

LIMITATION OF LIABILITY AND FORUM NON CONVENIENS: MITSUI OSK LINES LTD V THE SHIP: YANGZE 22 (NO 2) [2026] FCA 476

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1. Introduction

The peripatetic nature of the carriage of goods by sea¹ combined with differing procedural laws as between major shipping states means that a plaintiff's ability to arrest a ship in a favourable forum may, if the forum does not exercise restraint, prove dispositive of maritime litigation.²

This dynamic has increasingly been seen by admiralty courts of Australia and the United Kingdom.³ A group of cases has emerged where, following a collision, one party establishes a limitation fund in a jurisdiction with low limits of liability, while the other commences proceedings against the wrongdoing ship in Australia or the United Kingdom to take advantage of its comparatively higher limits of liability.⁴ The parties then litigate about where to litigate.

In Australia, these cases concern the different limitation regimes as between Australia and the People's Republic of China. Australia is party to the *Convention on Limitation of Liability for Maritime Claims 1976*, as amended by the Protocol of 1996 and the 2012 amendments thereto ('LLMC').⁵ China, however, is not. It has adopted a domestic regime under which shipowners can avail themselves of a much lower limit of liability than in Australia.⁶ Parties therefore often have opposed interests as to which jurisdiction hears their dispute. Further, because China is not a party to the LLMC, the existence of a limitation fund in China does not preclude the establishment of a competing fund in Australia (or vice-versa).⁷ As such, courts are left to determine where the parties should litigate.

This dynamic arose once more in *Mitsui OSK Lines Ltd v The Ship: Yangze 22 (No 2)* [2026] FCA 476 ('*Yangze 22*'). The judgment of Sarah C Derrington J in *Yangze 22* provides useful guidance on the circumstances in which an Australian court will exercise its discretion to decline jurisdiction⁸ on the grounds that it is a clearly inappropriate forum, where a plaintiff commences *in rem* proceedings in Australia seeking its higher limits of liability.

Her Honour found that Australia's higher limits of liability are not a significant factor against the conclusion that an Australian court is a clearly inappropriate forum. So, where a foreign court is the natural forum for the hearing of the plaintiff's action and will not relinquish jurisdiction, which action will be governed by a foreign *lex causae*, and where all witnesses and evidence are located abroad, the Federal Court is a clearly inappropriate forum.

2. Facts

What follows is a necessarily detailed exposition of how proceedings arising from a collision in Chinese internal waters between bulkers registered in Japan and Singapore came before the Federal Court of Australia. Its detail is necessary due to the fact-intensive nature of the *forum non conveniens* enquiry, which, it is suggested, may also explain why the High Court's exhortation in *Voth v Manildra Flour Mills Pty Ltd* ('*Voth*')⁹ for brevity in such proceedings¹⁰ has so often been honoured in the breach.

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¹ See Justice Steven Rares, 'Admiralty Law – The Flying Dutchman of Cross-Border Insolvency' (Conference Paper, Sydney International Commercial Litigation Conference, 2009) 11 [27].

² See generally Andrew Bell, 'The Why and Wherefore of Transnational Forum Shopping' (1995) 69 *Australian Law Journal* 124.

³ See *CMA CGM SA v Chou Shan* (2014) 224 FCR 384, 400–1 [69]–[76] (Allsop CJ, Besanko and Pagone JJ) ('*Chou Shan*') and the cases cited therein. See, eg, *Atlasnavios Navegacao LDA v The Ship Xin Tai Hai (No 2)* (2012) 215 FCR 265 ('*Xin Tai Hai*'); *Zurich Insurance Co Ltd (t/a Navigators and General) v Halcyon Yacht Charter (The 'Big Kahuna')* [2024] 2 Lloyds Rep 109; *Owners of the Ship Al Khattiya v Owners and/or Demise Charterers of the Ship Jag Laadki* [2018] 2 Lloyds Rep 243 ('*Al Khattiya*').

⁴ Or, in respect of wreck removal expenses, no limit of liability at all: *CSL Australia Pty Ltd v Tasmanian Ports Corporation Pty Ltd (The 'Goliath')* [2026] HCA 15.

⁵ 1456 UNTS 221 (entered into force 1 December 1986), as amended by the Protocol of 1996, opened for signature 2 May 1996, 35 ILM 1433 (entered into force 13 May 2004), and further amended by Resolution LEG 5(99) of the Legal Committee of the International Maritime Organization, 19 April 2012 (entered into force 8 June 2015) ('LLMC').

⁶ Which mirrors the limit under the LLMC prior to its amendment in 1996: see *Xin Tai Hai* (n 3) 267 [4] (Rares J).

⁷ See LLMC (n 5) art 13.

⁸ See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559–60 (Mason CJ, Deane, Dawson and Gaudron JJ) ('*Voth*').

⁹ *Ibid*.

