Case Note

CHOICE OF LAW IN *FORUM NON CONVENIENS* ANALYSIS

Puttick v Tenon Ltd
[2008] HCA 54

The overlap between questions of jurisdiction and choice of law is perhaps most visible when applying the doctrine of *forum non conveniens*: it is now generally accepted that the *lex causae* is indicative of where the natural forum is. But as the facts and holding of the decision of the High Court of Australia in *Puttick v Tenon Ltd* suggest, some issues remain which warrant careful treatment when considerations of the applicable law enter the jurisdictional analysis. Such difficulties relate to uncertainties on the threshold of proof, as well as the interaction between the *forum non conveniens* inquiry and procedural rules on pleading and proof of foreign law.

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I. Introduction

1 As jurisprudence emanating from England becomes an increasingly infertile ground on issues of *forum non conveniens*,[1] it is to other jurisdictions such as Australia and Canada that we turn for valuable insights into the application of this common law doctrine. Although the courts in these countries may have taken some steps away from the traditional *Spiliada* analysis[2] (which Singapore law inherited

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1 Due to European legislation that restricts significantly the scope of the English courts' jurisdiction to stay proceedings on grounds of *forum non conveniens*.

2 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. In Australia, the more restrictive test of "clearly inappropriate forum" has been adopted: *Oceania Sun Line v Fay* (1988) 165 CLR 197; *Voth v Manildra* (1991) 171 CLR 538; *Zhang v Renault* (2003) 210 CLR 491. Canadian courts have gone the other way to expand on the *Spiliada* analysis to largely rely on *forum non conveniens* as the underlying principle behind the law on anti-suit injunctions (see *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897) as well as the

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and continues to be applied here),[3] sufficient similarities remain, particularly as regards the factors to be considered, that justify close attention being paid to developments from these commonwealth jurisdictions. One such development is the Australian decision in *Puttick v Tenon Ltd* ("*Puttick*"),[4] concerning in the main the treatment of choice of law considerations in the jurisdictional analysis of *forum non conveniens*.

2 In what may appear to some as a rather forum-centric ruling, the High Court of Australia played down the significance of the applicable law as a factor to consider in deciding whether to stay proceedings in favour of another jurisdiction, at any rate on the facts and circumstances of the case itself. What is of particular interest is the court's view that the state of the pleaded issues and evidence at the stage of the stay application made it impossible to reach any definitive or even provisional finding as to the *lex causae*. This brings to mind a question, perhaps not often considered, of what should be the standard of proof required in establishing the applicable law (or more generally other jurisdictional facts) for the purpose of the *forum non conveniens* inquiry. This is especially important where questions of fact enter the inquiry as to *lex causae*, either because there are factual disputes affecting the identification of the precise legal issue(s) in question, or where the choice of law rule itself is significantly fact-based.

3 The Australian decision also provokes a further line of thought which may raise some concerns for defendants seeking to stay proceedings in favour of another jurisdiction. Our civil procedure rules are such that questions of the appropriate forum come up for consideration generally at a stage where the court is appraised only of the pleaded version of facts of the plaintiff in the statement of claim. This is because the defence would typically not be filed by the defendant who desires a jurisdictional challenge. Bearing in mind that foreign law comes into the picture only if pleaded, it will be seen that the court's approach in *Puttick*, of placing minimal or no weight on the factor of the applicable *lex causae* largely because the state of the pleadings made its determination an almost impossible one, potentially puts defendants in an invidious position in their bid to have another forum hear the case.

law on recognition and enforcement of foreign judgments (see *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 and *Beals v Saldanha* [2003] 3 SCR 416).

3 Most recently by the Court of Appeal in *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428; and *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543.

4 [2008] HCA 54.

II. The approach of the Australian High Court

4 Mr Puttick sought damages in a negligence suit commenced in the Supreme Court of Victoria for certain asbestos-related injuries, which he allegedly suffered during visits to Belgium and Malaysia in the course of his employment with a company called Tasman Pulp and Paper Company ("Tasman"). Tasman was a subsidiary of the defendant, Tenon Ltd ("Tenon"), a company incorporated in New Zealand. After Mr Puttick passed away, his wife was substituted as the plaintiff in the proceedings. It was the plaintiff's case that Tenon owed Mr Puttick a duty of care by reason of the management and control exercised by Tenon over Tasman and over the work of its employees.

