

Conditional *Forum Non Conveniens* in Canadian Courts

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When a plaintiff brings an action in what may be the wrong jurisdiction, the court may put the action on hold in favour of a proceeding in another jurisdiction—a forum non conveniens (fnc) stay, and may make such a stay conditional on some requirement as to how the action will proceed in the other jurisdiction. Courts in the United Kingdom and the United States have given considerable attention to the imposition of conditions on fnc stays, and the rules governing such conditions are well known in those countries. While the Supreme Court of Canada has given general approval to conditional fnc stays, there has been less examination in Canada of when and how they should be used. The author proposes a categorization of the types of conditions used in fnc stays, and examines the issues raised by each. He notes that some conditions (such as those used to ensure that the foreign forum is available) hardly seem necessary, while others (such as those purporting to govern how a foreign court proceeds) could have serious consequences. Ultimately, rather than proposing strict rules for conditions used in fnc stays, the author suggests that judges should make their reasons for imposing conditions more explicit in order to provide greater structure and consistency to their decisions.

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Introduction

The law of *forum non conveniens* (*fnc*) in this country hardly lacks for discussion and analysis. The Supreme Court has dilated on the subject several times, most recently in its 2012 decision *Club Resorts Ltd v Van Breda*¹ and its companion cases.² The chief Canadian texts on conflict of laws discuss *fnc* at length,³ and the Uniform Law Conference of Canada codified *fnc* criteria in its *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*), which is in force in Saskatchewan, British Columbia and

1. 2012 SCC 17, [2012] 1 SCR 572 [*Club Resorts*].

2. *Breedon v Black*, 2012 SCC 19, [2012] 1 SCR 666 [*Black SCC*]; *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18, [2012] 1 SCR 636. These three cases were principally about the question of court jurisdiction, but they also discussed and applied *fnc*. See also *Antares Shipping Corp v The Capricorn*, [1980] 1 SCR 553, 111 DLR (3d) 289; *Amchem Products Inc v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, 102 DLR (4th) 96 [*Amchem* cited to SCR]; *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)*, 2001 SCC 90, [2001] 3 SCR 907; *Spar Aerospace Ltd v American Mobile Satellite Corp*, 2002 SCC 78, [2002] 4 SCR 205; *Teck Cominco Metals Ltd v Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 SCR 321.

3. Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 115–40; Janet Walker, *Canadian Conflict of Laws*, loose-leaf (consulted on 1 May 2013) 6th ed (Markham: LexisNexis Butterworths, 2005) ch 13.

Nova Scotia.⁴ There are hundreds of decisions that appear to be in rough accord as to how applications for a stay of proceedings based on *fnc* should be approached and dealt with.

Yet one aspect of *fnc* doctrine remains murky and under-examined: the attachment of conditions to an *fnc* stay. Courts issuing stays sometimes do so on a qualified basis. They conclude that, in light of the plaintiff's inappropriate forum choice, they will put the action before them on hold in favour of a proceeding before some foreign court but only if the defendant who has applied for that stay will abide by one or more conditions. For instance, the defendant may have to agree to waive some defence before the other tribunal, promise to defray some of the plaintiff's expenses in litigating abroad or acquiesce in local or perhaps even worldwide enforcement of any judgment the foreign court might eventually deliver. In some instances, these conditions are imposed in response to an undertaking by the defendant who has sought the stay. As part of his *fnc* application, the defendant may promise, if the local court allows the requested stay, to refrain from doing something he would otherwise be free to do. Such arrangements permit defendants to engage in a sort of forum shopping—an activity typically thought to be the province of plaintiffs.⁵ That is, defendants requesting *fnc* stays can adopt the tactic of holding out various inducements and concessions, such as waivers of defences or offers to pay for witness transportation. Their obvious motive is to increase the likelihood that the court will grant a stay of local proceedings—with the result that the defendant gets

4. *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c 2, as amended by SNS 2010, c 48. The *CJPTA* has also been passed, though not yet brought into force, in Prince Edward Island and the Yukon. See *Court Jurisdiction and Proceedings Transfer Act*, online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/uniform-acts-en-gb-1/183-court-jurisdiction-and-proceedings-transfer-act/1092-court-jurisdiction-proceedings-transfer-act>> (subsequent references in this paper will be to the section numbers and wording in this version). For a discussion of the *CJPTA*'s treatment of *fnc*, see Vaughan Black, Stephen Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012) ch 8.

5. See *Piper Aircraft Co v Reyno*, 454 US 235 (1981) (Justice Marshall referred to *fnc* as permitting “reverse forum-shopping” at 252, n 19).

to defend in her preferred forum, or may not have to defend at all.⁶ In other instances, the condition appears to originate not in an undertaking offered by the defendant but as part of the court's own reasoning. Either way, the condition amounts to an important qualification of a stay.

The prospect of conditions may also give rise to counter-conditions that are imposed on the plaintiff as a consequence of *refusing* a stay of proceedings. Again, these counter-conditions may (but need not) originate in an undertaking tendered by a party. In resisting a defendant's motion for an *fnc* stay, a plaintiff may propose that if the court rejects the defendant's application and allows the action to go forward, the plaintiff will do or refrain from doing some act. An example of this sort of proposal in recent, high-profile litigation is found in the defamation actions brought in Ontario by financier Conrad Black against a group of mostly American defendants. The defendants argued that the Ontario courts lacked territorial jurisdiction over Black's claim or, in the alternative, that if Ontario did have jurisdiction, it should stay Black's proceedings on *fnc* grounds. In response, Black successfully argued that Ontario had jurisdiction. Interjectionally, it should be noted that this article does not deal with territorial jurisdiction, only with the distinct question of discretionary declination of that jurisdiction on the grounds of *fnc*. On the *fnc* point, Black undertook, in an amended statement of claim, that if the Ontario Court refused the defendants' application for a stay, he would not bring defamation actions in respect of the matter in

6. See David Robertson, "Forum Non Conveniens in America and England: 'A Rather Fantastic Fiction'" (1987) 103:3 Law Q Rev 398. There, he reports an empirical study of 180 successful *fnc* applications in the US. In most cases a successful *fnc* motion was determinative of the outcome. That is, this (admittedly now dated) study showed that in the wake of a defendant's successful *fnc* application a majority of plaintiffs effectively gave up, either by abandoning the suit or by settling for a low amount. See also Hilmy Ismail, "Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?" (1991) 11:2 BC Third World LJ 249; Jacqueline Duval-Major, "One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff" (1992) 77:3 Cornell L Rev 650; Russell J Weintraub, "International Litigation and Forum Non Conveniens" (1994) 29:3 Texas Int'l LJ 321.