¹⁰ *Ibid* 565.

2.1. The Collision

Late in the evening of 30 December 2024 the *Yangze 22*, a bulk carrier laden with chemical fertiliser, and the *Vega Dream*, a bulk carrier laden with iron ore, collided in Chinese internal waters while moving toward the Port of Shanghai. Both vessels were damaged. The *Yangze 22* suffered a hull breach on the starboard midship section, flooding in a cargo hold, and leaked nine metric tonnes of fuel oil from its starboard fuel tank. The claim by the owner of *Yangze 22*, Nebula Shipping Pte Ltd ('Nebula'), against the owner and bareboat charterer of the *Vega Dream*, Mitsui OSK Lines Ltd ('Mitsui') and Protea Navigation Inc ('Protea') respectively, exceeded RMB 200 million.

Mitsui and Protea alleged that the collision was caused deliberately by those on board the *Yangze 22*. As a result of the collision, Mitsui and Protea claimed that fuel oil from the *Yangze 22* spilled into the *Vega Dream*'s fore peak tank leading to claims for repair, loss of hire, and cargo damage, as well as emergency response costs.

2.2. Proceedings in China

Nebula acted quickly following the collision. On 21 January 2025, it applied to the Shanghai Maritime Court to establish a limitation fund in respect of claims against the *Yangze 22* valued at 6,903,375 special drawing rights ('SDRs')—equivalent to AUD 13,458,267.83.¹¹ Three days later, on 24 January 2025, Nebula applied to the Shanghai Maritime Court to arrest the *Vega Dream* in pursuance of its claim against Mitsui and Protea. Nebula's application to establish a limitation fund was accepted on 12 February 2025, and the following day the President of the Shanghai Maritime Court made an order for the arrest of the *Vega Dream*, which was carried out immediately. Also on 13 February, Protea commenced proceedings in the High Court of Singapore against Nebula in relation to the collision. This proceeding was discontinued on 29 May 2025.

Mitsui and Protea objected to the arrest on 21 February 2025, to no avail. As such, on 25 February, they provided security for Nebula's claim to the Shanghai Maritime Court by way of a letter of undertaking. On 5 March 2025, the Court accepted that letter of undertaking and released the *Vega Dream*. Finally, on 11 March 2025, Nebula commenced proceedings seeking damages from Mitsui and Protea in the Shanghai Maritime Court.

Subsequently, on 9 April, Mitsui and Protea unsuccessfully challenged the jurisdiction of the Shanghai Maritime Court. Their appeal from that decision was also unsuccessful: the Shanghai High People's Court held that the argument that the Shanghai Maritime Court was an inconvenient forum was 'untenable'.¹²

On 11 April 2025, Mitsui and Protea also appealed the decision to establish a limitation fund to the Shanghai High People's Court. While this appeal was pending, on 27 April 2025, Mitsui and Protea applied to register their claims against the limitation fund. In doing so they submitted to the jurisdiction of the Shanghai Maritime Court. Mitsui and Protea's appeal against the establishment of the limitation fund was later dismissed. So, on 6 May 2025 Mitsui and Protea filed a 'confirmation of rights' suit in the Shanghai Maritime Court, the process by which their claim is assessed.

By October 2025, the limitation fund in China was subject to fourteen separate claims.

2.3. Proceedings in Australia

On 28 April 2025—one day after registering their claims against the limitation fund established in China—Mitsui and Protea filed a writ in the Federal Court of Australia claiming loss and damage as a result of the collision between the *Vega Dream* and *Yangze 22*. A warrant for the arrest of the *Yangze 22* was issued the same day. She was arrested in the Port of Newcastle on 6 May 2025 (hours before Mitsui and Protea's 'confirmation of rights' suit was filed in China) and later released following Nebula's appearance and provision of security by way of a letter of undertaking issued by Assuranceforeningen Skuld ('Skuld LOU').¹³

The reason why Mitsui and Protea came to the Federal Court of Australia is self-evident. A limitation fund established in Australia would be worth AUD 48,700,933.78 (24,980,987 SDRs, according to the *Yangze 22*'s tonnage) which far exceeded the quantum of Mitsui and Protea's claims against Nebula, and which they would not be required to share with the thirteen other claimants who had registered against the Chinese limitation fund.

¹¹ As at 10 February 2026.

¹² *Mitsui OSK Lines Ltd v The Ship: Yangze 22 (No 2)* [2026] FCA 476, [19(d)] (Sarah C Derrington J) ('*Yangze 22*').

¹³ See *Mitsui OSK Lines Ltd v The Ship: Yangze 22* [2025] FCA 563 (Sarah C Derrington J).

Naturally, Mitsui and Protea's advantage was Nebula's disadvantage.¹⁴ Nebula therefore sought a permanent stay of the Federal Court proceedings on *forum non conveniens* grounds.