5 Tenon applied successfully for an order permanently staying the proceedings in favour of the courts in New Zealand. On appeal, the majority of the Court of Appeal agreed with the first instance judge, primarily on the basis that the *lex loci delicti* (the law of the place where the tort occurred), which was the *lex causae* in the matter,[5] was New Zealand law. The order for stay was overturned by the High Court of Australia, which decided that both the Court of Appeal and the first instance judge had erred in finding that there was sufficient material before them to reach a decision as to what law governed the rights and duties of the parties. French CJ, Gummow, Hayne and Kiefel JJ reasoned as follows:[6]

> *The amended statement of claim filed in the proceedings makes no express allegation that the plaintiff's claim was governed by any foreign law*. No defence has been filed. *The plaintiff's pleading contains only a few allegations which locate the occurrence of any fact or circumstance*. First it alleges Tenon's incorporation in New Zealand … Secondly, it alleges Mr Puttick's death in Victoria. Thirdly, it alleges that he was exposed to asbestos in Belgium and Malaysia. The pleading says nothing about where Mr Puttick was employed, or where Tenon or Tasman operated at the material times …
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> … there was no material that amplified the allegations, made in the plaintiff's pleading, that Mr Puttick had been 'required' to do certain things. No particulars were given in the pleading, or in the evidence adduced at first instance, of how, when, or where it was that Mr Puttick had been 'required to travel to Belgium and Malaysia' …
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> These uncertainties and ambiguities about the relevant relationships between Mr Puttick, Tenon and Tasman could not be, and were not, resolved in determining the respondent's application for a permanent stay. … *But because the relevant relationships between the parties could*

5 The *lex loci delicti* rule is the tort choice of law rule in Australia. By comparison, in Singapore, our courts continue to endorse the double actionability rule: see *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377.

6 [2008] HCA 54 at [18]–[21] (the plurality judgment).

> *not be identified and described in any relevant detail, and because it was not possible to say where (or for that matter how) the various requirements referred to in the plaintiff's pleading were made of Mr Puttick, not even a provisional finding could be made about what was the place of commission of the tort alleged.*
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> [emphasis added]

6 Since, in the High Court's view, crucial factual details such as the place the instructions for Mr Puttick to travel to Belgium and Malaysia were given were missing from the pleadings, the most that could be said was that there would be a lively dispute on where the tort was committed. Accordingly, the High Court said that the Court of Appeal and the first instance judge should have held that it was not possible to decide what would be the *lex causae* and that it was only *arguable* that New Zealand law was applicable. On that basis, the appeal could be allowed, but the High Court went further. It held that even proceeding on the assumption that the law of New Zealand was established to be the *lex causae*, that would not demonstrate that the Supreme Court of Victoria was a clearly inappropriate forum. Their Honours said:[7]

> If the tort which Mrs Puttick alleges Tenon committed against her late husband was shown not to be a foreign tort, Tenon's claim to a stay of proceedings would have been greatly weakened. But it by no means follows that showing that the tort which is alleged is, or may be, governed by a law other than the law of the forum demonstrates that the chosen forum is clearly inappropriate to try the action. *The very existence of choice of law rules denies that the identification of foreign law as the lex causae is reason enough for an Australian court to decline to exercise jurisdiction*. Moreover, *considerations of geographical proximity and essential similarities between legal systems*, as well as the legislative provisions now made for the determination of some trans-Tasman litigation, all point against treating the identification of New Zealand law as the *lex causae* as a sufficient basis on which to conclude that an Australian court is a clearly inappropriate forum to try a dispute. [emphasis added]

III. Consideration of the *lex causae* in determining the *forum conveniens*

7 There is now very little doubt that the applicable law is a relevant factor in ascertaining the natural forum. Most recently, our Court of Appeal explained that this is because "where a dispute is governed by a foreign law, the forum will be less adept in applying that law than the courts of the country of that law, and there could be savings in time and resources in litigating the dispute in the forum of

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7 [2008] HCA 54 at [31] (the plurality judgment).

