering the principle governing the discretion to allow service *ex juris* under s. 307 of the *Federal Court Rules* in admiralty cases. The Court in *Amchem* sought support for its restatement of the *forum non conveniens* doctrine in *Antares* on the grounds that there had been no reference to a two-tiered test in *Antares*. However, *Antares* was concerned with an order to serve *ex juris*, and no reference to a two-tiered *forum non conveniens* test would have arisen since that test had evolved in relation to stays of proceedings following service *in juris*. At the time *Antares* was decided, English courts still applied two different tests depending on whether the issue was discretion to serve *ex juris* or to stay proceedings and nothing in *Antares* suggests that Canadian courts had adopted a different approach. The unification of the test in English law was not to occur until *Spiliada*, ten years later. It is therefore not surprising that the Court in *Antares* would make no mention of a two-tiered test; its validity as authority for a rejection of such a test is therefore open to doubt.

depend on whether it existed in a forum with which the case had a real and substantial connection. Since the appropriateness of a forum is defined according to the real and substantial connection test, the implication is that a juridical advantage sought in an appropriate forum is not only legitimate, but is also indicative of the appropriateness of that forum. Beyond the logical difficulty of this aspect of *Amchem*, it significantly departs from *Spiliada* by according to juridical advantages a role in the determination of appropriateness.

According to the test formulated in *Spiliada*, juridical advantage is not considered in determining the appropriateness of a particular forum. Lord Goff specifically resisted the inference that a mere juridical advantage to the plaintiff could reverse a decision to stay based on the appropriateness test.[33] Given that a juridical advantage to the plaintiff will often be a disadvantage to the defendant, attributing conclusive weight to the former would too easily defeat the general principle guiding the courts' exercise of discretion: the interests of both parties and the ends of justice. In addition, previous English cases had already cautioned against the legal chauvinism involved in comparing legal systems in terms of their juridical advantages.[34] The restriction of the exception to protect a plaintiff only against a deprivation of "substantial justice" marked the liberalization of *Spiliada*'s version of the *forum non conveniens* doctrine.[35] It is arguable that, after *Spiliada*, little remains of the juridical advantage exception beyond breaches of natural or substantive justice very narrowly defined. It would seem, therefore, that in collapsing the exception into the general principle, the Supreme Court of Canada has given juridical advantage a broader role and content than it ever had in English law.

The second modification to the *Spiliada* doctrine relates to the burden of proof on stay applications. In *Amchem*, Sopinka J. noted that most Canadian common law provinces had done away with the requirement to obtain prior leave of the court for service *ex juris*.[36] As a result, most provincial statutes governing jurisdiction over foreign defendants appear to treat *in juris* and *ex juris* cases alike from a procedural standpoint. Unlike the English process in Order 11, the absence of a leave requirement

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33. In particular, Lord Goff rejected the *MacShannon* test enunciated by Lord Diplock that gave much weight to the plaintiff's situation. (*Spiliada*, *supra* note 7 at 482–84.)
34. For *e.g. The Abidin Daver*, *supra* note 20.
35. *Supra* note 21 at 482.
36. Two provinces still follow England: Alberta and Newfoundland, as does the Federal Court. One province, Nova Scotia, requires leave for service outside of Canada or the U.S.A. All other common law provinces specify conditions under which service *ex juris* will be without leave; a residual discretion to allow service with leave is usually retained.

means that the plaintiff is no longer required to justify, *a priori*, its choice of forum. Instead, the potential inadequacy of a court's jurisdiction in a concrete case must be contested *ex post facto* upon a challenge by the defendant, regardless of the locus of service. Under this system, a court's assumption of jurisdiction is not subject to substantive review; only procedural issues regarding the validity of service are of relevance. Sopinka J.'s rather casual treatment of this issue also stems from a belief that it is a trivial one. In his view, the burden of proof will rarely matter because "it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties."[37] Considering, however, that *Amchem* requires the judge to be persuaded that a court is *clearly and distinctly* more appropriate than another, the onus may be critical in complex cases exhibiting multiple connections.

Sopinka J. also concluded that the separate allocation of the burden of proof in English law was merely procedural and arose solely from the retention of the leave requirement under Order 11. It is clearly within provincial competence to determine the procedural aspects of a jursidictional challenge.[38] In the absence of provincial intervention, *Amchem* represents the new common law rule in Canada: where service *ex juris* does not require prior leave of the court, a jurisdictional challenge will be decided according to the doctrine of *forum non conveniens*—excluding the *Spiliada* exception—and the defendant will carry the onus of identifying the foreign court that is clearly and distinctly more appropriate than the court chosen by the plaintiff.

Treating the burden of proof allocation in *Spiliada* as historically contingent, Sopinka J. was able to dismiss it on the basis that the procedural aspects of jurisdictional challenges in English law did not correspond to the common Canadian reality. By focussing on the prior leave requirement, no attention was paid to the allocation's other rationale in English law, the exorbitant nature of service *ex juris* and the burden on the plaintiff to justify it. The suggestion in *Amchem* that the *Spiliada* rule is merely a result of the statutory constraints of Order 11 ignores the complex structure of the jurisdictional system in English law. Had the question been approached from a broader perspective, the Supreme Court would have had to consider the impact of the general principles articulated in *Morguard* on its formulation of the doctrine of *forum non conveniens* including the burden of proof issue. In addition to

37. *Amchem*, *supra* note 4 at 921. See further Edinger, *supra* note 4 at 375, who describes this statement by the Court as "incomprehensible".
38. *Amchem*, *supra* note 4 at 921.

these general problems, the abortive nature of the inquiry in *Amchem* provides little guidance to courts on the burden of proof issue in stay applications. The impact of this omission is apparent in *Frymer*[39] where the Ontario Court of Appeal divided on the interpretation of its rules of procedure, thereby underlining many of the difficulties not addressed by the Supreme Court in *Amchem*.