3. Forum Non Conveniens Principles

3.1. Development of the Doctrine

Sarah C Derrington J began with a concise statement of the history of the power of a court to stay proceedings despite its otherwise competent jurisdiction. The genesis of that power dates to the Scottish plea of *forum non competens*¹⁵ which was 'concerned with circumstances where, although the forum could assert jurisdiction, the parties were alien to the forum and the trial considered inconvenient'.¹⁶ By 1892, the Court of Session recognised that more than inconvenience was required to justify a stay: the defendant must show that there is another forum with jurisdiction 'in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'.¹⁷ In 1926, the House of Lords, exercising its appellate jurisdiction over the Court of Session, first recognised a doctrine of *forum non conveniens*, distinct from the doctrine of *lis alibi pendens*.¹⁸

English courts, meanwhile, focussed on the 'propriety' of the service of a writ out of the jurisdiction.¹⁹ As such, a stringent test was applied. The defendant had to show *both* that the continuation of the local proceedings was vexatious or oppressive or otherwise an abuse of process *and* that a stay would not cause injustice to the plaintiff.²⁰ The decision of the House of Lords in *The Atlantic Star*²¹ heralded an independent English doctrine of *forum non conveniens*, as Lord Kilbrandon held that the terms 'vexatious' and 'oppressive' should bear a "morally neutral" meaning devoid of undertones of moral delinquency or irresponsibility.²² Finally, in *Spiliada Maritime Corp v Cansulex Ltd* ('*Spiliada*')²³ Lord Goff stated that the English doctrine of *forum non conveniens* had become indistinguishable from that doctrine under Scots law.²⁴ Thus, English law now requires the court to determine *first* whether there is another 'more appropriate forum' for the plaintiff's action. If there is, the court will grant a stay unless *secondly* the plaintiff can show that justice requires that a stay be refused.²⁵

3.2. The Doctrine in Australia

Her Honour then turned to the Australian position.²⁶ While Australian courts initially followed *Spiliada*, in *Oceanic Sun Line Special Shipping Co Inc v Fay* ('*Oceanic Sun*')²⁷ a majority of the High Court departed from that approach and adopted a test which required a court to stay proceedings where it was a 'clearly inappropriate' forum.²⁸ The content of that test was then clarified in *Voth*, from which her Honour emphasised the following.²⁹

As a starting point, the principles guiding the power to stay proceedings on *forum non conveniens* grounds were those stated by Deane J in *Oceanic Sun*:³⁰

The power is a discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary and in which both the question of the comparative weight to be given to particular factors in the circumstances of a particular case and the decision whether the power should be exercised are matters for individual judgement and, to a significant extent, matters of impression. The power should only be exercised in a clear case and the onus lies upon the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him. Ordinarily, a defendant will be unable to discharge that onus unless he can identify some appropriate foreign tribunal to whose

¹⁴ See *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, 492 [258] (Callinan J).

¹⁵ *Yangze 22* (n 12) [22] citing *Société du Gaz de Paris v Société Anonyme de Navigation "Les Amateurs Français"* (1926) SC (HL) 13.

¹⁶ *Ibid*.

¹⁷ *Ibid*, citing *Sim v Rabinow* (1892) 19 R (Ct of Sess) 665, 668 (Lord Kinnear).

¹⁸ *Yangze 22* (n 12) [22], citing *Société du Gaz de Paris v Société Anonyme de Navigation "Les Amateurs Français"* (1926) SC (HL) 13.

¹⁹ *Yangze 22* (n 12) [23].

²⁰ *Ibid*, quoting *St Pierre v South American Cold Stores (Gath & Chaves) Ltd* [1936] 1 KB 382, 398 (Scott LJ).

²¹ [1974] AC 436.

²² *Yangze 22* (n 12) [24], citing *The Atlantic Star* [1974] AC 436, 477–78.

²³ [1987] 1 AC 460 ('*Spiliada*').

²⁴ *Ibid* 474, citing *Sim v Rabinow* (1892) 19 R (Ct of Sess) 665, 668 (Lord Kinnear).

²⁵ *Yangze 22* (n 12) [26].

²⁶ *Ibid* [28]–[38].

²⁷ (1988) 165 CLR 197 ('*Oceanic Sun*').

²⁸ *Yangze 22* (n 12) [28].

²⁹ *Yangze 22* (n 12) [31]–[38].