the applicable law".[8] To add on to that, it may be said that a further advantage of litigating in the foreign court is the existence of an avenue of appellate correction to remedy any errors, which would usually be less readily available for issues involving foreign law since these are regarded as questions of fact that entail more restrictive principles of intervention by the appeal court.[9] However, it is clear that the *lex causae* remains only a factor to be considered, and is not determinative of the *forum conveniens*. The very nature of the *Spiliada* test is a fluid balancing exercise that seeks to weigh different connecting factors to discover the appropriate forum, and obviously not one single factor can be regarded as conclusive.[10] Moreover, the perceived advantage of having a court apply its own domestic law may be illusory if it turns out that the foreign court may not in fact be of the same view that its domestic law is the *lex causae*.[11]

8 Indeed, the Australian High Court placed little significance on the issue of the applicable law in *Puttick*. The plurality judges alluded to the very existence of choice of law rules as explanation for why the identification of a foreign law as *lex causae* cannot be sufficient reason for the court to decline jurisdiction. The point made appears to be that choice of law rules are precisely developed so as to allow the forum court to select an applicable law and to apply it to resolve the dispute between the parties before the court. The inherent assumption is that the forum court has the capability to interpret and apply foreign laws. It therefore surely cannot be the case that every time a foreign law is found to be the *lex causae*, the proceedings are to be stayed in favour of that foreign court.

9 In the particular circumstances of the case, the High Court further took into account the geographical proximity between Australia and New Zealand and the similarities in the laws of the two countries. Our local courts have also accepted similarities between the *lex fori* and *lex causae* as undermining the significance of the applicable law factor.[12]

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8 *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [63]. See also *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [42].

9 See A Briggs & P Rees, *Civil Jurisdiction and Judgments* (London, Singapore: Norton Rose, 4th Ed, 2005) at p 309.

10 The process is hardly a mechanical one: "[A] court has to take into account *a multitude of factors* in balancing the competing interests. The *weightage accorded to a particular factor varies in different cases* and the ultimate appraisal ought to reflect the exigencies dictated by the factual matrix" [emphasis added] (*per* V K Rajah J (as he then was) in *Peters Roger May v Pinder Lilian Gek Lian* [2006] 2 SLR(R) 381 at [20]).

11 See A Briggs & P Rees, *Civil Jurisdiction and Judgments* (London, Singapore: Norton Rose, 4th Ed, 2005) at pp 309–310.

12 See, for example, the High Court decision in *Ismail bin Sukardi v Kamal bin Ikhwan* [2008] SGHC 191, where it was held that the fact that the *lex causae* was Malaysian

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In this connection, one would expect the complexity of the foreign law in question to be of relevance as well: the more complex it is, the greater is the advantage for the foreign court itself to handle the matter.

10 But quite apart from the appropriate *weight* to be given to choice of law in the *forum non conveniens* analysis is the problem that the applicable law *may not sometimes be capable of being considered as a factor at all*, or at any rate not without some difficulties. There are a few facets to the problem. First, the issues in dispute may not yet be clearly defined because the attempt to stay proceedings is often made at an early stage where pleadings are incomplete. In particular, stay applications are made typically when only the statement of claim is filed, which could mean that questions of foreign law remain latent. This aspect will be discussed in Part V below. Second, disputes of fact can affect what exactly is the legal issue in question and correspondingly what the applicable law is. In other words, the characterisation of the legal issue(s) before the court could be dependent first on which version of facts is to be accepted, a question that may not be easily resolved if one is only at the jurisdictional stage. Third, the test for the applicable law may itself be heavily fact-sensitive. One obvious example is the choice of law rule for torts, which requires the identification of where the tort had taken place.[13] The test has been described as one of locating the "substance" of the tort,[14] which would usually entail delving in some detail into the factual circumstances of the case. In a case like *Puttick*, in order to determine where the tort took place, it would be necessary to examine closely the precise relationship between Mr Puttick and his employer, especially the circumstances under which he was instructed to work overseas. As the High Court of Australia's ruling illustrates, such an exercise may not be easily undertaken in view of the scarcity of material before the court at such a premature stage of the proceedings.

IV. Threshold of proof in *forum non conveniens* inquiry

11 The difficulties highlighted above arise because questions of fact may often need to be answered before the applicable law can be determined. If the *lex causae* is to serve as one of the factors to be considered in determining the natural forum, this raises the issue of what should be the requisite standard for proving those underlying facts

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law was not a weighty factor because the Singapore law and Malaysian law relating to negligence on the roads are essentially the same.