III. *The Amchem Doctrine in Practice: Frymer v. Brettschneider*

Frymer, the first appellate level decision to apply *Amchem*, is all the more instructive because the decision at first instance was rendered before *Amchem*.[40] At trial, Adams J. followed the *Spiliada* formulation of the *forum non conveniens* doctrine including its rule on the distribution of the burden of proof. The defendant had been served *ex juris* in Alberta pursuant to Ontario's rules of service.[41] In deciding whether to grant a stay, Adams J. imposed the burden on the plaintiff to show that Ontario was clearly the more appropriate forum to hear the action. The judge felt confident that this allocation of the burden was justified because, in his view, the abolition in Ontario of the prior leave requirement for service *ex juris* had not radically altered the underlying substantive principles governing jurisdiction based on service *ex juris*.[42]

The Ontario Court of Appeal unanimously dismissed the appeal but divided on the burden of proof issue. Arbour J.A., McKinlay J.A. concurring, considered that the burden of proof issue was a question of provincial law to "be resolved by an analysis of the applicable rules [of procedure]."[43] She did not restrict this analysis to an interpretation of the technical wording of the procedural rules governing service *ex juris* but

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39. *Supra* note 8. In *Frymer*, a distribution agreement concerning assets under a Florida trust was being contested by an Ontario-resident beneficiary who claimed that the Alberta-resident trustee had exercised undue influence to obtain her consent to the distribution agreement. The distribution agreement had been drawn up in Florida and was expressly stated to be governed by the law of Florida; it was signed in Montreal, Quebec, where the plaintiff resided at the time. The Ontario court concluded that Florida was clearly the more appropriate forum to hear the case and therefore set aside service on the Calgary defendant and stayed the action.

40. The decision of the General Division is reported at (1992), 10 O.R. (3d) 157, 9 C.P.C. (3d) 264.

41. Specifically Rules 17.02(d) and (h).

42. Adams J. found support in *Singh* v. *Howden Petroleum* (1979), 24 O.R. (2d) 769, (1980) 100 D.L.R. (3d) 121 (C.A.); and in *United Oilseed Products* v. *Royal Bank of Canada* (1988), 29 C.P.C. (2d) 28 (Alta C.A.) which endorsed the *Spiliada* test including its attribution of burden. It should be recalled, however, that Alberta still requires prior leave of the court for service *ex juris*.

43. *Frymer, supra* note 8 at 80.

looked instead to the source and scope of the *forum non conveniens* doctrine in Ontario law.[44] Her conclusion was that the doctrine of *forum non conveniens* had its source in the inherent power of the court to control its own process and that the inclusion of the doctrine in the Ontario Rules of Civil Procedure (as part of the 1985 amendments) merely confirmed its application to cases of service *ex juris*.[45] Being a doctrine of general application, its specific application to stays in *ex juris* cases was "only of marginal significance in the appreciation of the scope of *forum non conveniens* in Ontario. . . ."[46] The continued availability of the doctrine outside the service *ex juris* context meant that the doctrine had retained its common law source, including modalities such as the burden of proof. In the absence of legislation imposing a particular onus, the presumption remained that it should be allocated according to common law rules.

Arbour J.A. did not then simply import the burden distribution from *Spiliada*. Instead, she significantly altered the rule by adopting a connecting factor based on the residence of the defendant as opposed to the location of service. In her view, on a motion to stay, the plaintiff should bear the onus of establishing the greater appropriateness of the domestic forum where the defendant is a non-resident; in all other cases, the resident defendant carries the burden of identifying the more appropriate foreign forum.[47] In the case before her, the defendant was a non-resident

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44. This approach is certainly justified by Sopinka J.'s own argument that the appropriateness of the forum is the underlying principle. It only makes sense, therefore, to look beyond the specific rules on service *ex juris* to determine the onus issue.

45. This was not the first time that the precise intersection between *forum non conveniens* and the Ontario Rules of Civil Procedure was being scrutinized. See E. Edinger, "The *MacShannon* Test for Discretion: Defence and Delimitation" (1986) 64 Can. Bar Rev. 283 at 301. In *Roger Grandmaître Ltd.* v. *Canadian Int'l Paper Co.* (1977), 15 O.R. (2d) 137 (Gen. Div.), aff'd (1977) 18 O.R. (2d) 175n (C.A.), the power of a court to decline jurisdiction on the basis of *forum non conveniens* was questioned following the 1975 removal of the leave requirement for service *ex juris*. There Robins J. favoured the doctrine's survival on the grounds that the discretion conferred by it could not be abolished by amendments to rules of procedure. The Court went on to decline jurisdiction on the basis of *forum non conveniens*. Although this decision was confirmed on appeal, the appeal decision left unanswered the question whether a general discretion, beyond *forum non conveniens*, had survived the abolition of leave. In *Singh*, *supra* note 42, the Court of Appeal held that any grounds previously used to refuse leave to serve abroad could be relied upon to decline jurisdiction despite a plaintiff's compliance with the rules for service *ex juris*. This broader holding appears to have been repealed in the latest amendment to the rules in 1985. Under the current rules, once service *ex juris* is authorized without leave, *forum non conveniens* provides the only available ground for a stay if the court has jurisdiction. Rule 17.06(2)(c) uses the expression: "Ontario is not a convenient forum for the hearing of the proceeding." Although the substance of *forum non conveniens* involves more than mere convenience, the Rule is considered to put the doctrine on a statutory basis. The adoption of "convenient" was part of a general attempt to delatinize the rules.