The Supreme Court of Texas acknowledged this in affirming the dismissal of the defendant's *fnc* motion. It acknowledged that a "forum non conveniens dismissal is often, in reality, a complete victory for defendant". See *Dow Chemical Co v Alfaro*, 786 SW (2d) 674 at 683 (Tex 1990).

any other court.⁷ In other words, Black promised that his Ontario action would be the only one he would launch in respect of this alleged libel. In holding for the plaintiff and declining to impose a stay, the Court made reference to that undertaking.⁸

This article provides an overview of current Canadian practice on the imposition of conditions on *fnc* stays. Part I deals with the use of conditional *fnc* stays in Canada and draws comparisons to approaches taken in other countries. Part II offers some observations about the types of conditions and gestures toward some general principles that should be recognized in this area. While I argue here for greater structuring in the use and formulation of such conditions, given the current under-examined state of the law, it would be premature to reduce the use of conditions in *fnc* stays to stringent rules that would dictate the granting or withholding of stays in all cases. The law pertaining to *fnc* is also notoriously open-ended and responsive to the unique features and context of each case; any effort to regularize the role played by conditions will have to be comparably fluid.⁹

7. See *Black v Breeden*, 2010 ONCA 547, 309 DLR (4th) 708 [*Black ONCA*], aff'd *Black* SCC, *supra* note 2. The Supreme Court of Canada's reference to this undertaking is the only mention it has ever made of conditions in relation to *fnc* stays. *Ibid* at para 33. The plaintiff also undertook to confine his damages claim to harm to his reputation in Canada. The origin of this may be an Australian case where the plaintiff sued only for harm to his reputation in Victoria and undertook to proceed nowhere else, and the defendant who was bringing the *fnc* application countered with undertakings "in the event of a stay of the Victorian action, to raise no limitations or jurisdictional objections there if the respondent were to sue in the United States". *Dow Jones and Co v Gutnick*, [2002] HCA 56 at para 176, 210 CLR 575 [*Dow Jones*].

8. *Black ONCA*, *supra* note 7 at para 105. Such proffered undertakings from plaintiffs are not invariably accepted by the court, even when the court declines to grant the stay. See also *Pearl v Sovereign Management Group Inc* (2003), 37 CPC (5th) 143 (available on CanLII) (Ont Sup Ct J). The plaintiff undertook that he would abandon some aspects of his claim if the court would deny the defendant's application for an *fnc* stay. The court dismissed the defendants' applications but concluded that "it is not necessary for Pearl to abandon [those] claims". *Ibid* at para 49.

9. American law offers illustrations of this. The Fifth Circuit Court of Appeals has taken steps in the direction of standardizing at least one aspect of the law on conditional *fnc*. It now requires that when a court dismisses a case on *fnc* grounds, the judge *must* incorporate a return jurisdiction condition, so that the plaintiff can return and sue in the US if the foreign forum declines jurisdiction. Failure to include such a condition constitutes an abuse of discretion. See *Re Air Crash Disaster near New Orleans, La*, 821 F (2d) 1147 at 1166 (5th

It suggests that judges who grant *fnc* stays should devote more systematic thought to whether conditions should accompany those stays, offer more extensive justification for the conditions they impose and take greater care in how those conditions are worded. It further suggests that in some situations there should be a presumption that *fnc* stays are conditional and offers some views on how those conditions should be phrased. More generally, it makes a plea for greater appellate court attention to the proper role of conditions on *fnc* stays.

I. State of the Law

A. Canada

Although conditional *fnc* stays are by no means rare in Canadian courts, none of the Supreme Court of Canada's discussions on the matter are helpful. A 1986 House of Lords' *fnc* case, *Spiliada Maritime Corp v Cansulex Ltd*,¹⁰ featured a brief, but general approval of the notion that

Cir 1987); *Baris v Sulpicio Lines Inc*, 932 F (2d) 1540 at 1551 (5th Cir 1991); *Robinson v TCI/US West Cable Communications Inc*, 117 F (3d) 900 at 907–08 (5th Cir 1997); *Vasquez v Bridgestone/Firestone Inc*, 325 F (3d) 665 at 675 (5th Cir 2004) (the court wrote that it was a “per se abuse of discretion” to fail to include a return jurisdiction clause in an *fnc* dismissal order). See also *Kinney System Inc v Continental Insurance Co*, 674 So (2d) 86 at 92 (Fla Sup Ct 1999) (the Supreme Court of Florida similarly held that every *fnc* motion should automatically be deemed to stipulate two conditions: that the action would be treated in the new forum as if it had been filed on the date it was filed in Florida, and that the plaintiff would lose the benefit of stipulations made by the defendant if it did not file the action in the new forum within 120 days of the Florida dismissal). However, the Fifth Circuit's approach is an exception. Other circuits have ultimately decided not to lay down mandatory terms governing *fnc* conditions, on the thinking that *fnc* is discretionary and should never be burdened with absolute rules. See *Leetsch v Freedman*, 260 F (3d) 1100 at 1104 (9th Cir 2001).