13 Under the *lex loci delicti* limb of the double-actionability rule.

14 *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391. This approach, of looking back at the whole series of events constituting the elements of the tort and asking where in substance did the cause of action arise, was referred to in the recent High Court decision of *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446.

for the purpose of resolving the jurisdictional contest. The Australian High Court in *Puttick* held that the lower courts should not have made a definitive finding that New Zealand law applied to govern the rights and obligations of the parties, because there was simply insufficient material to justify such a finding. In fact, according to the court, not even a *provisional* finding could be made as to where the tort occurred. It was not made clear what would constitute a provisional finding, although the court was certainly of the view that it had to be something more than simply being able to say that it is arguable that the tort took place in New Zealand. What was further left unarticulated in the decision was the weight that would be given to the choice of law as a factor in the *forum non conveniens* analysis, had it been possible to reach such a provisional finding that New Zealand law governed the dispute.

12 Indeed, it would appear that what ought to be the approach to handling disputes of fact on a stay application is a question rather rarely considered. This would of course be relevant not only in the specific context of ascertaining what the *lex causae* is, but also in relation to other connecting factors in the *forum non conveniens* inquiry. For instance, where there is disagreement as to the place where a contract was signed, or the location of parties or assets at the material time, to what extent must these facts be established? It is not always obvious what the evidentiary standard applied by the courts is.[15]

13 Things are clearer in the context of the applications for leave to serve outside jurisdiction. There is established case law that the degree of proof required by the court to show that the case falls within one of the heads of O 11 r 1 of the Rules of Court is that of a good arguable case.[16] To be more specific and accurate, a distinction should be drawn between the question of construction of the relevant sub-rules to O 11 r 1 on the one hand, and the question of whether it has been shown with the requisite degree of certainty that the facts are such that the claim falls within one of those sub-rules on the other.[17] The former is an issue of law to be determined by the court, and the standard of good arguable case only pertains to the latter question. What constitutes "a good arguable case" can be better understood by reference to the

15 In *Yeoh Poh San v Won Siok Wan* [2002] SGHC 196, the High Court noted that it was appropriate, at the interlocutory stage of considering a stay application, to form a *prima facie view* on the governing law, but did not elaborate further on this point.

16 *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156; *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438.

17 See A Briggs & P Rees, *Civil Jurisdiction and Judgments* (London, Singapore: Norton Rose, 4th Ed, 2005) at p 372.

following passage quoted by our Court of Appeal in *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* ("*Bradley Lomas*"):[18]

> It indicates that though *the court will not at this stage require proof to its satisfaction, it will require something better than a mere prima facie case*. The practice, where questions of fact are concerned, is to look primarily at the plaintiff's case and not to attempt to try disputes of fact on affidavit; it is of course open to the defendant to show that the evidence of the plaintiff is incomplete or plainly wrong. On questions of law, however, the court may go fully into the issues and will refuse leave if it considers that the plaintiff's case is bound to fail. [emphasis added]

14 Some guidance on how disputed facts should be resolved in *forum non conveniens* stay applications can be gleaned from recent Canadian case law and literature. In *Young v Tyco International of Canada Ltd*,[19] a decision of the Court of Appeal for Ontario, two different approaches were put forth. Laskin JA held that if the *forum non conveniens* test is in the particular case inextricably tied to the factual issues in dispute such that it becomes imperative to address the competing versions of facts put forward by the parties, then the court hearing the stay application should not attempt to arrive at a factual finding. Instead, the court should accept the plaintiff's version as long as it has a reasonable basis in the record, and proceed to conduct the exercise of determining the appropriate forum solely with reference to the plaintiff's claim and ignoring the defendant's defence to that claim. One can understand Laskin JA's concern that the judge hearing the stay application should adopt a prudential and not aggressive approach to fact-finding at such an early stage of the proceedings where there is typically a paucity of evidence and particulars. One can also see some similarity with the approach of our Court of Appeal in *Bradley Lomas*, albeit in the different context of considering whether leave to serve out of jurisdiction should be granted. However, Laskin JA's view that *sole* regard should be had to the factual assertions of the claimant in considering a stay application would seem to tilt the scales too far in favour of the claimant, who would have been given an arguably unjustified advantage simply by choosing the particular forum in which he desires to sue. A more balanced three-step approach was proposed in the same case by another judge, Simmons JA:[20]

> In my view, so long as *both* versions of the critical disputed facts have a reasonable evidentiary basis in the record, rather than choosing one version over the other, the motion judge should take account of both

18 [1999] 3 SLR(R) 1156 at [15]. The Court of Appeal was referring to the *Supreme Court Practice 1999* at para 11/1/11.