³⁰ *Ibid* [36], citing *Voth* (n 8) 564 (Mason CJ, Deane, Dawson, and Gaudron JJ).

jurisdiction the defendant is amenable and which would entertain the particular proceedings at the suit of the plaintiff. Otherwise, that *onus will ordinarily be discharged by a defendant* who applies promptly for a stay or dismissal *if he persuades the local court* that, having regard to the circumstances of the particular case and the availability of the foreign tribunal, it is a clearly inappropriate forum for the determination of the dispute between the parties. The reason why that is so is that, once it is accepted that the adjectives “oppressive” and “vexatious” are not to be narrowly or rigidly construed and are to be applied in relation to the effect of the continuation of the proceedings rather than the conduct of the plaintiff in continuing them, *the continuation of proceedings in a tribunal which is clearly an inappropriate forum would*, in the absence of exceptional circumstances being established by the plaintiff ..., *be oppressive or vexatious to such a defendant if there is some available and appropriate tribunal in another country*.³¹

In the application of those principles, Lord Goff’s exposition in *Spiliada* of ‘connecting factors’³² and the relevance (or otherwise) of a legitimate advantage which the plaintiff seeks by coming to the forum³³ is of assistance.³⁴ As to the latter, Sarah C Derrington J noted that Lord Goff cautioned against refusing a stay solely out of a reluctance to deprive the plaintiff of a juridical advantage in the forum. Instead, ‘regard must be had to the interests of all the parties and the ends of justice’.³⁵

Furthermore, the fact that the plaintiff’s action would be governed by a foreign *lex causae* is a significant, but never determinative, factor in favour of a stay.³⁶ Finally, in most cases, little weight should be placed on the notion that a plaintiff who has regularly invoked the jurisdiction of the court has a *prima facie* right to insist upon its exercise.³⁷

4. Is the Federal Court a Clearly Inappropriate Forum?

4.1. Factors Pointing in Favour of a Stay

Nebula argued that eight factors supported its application for a permanent stay of the Australian proceedings.³⁸ The first seven related to the familiar ‘connecting factors’ which Lord Goff described in *Spiliada*.³⁹ The eighth concerned whether, having regard to the parties’ controversy as a whole, the Australian proceedings were vexatious and oppressive.⁴⁰

First, Nebula pointed to the fact that concurrent proceedings with respect to the same collision and between the same parties were on foot in China, where Nebula had also established a limitation fund. Sarah C Derrington J found that, if both the Federal Court and the Shanghai Maritime Court proceeded to judgment, the risk of contradictory findings was ‘obvious’.⁴¹ This was not a reason *ipso facto* why the Federal Court proceedings should not proceed.⁴² But it is a situation which, ‘to the extent *Voth* permits’, the Court should avoid.⁴³

Secondly, Nebula argued that, as the collision occurred in Chinese internal waters, the Shanghai Maritime Court was the natural and obvious forum for the dispute.⁴⁴ In *CMA CGM SA v The Ship Chou Shan* (‘*Chou Shan*’),⁴⁵ the Full Court upheld the primary judge’s finding that China was the natural and obvious forum for the dispute where the collision occurred in China’s exclusive economic zone and the Shanghai Maritime Safety Administration had incurred pollution clean-up costs.⁴⁶ The Full Court held that China being the natural and obvious forum ‘reflects as much on Australia (as a posited competing forum) as it does on China.’⁴⁷ In the present case, the collision and consequent pollution clean-up occurred not merely in China’s exclusive economic zone, but in its internal waters.

³¹ *Yangze 22* (n 12) [36] (emphasis in original), quoting *Oceanic Sun* (n 27) 247–8 (citations omitted).

³² *Spiliada* (n 23) 477–8.

³³ *Ibid* 482–4.

³⁴ *Yangze 22* (n 12) [37].

³⁵ *Ibid*.

³⁶ *Ibid* [38].

³⁷ *Ibid*. Cf *Maritime Insurance Co Ltd v Geelong Harbour Trust Commissioners* (1908) 6 CLR 194; *Cope Allman (Australia) Ltd v Celermajer* (1968) 11 FLR 488, 494 (Gibbs J).

³⁸ *Yangze 22* (n 12) [44].

³⁹ *Spiliada* (n 23) 477–8.

⁴⁰ See *Yangze 22* (n 12) [69].

⁴¹ *Ibid* [50].

⁴² *Henry v Henry* (1996) 185 CLR 571, 591 (Dawson, Gaudron, McHugh and Gummow JJ) (‘*Henry*’).

⁴³ *Ibid*.

⁴⁴ *Yangze 22* (n 12) [51], [56].

⁴⁵ *Chou Shan* (n 3).

⁴⁶ *Ibid* 398 [62] (Allsop CJ, Besanko and Pagone JJ).

⁴⁷ *Ibid*.