10. (1986), [1987] AC 460 [*Spiliada*]. The House of Lords has returned to *fnc* since. See *Connolly v RTZ Corp plc* (1997), [1998] AC 854; *Lubbe v Cape plc*, [2000] 4 All ER 268; *Berezovsky v Michaels*, [2000] 2 All ER 986; *Tehrani v Secretary of State for the Home Department*, [2006] UKHL 47. However, those cases only offer glosses on *Spiliada*. *Spiliada* remains the leading *fnc* case in the UK. See *VTB Capital plc v Nutritek International Corp*, [2013] UKSC 5 (in its most recent encounter with the question, the Supreme Court of the United Kingdom began by noting that “[t]he *locus classicus* in relation to issues of appropriate forum at common law is *Spiliada* . . .” at para 12).

discretionary stays can be conditional. Six years later, in a wide-ranging judgment in *Amchem*,¹¹ the Supreme Court of Canada approved *Spiliada*, and *Amchem* became the leading *fnc* judgment in Canada. *Amchem* contained no mention of conditions, but because they were discussed and authorized by the House of Lords in *Spiliada*, *Amchem*'s broad approval of that case amounted to general endorsement of conditional stays. However, that endorsement is at best a bare one, as the Supreme Court did not elaborate on the purpose and limits of such conditions in *Amchem* and has not done so in subsequent encounters with *fnc*.¹²

Spiliada was followed in many Commonwealth countries, but not Australia. See *Voth v Manildra Flour Mills Pty Ltd*, [1990] HCA 55 [*Voth*] (courts should refuse to issue a stay even if there was a more appropriate forum in another country, as long as the Australian court was not a clearly inappropriate one). That test has received academic criticism but the High Court has held its ground. See *Henry v Henry*, [1996] HCA 51; *CSR Ltd v Cigna Insurance*, [1997] HCA 33; *Agar v Hyde*, [2000] HCA 41; *Régie Nationale des Usines Renault SA v Zhang*, [2002] HCA 10. *Fnc* stays in Australia are thus harder to get than in Canada. When they are granted, however, undertakings and conditions are a common accompaniment. As in Canada, however, Australian cases offer little express discussion of the principles that should guide the granting or refusal of such conditions. The High Court's decision in *Voth* makes reference to conditions, but only very briefly. *Supra* note 10 at 571. The decision in that case involved issuing a stay conditional on the defendant's waiving the time bar in the foreign jurisdiction. *Ibid* at 591.

It must be noted that the foregoing observations on Australian law relate only to international *fnc*. The matter is governed by statute among the states and territories. See *Service and Execution of Process Act 1992* (Cth), s 20. See also *Trans-Tasman Proceedings Act 2010* (Cth) Part 3 (which governs the *fnc* question where the other country involved is New Zealand).

11. *Supra* note 2 at 921–22.

12. See especially *Thomson v Thomson*, [1994] 3 SCR 551 at 607, 119 DLR (4th) 253. This was a decision pursuant to Manitoba's legislation implementing the Hague Child Abduction Convention. *Child Custody Enforcement Act*, RSM 1987, c C–360. In ordering the return of the child to Scotland and thus effectively terminating the jurisdiction of Manitoba's courts, the majority's judgment imposed a number of conditions on the successful party. These were controversial since there was no express basis for them in the Convention or its enacting legislation. Doctrinally, these conditions seem to be close kin to those imposed as part of an *fnc* stay of proceedings. In practice, however, declining jurisdiction as a consequence of ordering the return of a child pursuant to the Hague Convention has always been treated as distinct from and subject to different considerations than an *fnc* stay. *Thomson* may demonstrate that the Supreme Court regards courts as having a broad power to impose conditions as part of declining jurisdiction but the unique statutory circumstances that gave rise to that case mean that it is of limited use in the non-Hague Convention cases discussed here.

Likewise, Canadian texts on conflict of laws deal at some length with *fnc*, but only briefly advert to the role that conditions may play in this crucial pre-merits stage. The most authoritative text, *Canadian Conflict of Laws*, offers but a single sentence: “Where the applicant is in a position to ensure that the granting of a stay does not deprive the plaintiff of a legitimate personal or juridical advantage, the court may impose the terms in the order.”¹³

Similarly, the *CJPTA*’s endorsement and codification of *fnc* as a means to manage court access makes no mention of conditions. It simply provides that

[a]fter considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.¹⁴

The *CJPTA*’s silence on the subject of conditions in relation to *fnc* is noteworthy given that its terms on transfers of judicial proceedings do deal with conditions in some detail. Section 15(2)(b–d) provides that an order requesting a transfer may

- (b) impose conditions precedent to the transfer;
- (c) contain terms concerning the further conduct of the proceeding; and

13. Walker, *supra* note 3, ch 13 at 4, citing *Tower v Tower*, 167 ACWS (3d) 513, 52 RFL (6th) 455 (Ont Sup Ct J (Fam Div)) (where a stay was granted conditional on the defendant assisting the plaintiff in purging her contempt before the foreign court). See also Pitel & Rafferty, *supra* note 3 at 135–36 (though no Canadian cases are cited).

14. *Supra* note 4, s 11(1) (the remainder of the section goes on to spell out the factors pertinent to the exercise of that discretion but makes no mention of conditions). See also art 3135 CCQ (like the *CJPTA*, however, it makes no mention of conditions). In contrast, the Texas legislature codified the *fnc* criteria in 1993. See *Texas Civil Practice and Remedies Code*, § 71.051(c) (1993). That section provides:

The court may set terms and conditions for staying or dismissing a claim or action under this section as the interests of justice may require, giving due regard to the rights of the parties to the claim or action. If a moving party violates a term or condition of the stay or dismissal, the court shall withdraw the order staying or dismissing the claim or action and proceed as if the order had never been issued. Notwithstanding any other law the court shall have continuing jurisdiction for the purposes of this subsection.

Ibid. Some other states have comparable provisions. See *infra* note 20.

(d) provide for the return of the proceeding to the [superior court] on the occurrence of specified events.

Other sections in the *CJPTA* address the ongoing effect of those terms and conditions, including what happens if they are not fulfilled.¹⁵ In light of these explicit provisions on the role of conditions in proceedings transfers and the *CJPTA*'s effort to spell out the criteria for *fnc* stays, the *CJPTA*'s silence on the role of conditions in *fnc* stays is striking.