19 [2008] ONCA 709.

20 [2008] ONCA 709 at [67]–[72].

> versions by conducting the *forum non conveniens* analysis in up to three stages.
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> In the first stage, the motion judge may conduct the *forum non conveniens* analysis accepting the plaintiff's version of the facts. If the defendant's forum is clearly more appropriate even on the plaintiff's version of the facts, the motion judge need proceed no further and should simply stay the plaintiff's proceeding.
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> In the second stage, the motion judge may conduct the *forum non conveniens* analysis accepting the defendant's version of the disputed facts. Here, the motion judge should dismiss the defendant's request for a stay of proceedings if the defendant is unable to establish that its forum is clearly more appropriate based on its version of the disputed facts.
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> Where a third stage is necessary because the defendant's stay motion cannot be disposed of at either the first or second stage, the motion judge should conduct a *forum non conveniens* analysis recognizing that certain critical facts are in dispute and accepting that both versions have a reasonable prospect of being adopted.
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> *This third stage will have the disadvantage of effectively neutralizing the forum non conveniens connecting factors that turn on the critical disputed facts.*
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> … In the end, the only realistic bass for displacing a plaintiff's choice of forum on a stage three analysis is likely to be unfairness to the defendant if compelled to litigate in the plaintiff's forum that clearly outweighs any unfairness to the plaintiff if compelled to litigate in the defendant's forum.
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> [emphasis added]

15 Stages 1 and 2 of Simmons JA's analysis would only apply where either the plaintiff's or the defendant's case on the natural forum question is particularly weak. It would probably be more frequent that the parties' respective arguments on *forum non conveniens* are more evenly balanced, not least because each side is always going to frame its version of the facts in a way that emphasises the connecting factors pointing to its desired forum. In these cases, stage three would need to come into the picture, but Simmons JA herself acknowledged that the problem with stage three is that it effectively neutralises those connecting factors upon which there are disputes of fact, such that these become essentially non-factors in the inquiry.

16 Where the disputes of fact are in relation to choice of jurisdiction clauses, persuasive academic arguments have been made that the standard of proof to be applied ought to be the full civil standard of a balance of probabilities, notwithstanding that the dispute arises in the context of jurisdictional proceedings rather than at the

actual trial.[21] Stephen Pitel and Jonathan de Vries accept that generally, the use of a lower standard of a good arguable case to resolve factual issues raised in stay applications is justified because of the preliminary nature of the proceedings. However, they point out that issues relating to jurisdiction clauses are different in that these are not issues that ought to be left until trial to be resolved on a full evidentiary record. Rather, the very reason why such jurisdiction clauses exist is to address the antecedent question at the preliminary stage of where the litigation ought to be conducted. Once a jurisdiction clause is held to apply or not to apply during the jurisdictional stage, it will have little purpose to serve beyond that and during the trial on the merits. Hence, it is argued, the question of whether the jurisdiction clause exists and applies to the case should be established to the requisite standard of certainty in civil proceedings at the stage of considering the issue of *forum non conveniens*.[22]

17 Unlike choice of jurisdiction clauses, the question of choice of law obviously plays a role that goes beyond the purposes of the jurisdictional inquiry. It tells us what the governing law is to be applied to resolve the *substantive* dispute on the *merits*. It follows that the issue of choice of law will definitely feature prominently in the resolution of the conflict during the trial itself, such that the applicable law can and should only be conclusively determined at that stage. It cannot be that the court should make a determinative finding as to the applicable law on the full standard of balance of probabilities at the preliminary stage

21 Stephen Pitel & Jonathan de Vries, "The Standard of Proof for Jurisdiction Clauses" (2008) 46 Canadian Business Law Journal 66.