46. *Frymer*, *supra* note 8 at 84.

47. *Ibid.* at 84–85.

and therefore the burden rested on the plaintiff. Thus while Arbour J.A. retained the *Spiliada* "as of right" distinction, she changed the definition of the "as of right" criterion. Unfortunately, she offered no further explanation for her choice of residence as the relevant distinguishing factor except to state that it "accords with the principles of comity upon which the doctrine of *forum non conveniens* rests."[48] Nor is there any discussion of the observation in *Amchem* that residence may be manipulated "for tax or other reasons notwithstanding the defendant has a real and substantial connection with this country."[49]

Her conclusion on the burden of proof issue is, on its face, inconsistent with the decision in *Amchem*. True, Sopinka J. recognized that the issue ultimately depended on the particular provincial rules for service *ex juris*. If, however, the allocation of the burden is not explicitly prescribed by the rules of service themselves, then the general common law rule stated in *Amchem* should govern, placing the burden on the defendant seeking a stay. The Supreme Court has replaced the rule on the allocation of the burden put forth in *Spiliada* with its own version, applicable throughout the common law provinces in the absence of clear statutory modification, save perhaps where prior leave is still required for service *ex juris*.[50] As a result, it is no longer open to provincial courts to refer to English precedent, directly or indirectly, in construing their provincial rules of procedure on service *ex juris*.

Weiler J.A., in her partial dissent, held that the burden of proof should have rested on the defendant, not the plaintiff.[51] This conclusion was reached on the grounds that *Morguard*'s foreign judgment recognition rule had rejected the notion of exorbitant jurisdiction traditionally associated with service *ex juris*.[52] Weiler J.A. stated that this change in the rules of recognition severed the last link with the English common law enunciated in *Spiliada*, a link that had already been significantly weakened by the abolition of the leave requirement for service *ex juris*.[53] In other words, the removal of the "exorbitant" epithet was equivalent to extending the "as of right" qualifier to all justifiable exercises of jurisdiction based on *Morguard*'s real and substantial connection test. Despite its initial consistency with the *Morguard* test for jurisdiction, this minority

48. *Ibid.* at 85.
49. *Supra* note 4 at 921.
50. Where service is granted by leave of the court, it may be possible to imply that the plaintiff's burden to justify service *ex juris* is maintained in a motion to set aside service.
51. *Frymer, supra* note 8 at 67. She found that in this case, the burden of proof would not have affected the conclusion in relation to the appropriate forum.
52. *Ibid.* at 75.
53. *Ibid.* at 77.

view is vulnerable. According to Weiler J.A., "there is a real and substantial connection to the subject matter of the action when service is made pursuant to rule 17.02 [of the Ontario Rules]."[54] Why any rule for service *ex juris* necessarily conforms to the real and substantial connection test is not explained further and the correctness of that assertion is doubtful. Since *Hunt*, it is clear that the basic parameters of judicial jurisdiction are defined as a matter of constitutional law according to the principles articulated in *Morguard*.[55] Provincial rules for service *ex juris* are therefore subject to constitutional scrutiny.[56] By the time *Frymer* was decided it was no longer possible simply to assert, as Weiler J.A. did, that "the instances in which an action is recognized as having a real connection with Ontario are set out in rule 17.02."[57] If a constitutional challenge had been made—as indeed appears to have been done[58]—the court should have considered it first instead of choosing to dismiss the appeal on the grounds of *forum non conveniens*.

This suggested approach was taken in *Macdonald* v. *Lasnier*[59] where on a motion to stay proceedings, the defendant argued that the court either had no jurisdiction or, alternatively, that Ontario was not the appropriate forum to try the action. The plaintiff had served the defendant *ex juris*, in accordance with the provisions of Rule 17.02(h), on the basis that damage had been suffered in Ontario as a result of a tort allegedly committed in Quebec. Cunningham J. agreed with the defendant's objection that *Morguard* had "placed significant limits upon the initiation of such actions, requiring a real and substantial connection between Ontario and the action."[60] In his view, the mere fact that Rule 17 permitted service *ex juris* where damage was suffered in Ontario was not enough; constitutional imperatives required a sufficiently real and substantial connection with Ontario to give the Court jurisdiction. Having found no such connection, the Court stayed the action. Cunningham J. then went on to consider the alternative *forum non conveniens* argument and arrived at

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54. *Ibid.*

55. The possibility of a constitutional challenge to jurisdiction based on traditional division of powers arguments had already been implicit in *Moran* v. *Pyle National* (1974), [1975] S.C.R. 393, 43 D.L.R. (3d) 239; and more recently in *Dupont* v. *Taronga Holdings* (1986), [1987] R.J.Q. 124, 49 D.L.R. (4th) 335 (Que. Sup. Ct.). See generally, P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 328–335.

56. See for example, *Wilson* v. *Moyes* (1993), 13 O.R. (3d) 202 (Gen. Div.) and *Mathias Colomb Band of Indians* v. *Saskatchewan Power Corp.*, [1993] 6 W.W.R. 153 (Man. Q.B.), aff'd 111 D.L.R. (4th) 83 (Man. C.A.).

57. *Frymer*, *supra* note 8 at 75.

58. *Ibid.* at 77–78.

59. (1994), 21 O.R. (3d) 177 (Gen. Div.).

60. *Ibid.* at 181.

the same conclusion. It is submitted that this approach is the preferred one on principle. The doctrine of *forum non conveniens* only applies if the court is competent to hear the case in the first place: it is a discretion to decline jurisdiction, not an *a priori* condition of jurisdiction.[61] Even if the plea of *forum non conveniens* is an alternative plea, the court should decide the challenge to the jurisdiction first before considering whether to exercise or decline to exercise its validly established competence over the defendant.