In Ontario, the general empowering statute on *fnc* mentions the possibility of conditional stays. Section 106 of the *Courts of Justice Act* (*CJA*), which preserves this aspect of the inherent jurisdiction of the superior courts, says: "A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court *on such terms as are considered just.*"¹⁶

Like *Amchem*'s approval of *Spiliada*, this provision amounts to a general endorsement of judicial power to make an *fnc* stay subject to some term or qualification. Indeed, it goes a little further in that it establishes a statutory ground for such a power. Again, however, apart from the requirement that such terms must be just, the *CJA* provides no direction or assistance on when conditions should be imposed or what they might be. Overall, then, current Canadian law offers extensive statutory and judicial discussion of the factors pertinent to the granting of *fnc* stays, and a couple of statutory and Supreme Court acknowledgements that such stays may be conditional, but next to no clarification of the purpose or proper role of such conditions.

15. *Supra* note 4, ss 16(4), 20(1)(a).

16. RSO 1990, c C-43, s 106 [emphasis added]. This provision is not limited to stays on grounds of *fnc*, but it includes them. See also *Court of Queen's Bench Act*, CCSM 2012, c C-280, s 38; *Child Custody Enforcement Act*, *supra* note 12 ("a court which finds that it lacks jurisdiction to make a permanent child custody order may stay the application subject to (i) the condition that a party to the application promptly commence or proceed expeditiously with a similar proceeding before an extra-provincial tribunal, or (ii) such other conditions as the court considers appropriate", s 6(d)). Interestingly, the civil procedure rule that operationalizes Ontario's statutory provision makes no reference to conditions. Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194, r 17.06. It simply provides that a court may issue a stay of proceedings.

B. *The US and the UK*

By way of contrast to the situation in Canada, American and (to a lesser extent) English appellate courts have discussed *fnv* conditions at some length. They have ruled on terms that should be imposed, at least in certain situations, and on terms that go too far. Perhaps the best-known illustration of the latter is the suit brought in the US against Union Carbide, the majority shareholder in Union Carbide India Ltd., which had run an insecticide plant that catastrophically leaked methyl isocyanate into the air in Bhopal. A federal District Court in New York granted the defendants' *fnv* motion, effectively requiring that the injured plaintiffs' suit be brought in the country where the accident occurred, but imposed a number of conditions on the expected action in India.¹⁷ On appeal the *fnv* dismissal of the American action was upheld by the Second Circuit Court of Appeal, but some of the conditions imposed by the District Court were struck out as improper.¹⁸ One of these was the requirement that, in the Indian proceedings, Union Carbide would be subject to discovery on the standards set out in the US Federal Rules

17. See *Re Union Carbide Corp Gas Plant Disaster at Bhopal, India in December 1984*, 634 F Supp 842 at 844 (SDNY 1986). The use of conditional *fnv* dismissals in the United States is common. Moreover, perhaps due to a decision of the US Supreme Court, *fnv* dismissals in that country are increasing. *Sinochem International Co v Malaysia International Shipping Corp* 549 US 422 (2007); see also EE Daschbach, "Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals" (2007) 13:1 Law & Bus Rev Am 11; Donald Childress III, "When *Erie* Goes International" (2011) 105:4 Nw UL Rev 1131; Donald Childress III, "Forum Conveniens: The Search for a Convenient Forum in Transnational Cases" (2013) 53:1 Va J Int'l L 157. For a detailed examination of the Bhopal litigation, including the *fnv* decision in the US and subsequent developments in India, see Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1993).

18. See *Re Union Carbide Corp Gas Plant Disaster at Bhopal, India in December 1984*, 809 F (2d) 195 (2d Cir 1987) [*Union Carbide*]. The Supreme Court of the United States has not addressed the question of conditional *fnv*, but there have been other instances of review of this question by intermediate appellate courts. See *Mercier v Sheraton International Inc*, 981 F (2d) 1345 at 1349 (1st Cir 1992) [*Mercier*] (since *fnv* is a discretionary decision and essentially a matter of case management the standard of review of appellate courts—both on the question of granting the defendant's motion and on the question of the imposition of conditions—is one that must allow deference to the decision at first instance; the standard should be abuse of discretion). See also *Piper Aircraft Co v Reyno*, *supra* note 5 at 257, n 25.

of Civil Procedure. In the Second Circuit's view, such a requirement, at least in the circumstances of the case, was inappropriately one-sided: "Basic justice dictates that both sides be treated equally, with each having equal access to the evidence in the possession or under the control of the other."¹⁹

Some US state legislatures have seen fit to address the subject. As we will see below, conditions are commonly imposed on *fnc* to address limitation periods in alternative foreign forums. For example, Florida's Rules of Civil Procedure state:

In moving for forum-non-conveniens dismissal, defendants shall be deemed to automatically stipulate that the action will be treated in the new forum as though it had been filed in that forum on the date it was filed in Florida, with service of process accepted as of that date.²⁰

Appellate judges in the UK have also dealt with *fnc* conditions. In *The Sofia B*, the motions judge had awarded a stay on the condition that the defendant "effect discovery in the Spanish proceedings to the same standard as discovery in this jurisdiction".²¹ The Court of Appeal held this to be an error because, in its view, an English court could not adequately supervise discovery in Spain.

Both American and British appellate case law provide some clarity to the use of conditional *fnc* stays, whereas Canadian case law provides next to none. Moreover, as one would expect in the near absence of appellate guidance, Canadian lower-court rulings are disordered and unsatisfactory. In particular, courts tend not to distinguish their use of conditional *fnc* stays from other cases where conditions were either different or not imposed at all.

One explanation for the more extensive appellate discussion of *fnc* conditions in the US is that American lower courts often issue lengthier and more varied lists of conditions than Canadian courts. A nice example

19. *Union Carbide*, *supra* note 18 at 205. Not all Federal Circuits share this view. See *Harrison v Wyeth Laboratories Division of American Home Products Corp*, 510 F Supp 1 at 5-6 (ED Pa 1980), *aff'd* 676 F (2d) 685 (3d Cir 1982) (the District Court imposed a similar condition with respect to discovery in the foreign court).