Therefore, her Honour found the claim that China was the natural and obvious forum even stronger than in *Chou Shan*.⁴⁸

Thirdly, Nebula said that a ‘view’ of the Yangtze River may be necessary for witnesses to properly explain the circumstances of the collision and the pollution damage which followed.⁴⁹ Mitsui and Protea submitted that video and technical evidence amply illustrating the circumstances of the collision and its aftermath was available.⁵⁰ Sarah C Derrington J found that little turned on this factor.⁵¹

Fourthly, it was apparently uncontroversial that the *lex causae* was Chinese law, and Nebula argued that this supported the grant of a stay.⁵² Her Honour agreed.⁵³ That was particularly so because the Chinese legal system is based on civil law.⁵⁴ As an aside, her Honour’s reasoning here adds to a body of cases which support the proposition that the identity of the foreign *lex causae*, not merely the fact that a foreign *lex causae* will be applied, is relevant to whether an Australian forum is clearly inappropriate.⁵⁵

Fifthly, Nebula pointed to the fact that all witnesses, lay or expert, would likely be located in China.⁵⁶ Similarly, much of the documentary evidence relating to the collision and its aftermath was in the possession of Chinese state agencies.⁵⁷ No serious challenge was mounted to this submission.⁵⁸ The best that Mitsui and Protea could say was that the Court in its admiralty jurisdiction is not unknown to disputes with a significant international element.⁵⁹

The relevance of the *fifth* factor was only heightened by the *sixth* and *seventh*: much of the evidence to be adduced from China was not in the control of Nebula, Mitsui or Protea. This meant that, at best, the parties would be required to bear the inconvenience and expense of procuring witness evidence on commission from China. At worst, if it became necessary to obtain documentary evidence from a third party, any order by an Australian court for the production of that evidence would be an ‘empty threat’ absent intergovernmental cooperation.⁶⁰ As with the *fifth* factor, her Honour found that Mitsui and Protea had no real answer to this submission.⁶¹

When these connecting factors are viewed in the round, they all point toward the Federal Court being a clearly inappropriate forum. Nebula’s *eighth* factor pointing toward a stay—that the Australian proceedings were otherwise vexatious and oppressive having regard to the concurrent proceedings in China—is addressed below.⁶²

4.2. Factors Pointing Against a Stay

To resist a stay, Mitsui and Protea’s argument rested solely upon the fact that they came to Australia seeking a legitimate juridical advantage. The juridical advantage, they said, was three-fold. The *first* was their right to a higher limit of liability. The *second* was their right, unknown to Chinese law, to proceed *in rem* against the *Yangze 22*. The *third* was their security under the Skuld LOU.

As to the *first*, Sarah C Derrington J observed that there is no universally accepted view of what limits of liability should be.⁶³ This was the basis on which the Court of Appeal of England and Wales in *The Herceg Novi*⁶⁴ found that higher limits of liability in the United Kingdom did not weigh heavily against the grant of a stay. The Court there held that neither Singapore’s nor the United Kingdom’s limits of liability were ‘objectively more just than the other.’⁶⁵ So, just as Mitsui and Protea have a legitimate interest in commencing proceedings in a forum that is

⁴⁸ *Yangze 22* (n 12) [57].

⁴⁹ *Ibid* [58].

⁵⁰ *Ibid* [59].

⁵¹ *Ibid* [60].

⁵² *Ibid* [51]–[52].

⁵³ *Ibid* [55].

⁵⁴ *Ibid*.

⁵⁵ See Davies et al, *Nygh’s Conflict of Laws in Australia* (LexisNexis, 11th ed, 2025) 240 [8.39], and the cases cited therein.

⁵⁶ *Yangze 22* (n 12) [61].

⁵⁷ *Ibid* [65].

⁵⁸ *Ibid* [62].

⁵⁹ *Ibid*.

⁶⁰ *Ibid* [66], citing *Stemcor (A/Asia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391, [12] (Allsop J).

⁶¹ *Yangze 22* (n 12) [67].

⁶² See below, 5.

⁶³ *Yangze 22* (n 12) [85].

⁶⁴ [1998] 2 Lloyd’s Rep 454.

⁶⁵ *Ibid* 460 (Sir Christopher Staughton for the Court). Singapore adhered to lower limits of liability under the *International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957*, while the United Kingdom adhered to the higher limits in the LLMC.

a party to the LLMC, Nebula has a legitimate interest in avoiding that forum in favour of another that adheres to lower limits.⁶⁶ It follows that, considering the interests of all parties and the ends of justice, Australia's higher limit of liability was not an overwhelming factor against the grant of a stay.⁶⁷

Her Honour then addressed the relevance of the *second* claimed benefit—the right to proceed *in rem*. Mitsui and Protea argued that their *in rem* action was a unique juridical advantage because only that *in rem* action could secure their right to a higher limit of liability in Australia.⁶⁸ This, they said, meant that their claim before the Federal Court was unique to that before the Shanghai Maritime Court.⁶⁹ In an attempt to undo this 'allusion of an available claim with the quantum of damages',⁷⁰ Mitsui and Protea said that the 'underlying claim' in Australia was different to that in China because only in Australia can they bring a claim against the *res* as distinct from a claim against its owner.⁷¹