The problematic aspect of the Court's reasoning concerns the burden of proof issue. Referring to *Amchem*, Cunningham J. held that the "onus of displacing the forum selected by the plaintiff should be with the defendant."[62] He did not justify why the *Amchem* rule on the burden of proof, applicable in a *forum non conveniens* context, should be equally applicable to a primary jurisdictional challenge based on the *Morguard* test. Nor did he consider whether *Frymer* had altered the *Amchem* rule for Ontario. This is peculiar since *Frymer* was cited in the body of the judgment as the "law in the Province of Ontario" on the question of *forum non conveniens*.[63] Cunningham J.'s conclusion is, nevertheless, justified on other reasoning: it is consonant with the general rule that the party challenging the constitutionality of a statute has the burden of proof.[64] It must be observed, however, that the rule differs somewhat in the case of a challenge based on the *Charter* where a shift in burdens onto a party seeking to justify a breach will normally follow a *prima facie* case of breach.[65] Since the jurisdictional principles elaborated in *Morguard* and

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61. Where leave of the court is retained for service *ex juris*, the two aspects can be subsumed into one depending on the specifics of the rules of procedure. If, as in Alberta's Rule 30 or England's Order 11, rule 1, a claim must fall within an enumerated head, the court's decision will be two-stepped: first a determination that the particular claim falls within the category (jurisdiction) and second that the court should give leave to serve (discretion). Where, on the other hand, the rules are not particularized, as in Nova Scotia, the court's decision does not distinguish between the two elements. The latter scenario is the exceptional one since only Nova Scotia retains this model for rules of service in Canada.

62. *Supra* note 59 at 183.

63. *Ibid.* But see *Trepanier* v. *Kloster Cruise Ltd* (1995), 23 O.R. (3d) 398 (Gen. Div.) where the court combined the appropriateness test from *Amchem* and the burden allocation from *Frymer* to resolve a *forum non conveniens* claim by the defendant. The case was complicated by the presence of an exclusive jurisdiction clause (designating Florida) in what the court described as a consumer contract. Thus, although the onus was ostensibly on the plaintiff-consumer to justify her choice of forum, the "onerous and complicated" terms in the contract appeared to turn the tables against the corporate defendant seeking to enforce the jurisdictional clause. Compare the recent contrary finding by the U.S. Supreme Court in *Carnival Cruise Lines* v. *Shute*, 111 U.S. 1522 (1991).

64. Hogg, *supra* note 55 at 390–91.

65. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. See Hogg,

constitutionalized in *Hunt* are not exclusively based on division of powers,[66] it is at least possible that a different presumption as to the burden of proof is applicable to a primary jurisdictional challenge. La Forest J. did suggest in *Morguard* that section 7 of the *Charter* "might, at least in certain circumstances, play a role" in determining the appropriateness of jurisdiction.[67]

Despite certain promising signs in *Macdonald* v. *Lasnier* and the minority approach in *Frymer*, the interaction between the establishment of jurisdiction and the discretion to decline jurisdiction on grounds of *forum non conveniens* has not been dealt with in a satisfactory manner. In addition to confusion regarding the burden of proof issue on a *forum non conveniens* claim, there is currently no solution to the burden issue on a constitutional challenge based on the *Morguard* real and substantial connection rule, save an unreasoned extension of the rule in *Amchem*. Some responsibility for this result must lie with the decision in *Amchem*. It does not provide sufficient guidance on the two burden of proof questions, nor does it consider the relationship between the various constitutive elements of jurisdiction within a general approach to judicial jurisdiction in private international law.

IV. *A Principled Approach to the Burden of Proof Issue*

As explained earlier the main rationale underlying the *Spiliada* allocation rule is the perceived exorbitant nature of "assumed" or statute-based jurisdiction following service *ex juris* under Order 11.[68] As a result, English courts do not consider Order 11 jurisdiction to be legitimate for the purpose of recognition and enforcement of foreign judgments under

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supra note 55 at 857–60. Hogg states that there is no presumption of constitutionality in the case of a *Charter* claim whereas one exists in the case of a challenge based on division of powers. The burden on the party opposing the jurisdiction on a constitutional ground may therefore vary according to the nature of the claim.

66. Indeed, the novelty of *Hunt* is its "discovery" of a constitutional principle of full faith and credit requiring recognition and enforcement of provincial judgments that draws on different sections of both the *Constitution Act, 1867* and the *Charter* as well as "sub-constitutional factors." See V. Black & A.W. MacKay, "Constitutional Alchemy in the Supreme Court: *Hunt* v. *T & N plc*" (1994) 5 N.J.C.L. 79.

67. *Morguard*, *supra* note 2 at 1110. Article 7 states that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The suggestion stems from the potential influence of American caselaw on interstate jurisdiction which has long been discussed in terms of due process. See for example, A.R. Stein, "Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction" (1987) 65 Texas L.R. 689.

68. It should be noted that Lord Goff sought to mitigate this point by suggesting that some bases are more exorbitant than others and that each "head" of Order 11 should be assessed on its own merit. *Spiliada*, *supra* note 7 at 481.

common law rules.[69] Since *Morguard*, however, the rules of recognition in Canada have dramatically changed, putting an end to the suitability of this rationale in the interprovincial context.