20. Fla R Civ P 1.061(c). See also Wis Stat Ann ("a moving party under this subsection must stipulate consent to suit in the alternative forum and waive right to rely on statutes of limitation which may have run in the alternative forum after commencement of the action in this state" at § 801.63(1)).

21. [1981] Com LR 147 (CA).

of this is *Stangvik v Shiley Inc*, where the Supreme Court of California held that the plaintiffs' action should proceed in Sweden and Norway rather than California.²² In doing so, it required the defendants to meet all of these conditions: (1) submit to the jurisdiction of the foreign courts; (2) toll the foreign limitations periods during the pendency of the California action; (3) comply with the foreign courts' discovery orders; (4) make their employees available to testify in the foreign courts at their own expense, if ordered to do so by those courts; (5) make documents available in the foreign jurisdictions at their own expense; (6) permit depositions in California in accordance with Californian law; and (7) pay any judgment the foreign courts might render. That's a lot of conditions.

American lower courts have also been more aggressive and intrusive than Canadian courts in the terms they have laid down. An extreme instance is provided by *Pain v United Technologies Corp*,²³ where an appellate court upheld a lower judgment that, as the price of an *fnc* dismissal, required the defendant to concede liability in the foreign court and agree to proceed directly to the assessment of damages.²⁴ Canadian courts have not yet gone nearly that far, and arguably the more modest conditions they have imposed have not yet triggered the need for firm appellate regulation of this practice. Nevertheless, Canadian courts do impose conditions to accompany their *fnc* stays. At the very least, the acknowledgement of judicial power to make an *fnc* stay conditional would seem to require some tweaking to Canadian *fnc* doctrine. The goal of *fnc*, in Lord Goff's oft-quoted phrase from *Spiliada*, is "to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice".²⁵ To that end, *fnc* doctrine typically requires the defendant to show that a foreign forum is available and clearly more appropriate. I suggest the following amendment to those requirements: to obtain a stay on *fnc* grounds, the defendant must show that either there

22. 54 Cal (3d) 744 (1991).

23. 637 F (2d) 775 (DC Cir 1980), cert denied, 454 US 1128 (1981). The defendant stipulated to this condition. Evidently it took the view that it had little prospect of prevailing on liability but that the damages award would be smaller in the foreign court.

24. See also *Chhawchharia v Boeing*, 657 F Supp 1157 at 1163 (SDNY 1987). There, as the price of an *fnc* dismissal, the defendant was only allowed to plead one circumscribed defence in the foreign proceeding.

25. *Supra* note 10 at 480.

is a foreign forum which is available and clearly more appropriate *or* at least that one may be rendered so, through the imposition of conditions.²⁶

In a related vein, recognition of the role of conditions should prompt courts to modify the way the burden of proof is articulated in conditional *fnc* stays. In *Club Resorts*, the Supreme Court of Canada held that in an *fnc* application the onus remains on the defendant: “The party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.”²⁷ This seems clear enough. However, it is less than accurate to claim that defendants invariably bear the burden of demonstrating appropriateness, because courts, on their own initiative, can and do impose conditions that, in effect, turn an otherwise inappropriate forum into an appropriate one.²⁸ Defendants who fall short of satisfying that burden may find courts stepping in with conditions, helping them to meet it.

26. One American court has noted that conditions should not be used to transform an inadequate foreign forum into an adequate one. See *Bank of Credit & Commerce International (Overseas) Ltd v Bank of Pakistan*, 273 F (3d) 241 at 247–48 (2d Cir 1991). In practical terms, however, conditions function to do exactly that, at least in many cases, and some other American decisions have been explicit in regarding the matter this way. See *Veba-Chemie AG v M/V Getafix*, 711 F (2d) 1243 at 1245–46 (5th Cir 1983); *Perusahaan Umum Listrik Negara Pusat v M/V Tel Aviv*, 711 F (2d) 1231 at 1238, n 19 (5th Cir 1983).

27. *Supra* note 1 at para 103. *Club Resorts* was an Ontario case. See also *Courts of Justice Act*, *supra* note 16, s 106 (*fnc* stays may be issued on a court’s own initiative); *Yaiguaje v Chevron Corp*, 2013 ONSC 2527 (available on QL) [*Chevron*] (stay issued on court’s own initiative, but not on *fnc* grounds). Although it may be hard to square with the principle of parliamentary superiority, it seems likely that when it comes to *fnc* stays the Supreme Court’s view that judges cannot act *sua sponte* in this arena accurately states the law.

28. This is not to say that the burden is ever on the party opposing the stay, but simply that courts appear to be able to assist defendants by adding conditions which have the effect of rendering the foreign court clearly more appropriate. Likewise, the fact that courts refusing applications for *fnc* stays can do so in conjunction with the imposition of conditions on plaintiffs would appear to entail further reconfiguration of *fnc* doctrine. It would appear that courts which initially find that they are a less appropriate forum than some foreign one (a finding that would point toward the issuance of a stay in favour of that foreign court) can stipulate some condition that, if carried out by the plaintiff, will turn the local court into the more appropriate forum. This constitutes a significant addendum to the way *fnc* rules are currently stated.

C. Questions Raised

The possibility of conditional stays is by no means a minor or peripheral feature of *fnc* doctrine. After all, not all systems that permit *fnc* stays allow them to be made conditionally.²⁹ More important than the reformulation of the *fnc* doctrine discussed above are the unaddressed questions in the law in relation to *fnc* conditions. These include the following: the purposes, advantages and disadvantages of conditional stays; their justification; the limits on the sorts of conditions that may be imposed; and the problems of formulating, monitoring and enforcing those conditions.

An even broader question is whether it is prudent to allow the liberal use of conditions to, in effect, construct an artificial “third forum” for a given legal dispute. Classically, what was asked in deciding whether to issue an *fnc* stay was which of two fora was the more appropriate one to hear a given matter. It set forth a categorical, either/or decision. Liberal use of conditions has the effect of altering that choice by permitting the creation of a new “composite” forum—one that might have its limitations periods, discovery rules and perhaps some other standards drawn from one forum, but everything else drawn from another. While that may be a fine thing in terms of flexibility, it does change the *fnc* inquiry in ways that should give pause.