22 It may be the case that the underlying facts to be considered in determining whether the jurisdiction clause applies are intrinsically tied in to the substantive merits of the dispute, such that the objection is that those same facts should be the subject of determination only at trial on the full standard of proof. Indeed, it would appear that this concern about not making a pre-judgment prior to trial is the reason why the approach advocated by Pitel and de Vries is not the law in England: see *Konkola Copper Mines plc v Coromin Ltd* [2006] 1 Lloyd's Rep 10 at [96]; *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] 2 Lloyd's Rep 475 at [18]–[19]. On the other hand, one may argue that it is undesirable to end up with a situation where the trial court and the earlier court deciding the question of jurisdiction make inconsistent findings on the applicability of a jurisdiction clause: for instance, the earlier court may have decided that the foreign jurisdiction clause is not applicable on the standard of a good arguable case, such that the matter proceeds to trial, but only for the trial court to reach a different conclusion after considering all the evidence that the court should not in fact have assumed jurisdiction. Should the matter be sent to the foreign court in vindication of the contractual right of the defendant, or should the matter nonetheless go ahead in the local proceedings because the proceedings are already at an advanced stage? It is not obvious what the trial court should do when confronted with such a situation, although there is authority more generally for the view that procedural issues of jurisdiction are conclusively determined at the jurisdictional stage and is *res judicata*, meaning that they cannot be re-opened at the stage of trial: see *The "Jarguh Sawit"* [1997] 3 SLR(R) 829.

of considering jurisdiction, particularly since all that would be available to the court at that juncture would be affidavit evidence. The requisite standard of proof should be something lower than a balance of probabilities but beyond a mere plain assertion. In this regard, a good guide would probably be the standard of a good arguable case used in the context of satisfying the various limbs of O 11 for effecting service out of jurisdiction.[23] In point of fact, it can be argued that the burden on the defendant to show that the applicable law is a foreign *lex causae* for the purpose of supporting his application for a stay on the grounds of *forum non conveniens* should be less than the burden which the plaintiff needs to discharge to show, for example, that Singapore law governs, for the purpose of obtaining leave to serve out of the jurisdiction, since the latter involves an exorbitant exercise of jurisdiction by the court beyond its territorial borders. Therefore, as long as it is possible to make a preliminary finding with some degree of certainty that a foreign *lex causae* applies, then that ought to be a factor to consider in the *forum non conveniens* balancing act. Of course, the court would have to ascribe to it the appropriate weight. The High Court of Australia in *Puttick* stated that the lower courts had erred in deciding that New Zealand was the governing law for the dispute, but this probably should not be interpreted to mean that the impossibility of a *definitive* finding on what the applicable law is (on the full standard of proof) should necessarily mean that it becomes completely irrelevant for the jurisdictional inquiry of where the natural forum is. The High Court made several references to the point that not even a provisional finding on where the tort took place could be made. Although not articulated, it seems quite clear that the court had in mind something that was less than a balance of probabilities but more than simply an arguable case. Presumably, had it been possible to reach such a provisional finding, the *lex causae* would have been a relevant consideration.

V. Pleading foreign law and *forum non conveniens*

18 But it was not possible to reach such a provisional finding on the applicable law in *Puttick* because, according to the High Court of Australia, the state of the pleadings and materials before the court were simply inadequate for that purpose. The trouble is that the reason why the situation is so, could precisely be due to the way Mr Puttick had chosen to plead his case. The rules of pleading are such that foreign law only becomes relevant if it is pleaded by the parties. However, a plaintiff conscious of the possibility that the defendant may want to be heard in another forum, could certainly be counted upon to *not* plead that

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23 There is some support in English case law for adopting the standard of a good arguable case: see *Travelers Casualty and Surety Company of Europe Ltd v Sun Life Assurance Company of Canada (UK) Ltd* [2004] EWHC 1704 (Com).

foreign law is applicable so as to avoid lending weight to any application to stay the proceedings based on *forum non conveniens*. Indeed, in reaching their conclusion that it was impossible to say where the tort was committed, the judges[24] referred to how Mr Puttick's statement of claim "[made] no express allegation that the plaintiff's claim was governed by any foreign law" and that it "contain[ed] only a few allegations which locate the occurrence of any fact or circumstance". But it can be argued that defendants ought not to be prejudiced in their attempts to stay proceedings due to their opponent's failure to (properly) plead foreign law.