Sarah C Derrington J found that this conflated the 'underlying claim itself' and the three-fold function of an action *in rem* to found jurisdiction, to bring the owners of the *res* before the Court, and to give effect to an enforceable security interest in the *res* by way of arrest and judicial sale.⁷² Irrespective of whether the action proceeds *in rem* or *in personam*, the 'underlying claim' in tort is identical.⁷³

Furthermore, the expert evidence as to Chinese law before her Honour suggested that 'little of substance' distinguished the procedural consequences of the arrest of a vessel in China (in pursuance of an action against its owner) and the arrest of a vessel in Australia (in pursuance of an action *in rem*).⁷⁴ It could not therefore be said that the *in rem* action inheres Mitsui and Protea with any advantage unique to Australia.⁷⁵

Sarah C Derrington J quickly rejected Mitsui and Protea's *third* argument that the availability of security by way of the Skuld LOU was a juridical advantage. The very existence of the letter of undertaking was predicated on Mitsui and Protea's ability to invoke Australia's higher limits of liability.⁷⁶ This, in turn, presupposed that the higher limit of liability in Australia was a factor against the grant of a stay, which it was not.⁷⁷

At this stage, it may be observed that Mitsui and Protea's proceedings in the Federal Court of Australia bear a striking resemblance with an example given by the majority in *Voth* of a case where a forum would be clearly inappropriate:

... in order to obtain a legitimate advantage, the plaintiff may commence an action in the selected forum even though the subject matter of the action and the parties have little connexion with that forum and the defendant may be put to great expense and inconvenience in contesting the action in that forum. On the application of traditional principles [favoured by Brennan J in *Oceanic Sun*] a stay would be refused in such a case, notwithstanding that *the selected forum was a clearly inappropriate forum*.⁷⁸

5. Looking to the Controversy as a Whole, are the Australian Proceedings Vexatious or Oppressive?

Nebula's *eighth* factor in favour of a stay was that, having regard to the overlap between the foreign and domestic proceedings, Mitsui and Protea's continuation of the Australian proceedings was otherwise vexatious or oppressive. In *CSR Ltd v Cigna Insurance Australia Ltd* ('CSR')⁷⁹ a majority of the High Court said, where foreign and local proceedings arise out of the same substratum of fact,

the question is not whether the Australian court is a clearly inappropriate forum for litigation of the issues involved in the Australian proceedings. Rather, the question must be whether, having regard to the controversy as a whole, the Australian proceedings are vexatious or oppressive in the *Voth* sense of those

⁶⁶ *Yangze 22* (n 12) [85].

⁶⁷ *Ibid* [86].

⁶⁸ *Ibid* [87].

⁶⁹ *Ibid*.

⁷⁰ *Ibid*.

⁷¹ *Ibid*.

⁷² *Ibid* [88].

⁷³ *Ibid* [88].

⁷⁴ *Ibid* [94].

⁷⁵ *Ibid* [97].

⁷⁶ *Ibid* [96].

⁷⁷ *Ibid*.

⁷⁸ *Voth* (n 8) 556–7 (Mason CJ, Deane, Dawson and Gaudron JJ) (emphasis added).

⁷⁹ (1997) 189 CLR 345 ('CSR').

terms, namely, that they are “productive of serious and unjustified trouble and harassment” or “seriously and unfairly burdensome, prejudicial or damaging”.⁸⁰

5.1. Mitsui and Protea’s Proposed Solution

In an attempt to remedy the overlap, Mitsui and Protea offered an undertaking to withdraw from the proceedings in China if the Australian proceedings were not stayed.⁸¹ A similar undertaking was accepted by Rares J in *Atlasnavios Navegacao LDA v The Ship ‘Xin Tai Hai’ (No 2)* (*‘Xin Tai Hai’*)⁸² in circumstances where the plaintiff seeking to resist a stay in the Australian proceedings was also the plaintiff in the Chinese proceedings.⁸³

Crucially, in *Xin Tai Hai* the Australian plaintiff was not subject to a pre-existing claim against them in China.⁸⁴ Mitsui and Protea’s proposed undertaking overlooked the fact that they were themselves defendants in Nebula’s collision claim in China, a position from which withdrawal was not theirs to offer.⁸⁵ The proposed undertaking was therefore inutile because the Chinese court would continue to exercise jurisdiction over Nebula’s claim against Mitsui and Protea.⁸⁶ This did not diminish the risk of inconsistent findings in respect of the same collision.