Morguard effectively rejected the narrowness of the common law rules of recognition and enforcement and expanded them to include a new method of evaluating the legitimacy of a foreign court's jurisdiction.[70] The Supreme Court held that in addition to the traditional common law recognition rules based exclusively on the defendant's presence in (or submission to) the rendering jurisdiction, foreign judicial competence based on a real and substantial subject-matter connection to that forum would justify, at least between Canadian common law provinces, the recognition and enforcement of extra-provincial judgments.[71] This new and improved common law rule of recognition was given constitutional status in *Hunt* (decided after *Amchem*[72]) and has since been extended by lower courts to judgments of foreign countries.[73]

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69. See *supra* text accompanying notes 13–14.

70. There is an extensive literature on the recognition and enforcement aspects of *Morguard* including: E. Edinger, "*Morguard* v. *De Savoye*: Subsequent Developments" (1993) 22 Can. Bus. L.J. 29; J.A. Woods, "Recognition and Enforcement of Foreign Judgments Between Provinces: The Constitutional Dimensions of *Morguard Investments Ltd.*" (1993) 22 Can. Bus. L.J. 104; V. Black and J. Swan, "New Rules for the Enforcement of Foreign Judgments" (1991) 12 Advocates' Q. 489; H.P. Glenn, "Foreign Judgments, the Common Law and the Constitution" (1992) 37 McGill L.J. 537.

71. *Morguard* did not specify whether the connections were cumulative or alternative as to the parties (defendant and/or plaintiff), the action (and/or merely the transaction) and the forum. This ambiguity is not resolved in *Hunt* or in the most recent pronouncement of the Supreme Court on private international law in *Tolofson* v. *Jensen*, [1994] 3 S.C.R. 1022, [1995] 120 D.L.R. (4th) 289, 1 W.W.R. 609 [hereinafter cited to S.C.R.].

72. Since the constitutionalization of the "full faith and credit" obligation within Canada, Quebec Civil Code provisions governing recognition and enforcement are subject to the limitations specified in *Morguard* and restated in *Hunt*. The Court in *Hunt* refused to consider whether provincial rules could apply stricter conditions to judgments from non-Canadian jurisdictions (*supra* note 3 at 331). Although *Hunt* was decided after *Amchem*, it was argued before the decision was handed down in *Amchem*. And since Sopinka J. sat on both cases (and on *Morguard*), it is entirely reasonable to infer that he was aware of the impending constitutionalization of *Morguard* in *Hunt*. The closeness of the decisions in time makes the reasoning in *Amchem* all the more puzzling, particulary in light of the fact that the bench was virtually identical in all three cases.

73. See, for example, *Moses* v. *Shore Boat Builders* (1993), 83 B.C.L.R. (2d) 177 (application for leave to appeal to the Supreme Court dismissed (1994), 87 B.C.L.R. (2d) xxxii, La Forest, Sopinka and Major JJ.); *Arrowmaster Inc.* v. *Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.); *contra*: *Dodd* v. *Gambin Assoc.* (1994), 17 O.R. (3d) 803 (Gen. Div.). Since *Morguard*'s arguments for reforming the common law rules were based on principles of private international law as well as constitutional reasoning, the extension of the recognition rule is justified in the absence of specific limitations to interprovincial judgments. This conclusion is reinforced by the Supreme Court's refusal to hear an appeal in *Moses* despite the B.C. Court of Appeal's clear call for direction on this point.

The upshot of these cases is that jurisdiction over out-of-province defendants can be legitimate both from the perspective of the rendering court and the recognizing court based on a real and substantial connection test. This follows from La Forest J.'s statement in *Morguard* that "the conditions governing the taking of jurisdiction by the courts of one province and those under which [judgments] are enforced by the courts of another province should be viewed as correlative."[74] The new Canadian position therefore corrects the absence of correlation in English law that serves to justify the process governing service *ex juris* and stays of proceedings.

Given this potentially convincing ground for challenging the *Spiliada* allocation of the burden of proof based on the location of service, it is surprising that Sopinka J. did not even allude to it. In fact, the only references to *Morguard* in *Amchem* are to its general statements about the role of comity as a fundamental principle of Canadian private international law.[75] According to *Amchem*, resort to anti-suit injunctions is made necessary by the inconsistent commitment to comity on a world-wide basis that can lead to inappropriate assumptions of jurisdiction over international cases.[76] It is clear, therefore, that Sopinka J. sees a link between *Morguard* and *Amchem*, at least at a macro level. The failure to explicitly integrate the two decisions in elaborating the test for *forum non conveniens* is curious. It is not, however, particularly surprising given the Supreme Court's general reluctance to define the interaction between the various elements of judicial jurisdiction in private international law. Such a stand is unfortunate in light of numerous lower court decisions that demonstrate confusion on these basic issues.[77]

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74. *Supra* note 2 at 1094.

75. A discussion of La Forest and Sopinka JJ.'s reliance on a version of comity endorsed by the U.S. Supreme Court in *Hilton* v. *Guyot*, 159 U.S. 113 (1895) lies outside of this essay. Scepticism as to the value and meaning of that version is clearly established in G.B. Baker, "Interstate Choice of Law and Early-American Constitutional Nationalism" (1993) 38 McGill L.J. 454. See also R. Wisner, "Uniformity, Diversity and Provincial Extraterritoriality: *Hunt* v. *T & N plc*" (1995) 40 McGill L.J. 759.

76. The Court in *Amchem* comes to consider the doctrine of *forum non conveniens* as a step in a court's evaluation of a request to grant an anti-suit injunction to stop litigation in a foreign court. In short, a preliminary requirement in such a case is that the foreign court be inappropriate according to a *forum non conveniens* analysis.