19 The approach of the High Court of Australia may put defendants in an unenviable position: on the one hand, a defendant desirous of obtaining a stay of proceedings in favour of another foreign jurisdiction would want to bring in the issue of foreign law; but on the other hand, he may not be able to plead foreign law by filing a defence without running into the objection that he has submitted to the jurisdiction of the local court in such a way as to preclude any further challenge based on *forum non conveniens*. Under O 12 r 7(2) of the Rules of Court,[25] a defendant who wishes to contend that the court should not assume jurisdiction because Singapore is not the proper forum must file the application for stay within the time limited for filing the defence. This typically means that an application to stay proceedings will be considered without the defence having been filed. Strictly though, O 12 r 7(2), being merely a timing provision, does not actually preclude a stay application from being taken up even after the defence is filed. Neither does it prevent the filing of the defence subsequent to an application being filed to stay the proceedings. The problem for the defendant lies more in case law, and in particular the cases which concern whether a particular step has been taken in the proceedings which prohibits any challenge based on *forum non conveniens*.[26] Although many of the local decisions are in the context of applications for stay in favour of arbitration and deal specifically with the interpretation of the phrase "step in proceedings" under s 6 of the Arbitration Act,[27] the High Court in *Wing Hak Man v Bio-Treat Technology Ltd* has helpfully pointed out that the relevant inquiry whether under the arbitration regime or in the case of a stay of proceedings on grounds of *forum non conveniens* is in substance the same, *viz* whether the conduct of the defendant demonstrates its "unequivocal, clear and consistent intention to have the dispute determined by this court".[28]

24 French CJ, Gummow, Hayne and Kiefel JJ.
25 Cap 322, R5, 2006 Rev Ed.
26 These cases were comprehensively discussed by the Court of Appeal in *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460.
27 Cap 10, 2002 Rev Ed.
28 [2009] 1 SLR(R) 446 at [63].

20 There is a distinction between challenging the existence of the court's jurisdiction and asking the court not to exercise jurisdiction that it possesses. Seeking a stay of proceedings based on *forum non conveniens* belongs to the latter category. It could conceivably be argued that filing a defence should not amount to a waiver of the right to request the court to refrain from exercising jurisdiction that it undisputedly has, as opposed to saying that the court has no jurisdiction at all to begin with. Submitting to the court's jurisdiction is not inconsistent with requesting the court not to exercise it. But the concern would appear to be grounded in some notion of estoppel and that a litigant should not be permitted to "blow hot and cold":[29] pleading a defence is effectively asking the court to adjudicate the matter on the merits, and one should not be allowed to subsequently retract and tell the court to instead abstain from ruling on the substantive dispute.[30] Yet, the assumption, that the filing of a defence should necessarily mean that the defendant is submitting to the court's jurisdiction to resolve the merits of the dispute, may not always hold true. A defendant wishing the dispute to be heard in another country's court may well want to plead his version of facts and identify the real issues in dispute from his perspective. By doing so, the defendant hopes to show that the majority of the connecting factors in fact point to a different jurisdiction. In particular, as noted above, pleading the applicability of a foreign governing law will contribute to the factors in favour of a foreign jurisdiction. Using the facts of *Puttick* as illustration, the defendant, Tenon, could have pleaded details of the employment relationship in its defence to show, for instance, that the instructions to Mr Puttick were mostly given in New Zealand. The point is that the act of filing a defence, to convince the court that it is inappropriate for the court to exercise its jurisdiction because of the foreign elements of the case and specifically the applicability of a foreign law, is in fact diametrically contrary to an intention to seek the court's substantive adjudication of the dispute. Bearing in mind that the proper test is ultimately whether the conduct of the defendant evinces an unequivocal and consistent intention for the substantive dispute to be determined by the court, a strong contention can certainly be made that the mere filing of a defence without more cannot be tantamount to taking a step in the

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29 In the context of considering a stay in favour of arbitration, see the Court of Appeal's comment in *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 at [93].