5.2. Having Regard to Both Proceedings, Are the Australian Proceedings Vexatious or Oppressive?

From this point, Mitsui and Protea’s primary argument mirrored that put forward as a legitimate juridical advantage available in the Federal Court: because their action in Australia proceeded *in rem*, the issues before the Federal Court and the Shanghai Maritime Court were not the same.⁸⁷

Further, pointing to the established position that a plaintiff with an unsatisfied claim *in personam* can proceed *in rem*, Mitsui and Protea argued that to permanently stay the proceedings in Australia would be to deny their ‘right’ to pursue an *in rem* claim in Australia for the difference between the damages available in China and Australia.⁸⁸ The source of that right was, they said, the decision of the High Court in *Clayton v Bant*.⁸⁹ That case did not concern *forum non conveniens* but the circumstances in which an issue is *res judicata* giving rise to an estoppel. The plurality held that the ‘substantial difference in the coverage’ of alimony rights as between the UAE and Australia meant that a divorce ruling by a UAE court did not give rise to *res judicata* as to the wife’s right to spousal maintenance in Australia.⁹⁰ Mitsui and Protea were drawing a very long bow in arguing that this translated to give them a right to claim damages in two successive actions in two different jurisdictions arising out of the same collision between the same parties.

Viewed through that lens, her Honour was cognisant of the fact that Mitsui and Protea had filed the Australian writ after they had commenced proceedings against Nebula in, and submitted to the jurisdiction of, the Shanghai Maritime Court. As such, the observations of the majority in *Henry v Henry* (*‘Henry’*)⁹¹ were apt:

It is *prima facie* vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue. And although there are cases in which it has been held that it is not *prima facie* vexatious, in the strict sense of that word, to bring proceedings in different countries, the problems which arise if the identical issue or the same controversy is to be litigated in different countries which have jurisdiction with respect to the matter are such, in our view, that, *prima facie*, the continuation of one or the other should be seen as vexatious or oppressive within the Voth sense of those words.⁹²

⁸⁰ Ibid 400–401 (Dawson, Toohey, Gaudron, McHugh and Kirby JJ) (citations omitted).

⁸¹ *Yangze 22* (n 12) [72].

⁸² *Xin Tai Hai* (n 3).

⁸³ Ibid 293–4 [119], 300 [145].

⁸⁴ *Yangze 22* (n 12) [73].

⁸⁵ Ibid [73]–[74].

⁸⁶ Recall that, on Mitsui and Protea’s application for a stay of the Chinese proceedings, the Shanghai High People’s Court said the argument that the Shanghai Maritime Court was an inappropriate forum was “untenable”: see *ibid* [19(d)].

⁸⁷ *Yangze 22* (n 12) [87], [89].

⁸⁸ *Yangze 22* (n 12) [99].

⁸⁹ (2020) 272 CLR 1.

⁹⁰ Ibid 16 [41] (Kiefel, Bell and Gageler JJ).

⁹¹ *Henry* (n 42).

⁹² *Yangze 22* (n 12) [104] (emphasis in original), quoting *Henry* (n 42) 591 (Dawson, Gaudron, McHugh and Gummow JJ).

Her Honour therefore undertook a careful analysis of the Australian and Chinese proceedings to determine whether they raised the same issues.

In the Federal Court, Mitsui and Protea's claim was for damages arising out of the collision. Although it was commenced *in rem*, by this point it also proceeded *in personam* due to Nebula's unconditional appearance. In the Shanghai Maritime Court, two related claims were on foot, both arising out of the collision: Nebula's claim against Mitsui and Protea, and Mitsui and Protea's claim against Nebula's limitation fund. Each of the three concurrent claims founded a maritime lien. Furthermore, the expert evidence established that the law in China with respect to the distribution of the fund was almost identical to that under the LLMC. No evidence was adduced as to whether the status of a claim as a maritime lien affected its priority in the distribution of a Chinese limitation fund, so her Honour declined to speculate on that point. Her Honour concluded that, while the *in rem* claim was only available in Australia, Nebula's unconditional appearance before the Federal Court had rendered it moot.

The position was, therefore, as follows: three separate proceedings were on foot, all based on the same cause of action, seeking the same relief.⁹³ Although Mitsui and Protea's claim *in rem* had not merged with their claim *in personam*, the parties to each action were also substantively the same.⁹⁴

However, because the *extent* of the available relief was more limited in China than in Australia, Mitsui and Protea's decision to commence proceedings in Australia could likely not be characterised as vexatious or oppressive in the 'strict sense' adverted to by the High Court in *Henry*.⁹⁵ As such, Sarah C Derrington J found that the objective test expounded by the majority in *CSR* was applicable.⁹⁶ Having regard to the controversy as a whole,⁹⁷ her Honour held:

In the circumstances of this case, where unlike those that pertained in the *Xin Tai Hai*, China is the natural and obvious forum for the resolution of the dispute and where: the *lex causae* is the law of the PRC; three extant proceedings are before the Shanghai Maritime Court, in which two security funds have been established; the writ in these proceedings was served *after* [Mitsui] and Protea had submitted to the jurisdiction of the Shanghai Maritime Court; most, if not all, of the witnesses (and documents) are located in China; it is impossible to have all matters pending in the Shanghai Maritime Court transferred to this Court because of the exclusive jurisdiction of that court in respect of several claims; and there is a significant risk of inconsistent findings, it would be vexatious and oppressive to Nebula to be required to litigate the same sub-stratum of fact in this Court and the Shanghai Maritime Court.⁹⁸ This Court is a clearly inappropriate forum[.]