Questions also arise about the effect on Canadian litigation of conditions imposed on the parties by foreign courts. As long ago as 1932, the US Supreme Court confirmed that a lower court could require a defendant to submit to the jurisdiction of a Canadian court.³⁰ Thus, there are instances where the only reason why a Canadian court has jurisdiction to hear a matter is because the defendant has submitted to its jurisdiction under

29. Japan is one. Japanese “special circumstances” doctrine is similar to common law *fnc*, at least according to the chief comparative study of *fnc* law. See Ronald Brand & Scott Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (Oxford: Oxford University Press, 2007) at 124. Yet under that doctrine the courts of Japan lack the option to impose conditions; they must either take the case or dismiss it absolutely. See Masato Dogauchi, “The Hague Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters from the Perspective of Japan” (2001) 3 *Jap Ann Intl L* 35 at 44.

30. See *Canada Malting Co v Patterson Steamship Lines*, 285 US 413 at 418 (1932).

a term imposed in some foreign (usually American) *fnv* application,³¹ or where the standard of discovery in a Canadian proceeding may be dictated by a foreign court. One might ask whether Canadian courts should ever be concerned about that sort of meddling.

Other questions may present themselves if a condition set out in the foreign litigation is not met. This problem may arise in the much-discussed Chevron/Ecuador action currently before the courts of Ontario.³² The judgment creditors had succeeded in a lawsuit in Ecuador that involved an extensive environmental contamination in the Oriente region of that country, the Bhopal of the Amazon. In the Ontario action brought to enforce that judgment, they have alleged that as a condition of the *fnv* dismissal of their original attempt to sue in the US the defendant agreed to the worldwide enforcement of any judgment the courts of Ecuador might render.³³ One of the many questions the Ontario courts might have to answer is the effect of those conditions in Canada.³⁴ To what extent,

31. See e.g. *Teja v Rai*, 2002 BCCA 16 at para 4, 209 DLR (4th) 148.

32. See *Chevron*, *supra* note 27 (Justice Brown imposed a stay of proceedings, but that is now under appeal).

33. The account of conditions imposed in the Texaco/Chevron/Ecuador litigation is a tangled one. The original *fnv* dismissal was unconditional. *Aguinda v Texaco Inc*, 945 F Supp 625 (SDNY 1996). On appeal, the Second Circuit held that in the absence of a commitment from the defendant to submit to the courts of Ecuador the failure to include a condition requiring the defendant to appear in the Ecuadorian action was an error. *Jota v Texaco Inc*, 157 F (3d) 153 at 159 (2d Cir 1998). On rehearing, Texaco provided that undertaking and further agreed “to waive for 60 days after this date any statute of limitations-based defenses that may have matured since the filing of [the action]”. *Aguinda v Texaco Inc*, 142 F Supp (2d) 534 at 539 (SDNY 2001). This was upheld on appeal, except that the Second Circuit thought that the 60-day period was too short and extended it to a full year. *Aguinda v Texaco Inc*, 303 F (3d) 470 (2d Cir 2002) [*Texaco* 2d Cir]. In the 2001 rehearing before the District Court, Texaco had also offered to satisfy any Ecuadorian judgment in the plaintiffs’ favour, subject to the right to contest validity in the circumstances set out in New York’s statute governing recognition of foreign-country judgments. But, I kid you not, neither the District Court in its *fnv* dismissal nor the Second Circuit in its affirmation made any mention of this. However, a subsequent decision of the Second Circuit, after Texaco had been bought by Chevron, concluded that since this promise had likely influenced the District Court in its decision to grant an *fnv* dismissal it was enforceable against Chevron. *Republic of Ecuador v Chevron Corp*, 638 F (3d) 384 at 384, n 4 (2d Cir 2011) [*Chevron* US].

34. For an account of the other conditions in the Chevron/Ecuador dispute and the Ontario enforcement action generally, see Nicholas Pengelley, “We All Have Too Much Invested to Stop: Enforcing Chevron in Canada” (2012) 40:2 *Advocates’ Q* 213.

if at all, should a requirement imposed by an American court dictate a Canadian court's approach to enforcement of the Ecuadorian judgment?

II. Categories of Conditions

It will be helpful at this point to offer a general description of the sorts of conditions that courts have been imposing in connection with *fnc* stays. There is no recognized nomenclature, and those conditions could be categorized in a variety of ways. For the purposes of my analysis, I adopt the following taxonomy based on the purpose for which a particular condition was imposed: (1) ensuring the effective availability of the foreign forum; (2) compensating the plaintiff for being denied its preferred forum; (3) facilitating the enforcement of the foreign court's judgment; and (4) affecting how the foreign proceeding is conducted. In many instances those purposes must be inferred as courts that impose them do not always make them explicit.³⁵ These four categories are, of course, not mutually exclusive, and some conditions might fall into more than one of them.

A. Ensuring the Availability of the Foreign Forum

Conditions used to ensure that the foreign forum will be available to handle the suit are the most frequently imposed kind. Availability of an alternative forum is not the only criterion that must be satisfied before an *fnc* stay will issue, but it is a threshold requirement that must be met before further inquiry can be undertaken. What constitutes "availability" for this purpose is not entirely clear. While some American courts have held that extreme delay in the foreign court can mean that the foreign forum is not available,³⁶ it is far from certain that a Canadian court would do the same. Despite this uncertainty, however, "availability" remains a

35. For example, a condition that the defendant submit to the jurisdiction of the foreign court will seek both to ensure the effective availability of the foreign forum and to facilitate enforcement, since in some jurisdictions a pre-condition for recognition of a foreign judgment is that the foreign court have jurisdiction and the defendant's submission to that foreign court usually suffices. The discussion that follows uses this provisional classification to offer an overview of the current use of conditions in *fnc* stays.