30 Even then, it may be argued that there is no practical reason why the defendant should not be permitted to change his mind. If the point is that the plaintiff would have suffered prejudice in spending time and effort to resist the defence (for example, by filing a pleading in reply), this does not seem to be prejudice that cannot be compensated by way of an appropriate costs order.

proceedings that precludes a jurisdictional challenge on the basis of *forum non conveniens*.[31]

21 The point is all the more forceful if one considers the possibility that an astute plaintiff may try to file a skeletal statement of claim first with scant details, and subsequently seek to amend it to add in more particulars, many of which may suggest that a foreign law applies or which may point to a foreign jurisdiction. If the defendant's filing of the defence amounts to a submission to the jurisdiction of the court to resolve the substantive dispute, he would have lost the ability to apply for a stay of proceedings after seeing such an amended statement of claim. It appears that Heydon and Crennan JJ in *Puttick* were sensitive to this possibility of abuse by the plaintiff, when they opined[32] that "[a] judge considering a stay application may be able to determine the location of the alleged tort *despite somewhat unreal or artificial contentions in the pleadings*" [emphasis added].

22 A defendant finding himself in a situation similar to that of Tenon in the case of *Puttick* would be well advised to do one of two possible things. First, he could file a defence setting out his version of the material facts and pleading the applicability of a foreign law, *but with the express reservation that the filing of such a defence is not intended in any way to preclude him from asking the court to exercise its discretion to stay proceedings in favour of another forum*. Incorporation into the defence of such a preservation of the right to stay proceedings has in principle been recognised as conceptually possible by the Singapore court.[33] However, if the fear is that such a reservation may not suffice to prevent the act of putting in a substantive defence from jeopardising a stay application, the next best thing for the defendant would be to prepare a suitably detailed affidavit setting out all the material facts which point to another jurisdiction and which go to establishing that

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31 It is possible to approach the matter from another perspective. It is now generally accepted that a defendant should not be compelled to file his defence pending a stay application, because he ought not to be put in an awkward position where he is effectively forced to take two contradictory positions. The defendant is entitled to focus his attention on the stay application and not be distracted in having to put up a substantive defence on the merits: see *Yeoh Poh San v Won Siok Wan* [2002] 2 SLR(R) 233; *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR(R) 382; *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460. But if the defendant chooses *on his own accord* to put up so much of a substantive defence on the merits as is necessary in his view to buttress his jurisdictional challenge based on *forum non conveniens*, there should be little objection to him doing so.

32 [2008] HCA 54 at [36].

33 See *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446 at [62]; *Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd* [2003] 4 SLR(R) 499; *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460.

the applicable law is a foreign one.[34] In this connection, it is submitted that the court should be careful not to entertain any argument by the plaintiff that such matters raised in the defendant's affidavit should not be considered as they are not pleaded.[35] In addition, bearing in mind that foreign law is to be proved as a question of fact, the defendant would do well to include an expert opinion on the foreign law in support of his application to stay proceedings.

VI. Conclusion

23 One important reason why Mr Puttick succeeded in resisting the application for stay on grounds of *forum non conveniens* was the fact that the state of the pleadings (consisting only of his statement of claim) did not carry sufficient details which would allow any finding to be made as to the applicability of a foreign law. This may seem a somewhat unsatisfactory position, at any rate from the perspective of a defendant seeking the stay. Notwithstanding the general acceptance now that the *lex causae* is a factor to consider, the case illustrates that there remain considerable difficulties for the defendant who seeks to rely on it to show that the natural forum is elsewhere. To ensure a reasonably level playing field between plaintiff and defendant in the context of the jurisdictional fight as to the appropriate forum, it has been suggested that the standard of proof in order for the *lex causae* to feature as a factor in the *forum non conveniens* balancing exercise should not be an onerous one.[36] In addition, it is submitted that the court should, especially when considering whether the filing of a defence amounts to a submission to its jurisdiction, be sensitive to the defendant's need to put in his version of the facts to justify the foreign *lex causae* as a factor in aid of his attempt to stay the proceedings in favour of another forum.

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34 In *Puttick v Tenon Ltd* [2008] HCA 54 itself, it appears that the Australian High Court did venture beyond the plaintiff's pleading to consider evidence adduced for the purpose of the stay application (see [19] and [20] of the decision), but unfortunately for the defendant, the evidence was still found to be insufficient to even make a provisional finding on the question of the applicable law.

35 *Cf* the situation of a summary judgment application, where a defendant is not permitted to raise matters in his affidavit resisting the application if such matters are not found in his defence, unless there were good reasons for not raising them in the pleading: see *United States Trading Co Pte Ltd v Ting Boon Aun* [2008] 2 SLR(R) 981.

36 Again, it is a different question how much *weight* to attribute to the choice of law as a factor in the *forum non conveniens* inquiry.