6. Comment

Consistently with Deane J's statement of principle in *Oceanic Sun*⁹⁹ and McKerracher J's treatment of concurrent Chinese proceedings at first instance in *CMA CGM SA v Ship 'Chou Shan'*,¹⁰⁰ Sarah C Derrington J's decision in *Yangze 22* further clarifies that the question of whether concurrent foreign proceedings render the continuation of Australian proceedings vexatious or oppressive is an aspect of the broader 'clearly inappropriate forum' inquiry, not separate from it.

Her Honour did not regard the fact that Mitsui and Protea regularly invoked the Court's *in rem* jurisdiction as a persuasive factor against the grant of a stay.¹⁰¹ This is consistent with *Voth*, where the majority observed that while Australian courts have a *prima facie* obligation to exercise their jurisdiction, that obligation does not extend to cases where the court is a clearly inappropriate forum.¹⁰² As such, while the obligation to exercise jurisdiction signals that the power to stay proceedings must not be exercised lightly,¹⁰³ it does not otherwise speak to the circumstances in which a court will be a clearly inappropriate forum.¹⁰⁴ It follows that the fact that the Court's

⁹³ *Yangze 22* (n 12) [113].

⁹⁴ *Ibid*.

⁹⁵ *Ibid* [84]. See *CSR* (n 79) 395, 402 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

⁹⁶ *Yangze 22* (n 12) [114].

⁹⁷ *CSR* (n 79) 400–401 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

⁹⁸ *Yangze 22* (n 12) [116] (emphasis in original).

⁹⁹ *Oceanic Sun* (n 27) 247–8.

¹⁰⁰ *CMA CGM SA v Ship 'Chou Shan'* [2014] FCA 74, [105]; undisturbed on appeal: *Chou Shan* (n 3) 389 [25].

¹⁰¹ *Yangze 22* (n 12) [38].

¹⁰² *Voth* (n 8) 559 (Mason CJ, Deane, Dawson and Gaudron JJ).

¹⁰³ See *Oceanic Sun* (n 27) 241 (Deane J).

¹⁰⁴ *Voth* (n 8) 565–66 (Mason CJ, Deane, Dawson and Gaudron JJ).

jurisdiction was regularly invoked should play a limited role in the operation of the ‘clearly inappropriate forum’ test.¹⁰⁵

Sarah C Derrington J’s reasoning differs from *Chou Shan* and *Xin Tai Hai* insofar as her Honour expressly stated that Australia’s higher limits of liability are not a significant factor against a stay of proceedings on *forum non conveniens* grounds.¹⁰⁶ In coming to that conclusion, her Honour relied on case law from the United Kingdom considering the same question which had previously been viewed with scepticism for fear of equating the ‘more appropriate forum’ test with the Australian ‘clearly inappropriate forum’ test.¹⁰⁷ In the author’s view, where that English case law is only being relied upon to determine whether the policy of the forum requires a juridical advantage available in the forum to militate against a stay of proceedings, that is entirely consistent with the inward-looking ‘clearly inappropriate forum’ test.

Indeed, where a dispute has no connection with Australia (being governed by a foreign *lex causae* with all evidence and witnesses in a foreign jurisdiction) and where a foreign court has jurisdiction over the same dispute, the only legitimate reason why a party would institute proceedings in an Australian forum is the prospect of gaining a juridical advantage. But, as Callinan J said in *BHP Billiton Ltd v Schultz*, ‘one person’s legitimate advantage is another person’s disadvantage.’¹⁰⁸ So, where public policy does not require the forum to favour the *lex fori*,¹⁰⁹ it is only right that the Court did not allow Mitsui and Protea to pull themselves up by their bootstraps and argue that the fact they approached an Australian court because of its higher limits of liability suffices to make that Court appropriate.

¹⁰⁵ See *ibid*.

¹⁰⁶ *Yangze 22* (n 12) [85]–[86]. Cf *Chou Shan* (n 3) 401 [77] (Allsop CJ, Besanko and Pagone JJ); *Xin Tai Hai* (n 3) 299 [143] (Rares J).

¹⁰⁷ See *Chou Shan* (n 3) 401–2 [78]–[83] (Allsop CJ, Besanko and Pagone JJ); *Xin Tai Hai* (n 3) 293 [116] (Rares J).

¹⁰⁸ (2004) 221 CLR 400, 492 [258].

¹⁰⁹ See, eg, *Karpik v Carnival plc* (2023) 280 CLR 640, 668 [40] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).