36. See *Bhatnagar v Surrendra Overseas Ltd*, 52 F (3d) 1220 (3d Cir 1995).

fundamental criterion in Canadian law. More pertinently for the present analysis, some conditions are specifically designed to address availability. These conditions (variously phrased), which will be examined in the following subsections, seek to ensure that the foreign court has or will be given jurisdiction over the dispute in question, and also that it will exercise that jurisdiction in a way which enables it to get to the merits of the matter.

(i) Jurisdiction

The most basic condition relating to the availability of the foreign court requires the defendant seeking the stay to submit to the jurisdiction of that court.³⁷ In the US, this condition has been widely used since the mid-1920s.³⁸ In the UK, the requirement of another available forum has been held to be satisfied as long as the defendant undertakes to submit to the foreign court.³⁹ Canadian courts granting *fnv* stays have also been willing, with little discussion, to add a requirement that in the foreign

37. In the United States this is the most commonly imposed condition. This claim is based on an annotation which catalogues all conditional *fnv* cases in American federal courts. See Tim Thomas, "Validity and Propriety of Conditions Imposed upon Proceeding in Foreign Forum by Federal Court in Dismissing Action under Forum Non Conveniens" (1988) 89 ALR Fed 238. This was updated by a 2001 Supplement. Thomas lists many cases where, as a condition of the court dismissing a case, the defendant was required to submit to proceedings in Canada. See also Julius Jurianto, "Forum Non Conveniens: Another Look at Conditional Dismissals" (2006) 83:4 U Det Mercy L Rev 369; J Stanton Hill, "Toward Global Convenience, Fairness and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals before Determining Jurisdiction in United States Federal District Courts" (2008) 41:4 Vand J Transnat'l L 1177; John Bies, "Conditioning Forum Non Conveniens" (2000) 67:2 U Chicago L Rev 489; Thomas Main, "Toward a Law of 'Lovely Parting Gifts': Conditioning Forum Non Conveniens Dismissals" (2012) 18:2 Southwestern Journal of International Law 475.

38. See Robertson, *supra* note 6.

39. See *Lubbe v Cape plc*, *supra* note 10. Though in rare cases courts may issue a stay even though a defendant has not undertaken to submit and is not obviously subject to the jurisdiction of the foreign court. See *Gheewala v Hindocha*, [2003] UKPC 77 (Jersey).

proceeding the defendant must “consent to the jurisdiction”,⁴⁰ “not contest jurisdiction”⁴¹ or simply “attorn”⁴² in the foreign court.

It is difficult to see how any defendant seeking an *fnc* stay could object to the imposition of such a term given that it is a prerequisite for an *fnc* stay that the foreign court have jurisdiction in the matter.⁴³ If there is doubt about whether that requirement is satisfied, the defendant would be hard pressed to argue against an undertaking crafted to remove the doubt. Although we will see below that some conditions might prove objectionable to the foreign court, a requirement that a party submit to that court’s jurisdiction seems unlikely to fall into this category.

While such conditions may be unobjectionable, they are hardly necessary. This problem can be dealt with simply by adopting a wait-and-see approach. An *fnc* stay presupposes that the foreign court can hear the case. If that turns out not to be so, the original court can, on application, reverse its stay. Some Canadian courts have recognized this possibility. Rather than imposing conditions requiring defendants to submit, consent or attorn to the foreign court’s jurisdiction, they have simply stated that if the foreign court cannot hear the case, they will consider lifting the

40. *SC International Enterprises Inc v Consolidated Freightways Corp of Delaware*, 2002 BCSC 767 at para 30, 21 CPC (5th) 238.

41. *Shah v Jesudason* (1999), 176 DLR (4th) 116 at para 27, 177 NSR (2d) 162.

42. *Sterling Software International (Canada) v Software Recording Corp of America* (1993), 12 OR (3d) 694 at 700, 17 CPC (3d) 420 (Gen Div) [*Sterling*]; *Mohler v Dairy Queen of Western Canada Ltd*, [1976] 3 WWR 619 at para 41 (available on WL Can) (Alta SC (AD)).

43. This implicit point is not always acknowledged. But see *Confederation Trust Co v Discovery Tower II Ltd* (1995), 95 BCLR (2d) 309 at para 15–16 (available on QL) (CA) (the Court held that an *fnc* stay was out of the question since the foreign (Ontario) court lacked jurisdiction and, moreover, the jurisdictional defect in question went to the subject matter of the dispute, which could not be cured by consent).

Arguably the Supreme Court of Canada’s recent judgment in *Club Resorts* effected some alteration to this point, perhaps inadvertently. *Supra* note 1. There, LeBel J wrote that the defendant seeking an *fnc* stay “must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action”. *Ibid* at para 103. Possibly, though the matter is hardly free from ambiguity, this means that the proposed alternative forum must have jurisdiction under *Canadian* jurisdictional standards. This would mark a considerable departure from orthodoxy, where the inquiry into the availability of the foreign forum necessarily entailed an inquiry into whether it had jurisdiction under its own rules. See Tanya Monestier, “(Still) A Real and Substantial Mess” (2013) 36:2 *Fordham Int’l L Rev* 397 at 442–43.

stay.⁴⁴ Even in the absence of such a statement, the stay could be lifted in the event, as it was granted on the supposition, whether expressly stated or not, that the foreign court would have jurisdiction in the matter.

In practical terms then, it barely seems to matter whether a condition of this sort is imposed. Such conditions do hold out the prospect of avoiding the time and expense of litigating jurisdiction in the foreign court,⁴⁵ and in a few cases this may occasionally be a non-trivial consideration. But in most cases, terms of that sort do little more than emphasize something obvious: that the matter can proceed in the original forum if it turns out that the foreign court lacks jurisdiction over the case.