77. For example, in the case of *Webb* v. *Hooper*, *supra* note 5, the Alberta Court applied the *Amchem* test on *forum non conveniens* in deciding whether to recognize a Kentucky judgment. In the view of the court, the *Amchem* test was simply equivalent to the *Morguard* test. In *Kelly* v. *KMart Canada*, *supra* note 5 at para. 11, a British Columbia judge argued that "the principles applicable for leave to grant service *ex juris* do not have application" to a stay of proceedings pursuant to service *in juris* and then sought the test for *forum non conveniens* in *Amchem*, *Spiliada* and *Antares*. Finally in *Tortel Communications* v. *Suntel*, *supra* note 5, the Manitoba Court of Appeal relied on *forum non conveniens* as a justification for finding that the plaintiff

V. *Outline of a Solution*

Although the full implications of *Morguard* and *Hunt* on provincial rules of jurisdiction and service *ex juris* are only beginning to be fleshed out in the courts, it is clear that the revolution in recognition rules requires a reassessment of jurisdiction itself with consequent alterations of *forum non conveniens*. Specifically, the distinction and relationship between establishing judicial competence and exercising it needs to be clarified. In its two pronouncements on the issue besides *Morguard* and *Amchem*, the Court has either expressly refused to consider the relation between jurisdiction and *forum non conveniens* or has simply posited the continued coexistence of these two elements.[78] The Supreme Court in *Hunt* proffered a general statement, expressly refusing to explore the issue further. Speaking for the Court, La Forest J. stated:

> I need not, for the purposes of this case, consider the relative merits of adopting a broad or narrow basis for assuming jurisdiction and the consequences of this decision for the use of the doctrine of *forum non conveniens*. . . . I need not consider the implications, if any, of *Morguard* on choice of law and other aspects of conflicts law . . . . [T]he assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.[79]

This terse comment did not address the problem caused by reliance in both *Morguard* and *Amchem* on a rule of real and substantial connection in relation to both jurisdiction and *forum non conveniens*. However, a passage in *Tolofson* v. *Jensen* suggests that the Court continues to treat *forum non conveniens* as a separate process. Having reiterated that a real and substantial connection is required to establish jurisdiction, La Forest J. indicated:

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had not met the criteria for service *ex juris* without leave. The Court cited the passage in *Amchem* relating to juridical advantage as the statement of principle, the conclusion being that a juridical advantage could not found the jurisdiction of the court.

Of even greater concern is the failure of some courts to recognize the authority of *Amchem* for the *forum non conveniens* doctrine. For example, none of the following cases cites *Amchem* and many rely on precedents that have been implicitly overturned by the Supreme Court decision: *Carroll* v. *Wag-Aero*, [1994] N.S.J. No. 550 (S.C.); *Johnson* v. *Hall*, [1994] N.S.J. No. 472 (S.C.); *Stewart Estate* v. *Stewart Estate*, [1994] N.W.T.J. No. 23 (S.C.); *G.N. Johnston Equipment* v. *Remstar International*, [1994] N.B.J. No. 366 (Q.B.); *Dairy Producers Co-op* v. *Agrifoods Int'l*, [1994] S.J. No. 301 (Q.B.) and *Confederation Trust* v. *Discovery Towers*, [1994] B.C.J. No. 1040 (C.A.).

78. For further analysis of this question see V. Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993) 22 Can. Bus. L.J. 4 at 20ff; see also C. Walsh, "Case Comment: *Hunt* v. *T & N plc*" (1994) 73 Can. Bar Rev. 394 at 412–13.

79. *Hunt*, *supra* note 3 at 326.

> In addition, through the doctrine of *forum non conveniens* a court may refuse to exercise jurisdiction where, under the rule elaborated in *Amchem*, . . . there is a more convenient or appropriate forum elsewhere.[80]

This implies that given a real and substantial connection (based on personal or subject-matter connections) the court can nonetheless stay the action on the basis of *forum non conveniens*. It must be assumed, therefore, that the test is *not* identical in both cases.[81] One aspect of the burden of proof analysis in relation to *forum non conveniens* suggests how and why this distinction should be maintained.

As explained previously, the different allocation of the burden of proof in English law is related to the source of the court's jurisdictional competence. In *Spiliada*, Lord Goff attributed much weight to the process established under Order 11.[82] *Amchem*'s rejection of *Spiliada* on this point—on the basis of incompatibility with provincial rules of procedure—may suggest that the removal of the leave requirement in Canada has had a double effect. At a merely procedural level, it puts service *in juris* on the same footing as service *ex juris*. At a more substantive level, it tends to collapse the distinction between personal and subject-matter connections that has traditionally paralleled the location of service: Whereas jurisdiction based on service *in juris* has typically been justified because of a connection between the defendant and the forum, a subject-matter connection to the forum has supported service *ex juris* to grant competence over foreign defendants located outside the traditional *in personam* reach of the court.[83] Since the jurisdiction of the common law court flows from service on the defendant, the breakdown of the distinction between service in and out of the jurisdiction could easily imply a corresponding assimilation of the underlying connections.

The Supreme Court's decisions in *Morguard* and *Hunt* do not support such a conclusion. In the former case, La Forest J. explicitly stated that presence-based jurisdiction, unlike subject-matter connection, needed no

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80. *Tolofson* v. *Jensen*, *supra* note 71 at 1049 [hereinafter *Tolofson*].

81. For a defence of this position, see Black, *supra* note 78 at 20ff. According to Black, there are valid arguments for maintaining both elements in conformity with the principles of order and fairness as they take shape within the unique constitutional framework of the Canadian federation.

82. *Supra* note 21 at 480–81.

83. This distinction is also important from the point of view of timing. Service *in juris* is valid where the defendant was present/resident in the jurisdiction at the time of service; in other words, the personal connection between the defendant and the forum need only exist at the time of litigation. For the purpose of service *ex juris*, however, the connection between the subject-matter and the forum must necessarily exist at the time the cause of action arose. The competence of a court on the basis of subject-matter connections will therefore survive beyond the time the cause of action arose within its jurisdiction.

further justification to be considered appropriate.[84] In other words, service *in juris* is presumed to conform to the real and substantial connection test and therefore confer legitimate jurisdiction on the court despite the absence of any other connections between the case and the forum. In *Hunt*, La Forest J. retreated somewhat from this position, suggesting instead that traditional common law bases "may require reconsideration in light of *Morguard*".[85] This comment was arguably directed at transient presence which is still sufficient to found jurisdiction "as of right" in English law[86] (although its validity for recognition purposes has been subject to doubt[87]). In light of *Morguard*'s primary concern for order and fairness, it is difficult to conceive how jurisdiction based solely on a defendant's temporary presence in the forum, absent any other connection with the cause of action or the defendant, could ever conform to the standard established by the Supreme Court.

The rejection of transient presence does not imply a rejection of presence-based jurisdiction based on personal links between the defendant and the forum—"personal" being used in contrast to "subject-matter." On the contrary, a limited personal basis for judicial jurisdiction is essential to secure access to justice in the absence of a subject-matter nexus with a single state or province.[88] The intrinsic validity of this jurisdictional basis is recognized by most countries. For example, in the European Union, the Brussels Convention adopts the domicile of the defendant as the primary jurisdictional basis.[89] More recently, a special commission of the Hague Conference, of which Canada is a member, found an international "consensus . . . in favour of accepting a basis for jurisdiction founded on the links which a defendant . . . has with the

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84. *Morguard*, *supra* note 2 at 1103–04.

85. *Hunt*, *supra* note 3 at 325.

86. It is precisely the potential inequity arising from the transient presence rule that gave rise to a control mechanism in English law that eventually developed into the *forum non conveniens* doctrine articulated in *Spiliada*. The English courts have, however, abdicated any responsibility for changing the common law rule, claiming that it is too long established to permit judicial amendment: *Adams* v. *Cape Industries*, [1990] Ch. 433 (C.A.). The same has been said in the U.S.: *Burnham* v. *Superior Court of California*, 495 U.S. 604 (1990); and recently in Canada: *Exta-Sea Charters* v. *Formalog* (1991), 55 B.C.L.R. (2d) 197 (S.C.).

87. Residence is recognized, at common law, as a proper jurisdictional basis for recognition purposes. There is authority for the view that mere presence is sufficient as well: *Carrick* v. *Hancock* (1895), 12 T.L.R. 59 (Q.B.) although it is criticized on the basis that English law controls the transient presence rule internally, something that it does not do at the recognition stage. See *Cheshire & North*, *supra* note 11 at 349–50. But see *Carrick Estates Ltd.* v. *Young* (1987), 43 D.L.R. (4th) 161 (Sask. C.A.).

88. *Amchem*'s statement, *supra* note 4 at 911, that a situation involving multiple defendants linked to several jurisdictions is the reality of modern litigation is an argument in favour of subject-matter connection, not an argument against presence-based jurisdiction.

89. See *supra* note 28.

forum."[90] The deficiency of the common law presence rule lies only in the absence of a durability element.

Assuming the adoption of a more substantial criterion such as residence as opposed to mere presence, subjection to "home" jurisdiction would not involve any *prima facie* injustice to the defendant. Provided that residence is defined in terms that ensure a real and substantial connection between the defendant and the forum, it fulfils the conditions of order and fairness that "must underlie a modern system of private international law . . . to ensure the security of transactions with justice."[91] A residence rule meets the requirements of certainty and predictability which serve both order and fairness. The fairness principle also seeks to prevent subjecting the defendant to a jurisdiction with which she has no connections; this is respected under a residence rule defined in terms of real and substantial connections between the party and the forum. Barring unequivocal language by the Court or legislative intervention, personal jurisdiction should be assumed to endure alongside the statutory grounds based mainly on subject-matter.[92]

From the premise that the distinction between personal and subject-matter connections survives *Morguard* and *Hunt*, it is possible to envisage placing the burden on the plaintiff seeking to establish jurisdiction based on subject-matter, outside the "personal" jurisdiction of the defendant. Hence, in the absence of a personal connection between the defendant and the forum, the plaintiff would have to justify the chosen court's taking of jurisdiction on the basis of connections between the action and the forum. On the assumption that subjecting a non-resident to local jurisdiction involves some element of due process, placing the burden on the plaintiff to justify this assertion of jurisdiction would create a built-in procedural control over long-arm jurisdiction without reintroducing a prior leave requirement.

On the other hand, if residence becomes the requisite connection for personal jurisdiction, defined in terms of a real and substantial connection excluding subject-matter links, the legitimacy (and hence constitutionality) of that jurisdiction is implicit. There is no need, in such circumstances, to control the plaintiff's choice of the place of litigation and

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90. Permanent Bureau of the Hague Conference on Private International Law, *Conclusion of the Special Commission of June 1994 on the Question of the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Preliminary Document No. 1. at para. 12.

91. *Morguard*, *supra* note 2 at 1097. See also C. Walsh, *supra* note 78 at 404–09.

92. If this accurately reflects the state of Canadian law on judicial jurisdiction in a private international law perspective, the similarity with the English system is substantively intact despite procedural divergences. Rejection of the *Spiliada* allocation rule cannot succeed, in principle, on this point.

therefore the burden can remain on the defendant to rebut the presumption that his or her residence, in fact, does not conform to the constitutional requirement.[93]

Although it is possible to collapse personal and subject-matter connection into a general "real and substantial connections" test, the maintenance of two separate grounds is preferable. For one, it underscores the conceptual distinction between the two bases: one based on membership in a community and the other based on activity affecting a community.[94] This approach also abstracts from the location of service, concentrating instead on the jurisdictional basis itself. This serves to emphasize that since *Morguard*, jurisdiction should be considered in substantive terms whereas rules of service have become merely procedural. In addition, if the Supreme Court wishes to maintain a separate role for *forum non conveniens*, the two types of jurisdictional connections—personal and subject-matter—should remain autonomous, that is, they should each have to be sufficient to establish jurisdiction. A court's discretion to decline jurisdiction would then combine factors going to both types of connections to determine the appropriateness of the forum from a *forum non conveniens* perspective. Questions of convenience and expense which are not considered at the primary jurisdictional stage would come into play as would other connections not normally considered relevant to found jurisdiction such as the residence of the plaintiff.[95]

Since both the *Morguard* and *Amchem* tests rely on the "real and substantial connection" criterion, the division of judicial jurisdiction into two types with specific connecting factors will prevent confusion and facilitate the application of the rules. In particular, it will avert any attempt to balance the various connections at the primary stage of establishing the competence of the court by confining the evaluation to a single type of connection. By restricting the broad balancing analysis based on all the factors to the *forum non conveniens* stage, the issue of actual competence is more likely to be adequately assessed on its own

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93. Where the plaintiff carries the burden of justifying his choice of jurisdiction, it would be necessary to allow the defendant to contest the legitimacy of jurisdiction at the enforcement stage. Forcing the defendant to challenge at the outset would defeat the purpose of the burden allocation. This approach maintains the plaintiff's ability to seek a default judgment, thereby balancing the plaintiff's and the defendant's rights according to the principles of order and fairness.

94. This terminology is borrowed from L. Brilmayer, "Liberalism, Community, and State Borders" (1991) 41 Duke L.J. 1.

95. A list of relevant factors was suggested by Low J. in *Stern* v. *Dove Audio*, [1994] B.C.J. No. 1098: residence of parties; where parties carry on business; where cause of action arose; where loss/damage occurred; juridical advantage to plaintiff; juridical disadvantage to defendant; convenience to potential witnesses; cost of conducting litigation; difficulty and cost of proving foreign law; applicable substantive law; parallel proceedings in other jurisdictions.

merits.[96] Considering also the different standard for review of constitutional decisions as opposed to exercises of discretion, there is much to be gained at appellate levels by simplifying the process for lower courts.[97]

By maintaining the autonomy of personal and subject-matter connections, the likelihood of recognition and enforcement of foreign judgments is also enhanced. The foreign rendering court's jurisdiction will comply with the Canadian private international law requirement of order and fairness in the assumption of jurisdiction on the basis of either personal or subject-matter connections. Where, for example, a state of the European Union has taken jurisdiction on the basis of domicile, a Canadian court will be prepared to enforce the resulting judgment irrespective of an absence of subject-matter connection between the case and the rendering forum. Any other result would contradict the objective of *Morguard* by narrowing as opposed to broadening the grounds for recognition and enforcement; it would also undermine the "correlative" relation between enforcement rules and jurisdictional rules that underlies much of the Supreme Court's reasoning in that case. Moreover, it would indicate that a foreign court's conformity with the first stage of jurisdictional scrutiny, defined according to the *Morguard* standard, is sufficient for recognition purposes. On the other hand, conformity with the second stage, defined according to the *forum non conveniens* test in *Amchem*, would become necessary for anti-suit injunctions.

Overall, therefore, the legitimacy of a jurisdictional claim should be assessed at the primary stage of establishing the competence of the court while the appropriateness of exercising jurisdiction should be gauged at the secondary *forum non conveniens* stage. At the primary stage, the plaintiff should be required to justify a jurisdictional claim over a non-resident defendant. At the secondary stage, however, once the court's

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96. The court in *Macdonald* v. *Lasnier*, *supra* note 59, failed to clearly distinguish between these two phases of jurisdiction. In determining whether the assumption of jurisdiction was constitutional, the Court considered several factors usually relevant to a *forum non conveniens* analysis. For example, the Court mentioned the location of witnesses and documents (at 182). When the Court then came to determine whether it should exercise its discretion to decline jurisdiction, there was little further analysis because most of the factors had already been balanced for the constitutional argument.

97. Maintenance of the division is not problematic from a constitutional point of view since the Supreme Court has admitted the legitimacy of concurrent judicial jurisdiction. See in particular, *Morguard* at 1109: "it is simply anachronistic to uphold a . . . single situs for torts or contracts for the proper exercise of jurisdiction." This should be contrasted with the conclusion in *Tolofson* on choice of law. There La Forest J. held that while a province may be theoretically competent to regulate its residents' out-of-province activity, "it is arguable that it is not constitutionally permissible for both the province where certain activities took place and the province of the residence of the parties to deal with civil liability arising out of the same activities" (*supra* note 71 at 1066).

competence has been constitutionally and internationally validated, the onus should be on the defendant to identify a clearly more appropriate foreign court thereby persuading the domestic court that it should decline to exercise its jurisdiction, being a *forum non conveniens*. Such a framework would reconcile the Supreme Court's explicit statements in *Morguard* about international and constitutional constraints on jurisdiction with its implicit distinction in *Morguard*, *Hunt*, and *Tolofson*, between the assumption of jurisdiction and the discretion to exercise it.

In the end, therefore, Justice Sopinka may have been right to dismiss the location of service in *Amchem* as merely procedural. This article has attempted to show that this finding has much broader implications that require a comprehensive review of international judicial jurisdiction by the Supreme Court in its bid to construct a "rational and workable system of private international law" based on the "underlying reality of the international legal order."[98]

98. *Tolofson*, *supra* note 71 at 1047–48.