In the US, there is much judicial discussion (and some legislation) dealing with this particular condition, however, there is an explanation for the extensive attention to this question in American case law. In the US, the judicial response to a successful *fnc* motion is not, as it is in Canada, a stay of proceedings. Rather, it is a dismissal of the American proceeding in favour of the proposed foreign one. If the American action is dismissed unconditionally in the expectation that the foreign court will be able to hear the case, but it turns out that the foreign court cannot, the plaintiff may be unable to return to an American court. If the plaintiff tries to do that, the defendant may plead *res judicata*—that is, argue that as the plaintiff's original US action was unconditionally dismissed, no new one can be brought. This concern should not arise in Canada, where the proper (though not invariable⁴⁶) response to a successful *fnc* application is a stay rather than a dismissal. A plaintiff who, for unexpected reasons, cannot invoke the jurisdiction of the foreign court can always return and ask that the stay be lifted. A defendant could not easily oppose such a request, as his original *fnc* application would have been brought on the

44. See *Gordon Estate v Venables*, 2008 BCSC 501 at para 40, 167 ACWS (3d) 692; *Nationale-Nederlanden Financing Co BV v Jones* (1984), [1985] 1 WWR 664 at para 12, 36 Sask R 246 (QB); *O'Connor v Chapman*, 2007 BCSC 657 at para 14, 173 ACWS (3d) 800; *Huhtamaki Co Manufacturing v CKF Inc*, 172 ACWS (3d) 901 (available on QL) at para 38 (Ont Sup Ct J).

45. See *Calavo Growers of California v Generali Belgium*, 632 F (2d) 963 at 968 (2d Cir 1980).

46. See *2249659 Ont Ltd v Siegen*, 2012 ONSC 3128, 218 ACWS (3d) 540.

assumption that there was an available foreign forum.⁴⁷ In that light, while conditions requiring that the defendant submit to the jurisdiction of the foreign court may clarify matters somewhat, they hardly seem necessary.

There is a further concern here. Consent or attornment on the part of the defendant may not always be sufficient to confer jurisdiction on the foreign court; the defendant's submission to the foreign court's jurisdiction does not guarantee availability. The foreign court may lack subject matter jurisdiction, which cannot be conferred by consent, or it may lack personal jurisdiction because it operates under a regime where, unlike the common law, personal jurisdiction cannot be conferred by consent. Some Central and South American countries provide that even where their courts have jurisdiction it is lost when a plaintiff successfully invokes the jurisdiction of a foreign court. In those countries, rules of court jurisdiction are regarded as matters of public policy that are not amenable to modification or waiver by private consent, even by both parties. This applies even where the foreign action has been derailed by an *fnc* application.⁴⁸

In the Canadian context, a defendant might argue that he has met the condition of submitting to the jurisdiction of a foreign court simply by submitting, regardless of whether the submission turns out to be sufficient to confer jurisdiction. If an action is stayed on *fnc* grounds subject to the condition that the defendant submits to the jurisdiction of the foreign court and the defendant does so, but the submission turns out to be insufficient to confer jurisdiction on that court, the defendant might argue that he has fulfilled his condition and the Canadian stay should remain in place. This problem might be avoided if the original conditions stated that the defendant must submit to the foreign tribunal *and* that the tribunal must exercise its jurisdiction. Such a formulation is preferable to simply requiring the defendant to submit, but it might be simple to avoid such complications by just noting that such conditions are unnecessary

47. For a rare instance of a court dismissing an action on *fnc* grounds even in the face of a finding that there was no adequate alternative forum, see *Islamic Republic of Iran v Pahlavi*, No 22013-79 (NY Sup Ct 1981), aff'd 94 AD (2d) 374 (NY Sup Ct App Div 1983), aff'd 62 NY (2d) 474 (Ct App 1984), cert denied, 469 US 1108 (1985).

48. See Henry Saint Dahl, "Forum Non Conveniens, Latin America and Blocking Statutes" (2003) 35:1 U Miami Inter-American L Rev 21 at 27; Dante Figueroa, "Are there Ways Out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?" (2005) 1:1 Bus L BRIEF (Am U) 42 at 44.

in Canada. In sum, although conditions requiring the foreign court to have jurisdiction seem unobjectionable, they are unnecessary; the fact that they are granted in some cases but not in others seems to matter little.

(ii) Time Bars

The fact that a foreign court has jurisdiction over a dispute may not be enough to satisfy the availability criterion. If there is some reason why the foreign court cannot reach the merits of the dispute—however, the “merits” are understood by the original court—then that foreign court may not be regarded as available for the purposes of the *fnc* analysis.

A variety of conditions might fit into this category,⁴⁹ but by far the most common are those relating to limitation periods or prescription defences in the foreign forum. If the foreign court, while it has jurisdiction over a matter, seems likely to dismiss the action due to a time bar then, at least in a practical sense, that foreign forum might be regarded as unavailable. The House of Lords engaged with this problem in *Spiliada*. It acknowledged that any stay of proceedings issued by an English court should be on the condition that the plaintiff not lose “the benefit of having started proceedings in this country”,⁵⁰ as long as the plaintiff had acted reasonably in bringing suit in England and had not acted unreasonably in failing to start proceedings in the foreign forum.

The ruling in *Spiliada* clearly contemplates the possibility of situations where an *fnc* stay might issue, even though a limitation period in the other forum had run out, which would effectively put an end to the suit. Indeed, in *Spiliada* the House of Lords considered this hypothetical:

49. See e.g. *Tower v Tower*, *supra* note 13. The court held that as a term of obtaining its *fnc* stay the defendant had to assist the plaintiff in purging his contempt before the foreign court. This would enable the plaintiff to participate in the foreign hearing without fear of incarceration, thus rendering the foreign forum an effectively available one.

50. *Spiliada*, *supra* note 10 at 484, Lord Goff. Of course, different views can be taken on which time bars should be waived. Some US appellate courts have taken the position that the only foreign limitations defences which should be waived are those arising after the US suit was filed. See *Needham v Phillips Petroleum Co*, 719 F (2d) 1481 (10th Cir 1983); *Zekic v Reading & Bates Drilling Co*, 680 F (2d) 1107 (5th Cir 1982), *rev'd* on other grounds; *Gschwind v Cessna Aircraft Co*, 161 F (3d) 602 at 607 (10th Cir 1998); *Farmanfarmaian v Gulf Oil Corp*, 588 F (2d) 880 (2d Cir 1978).

Suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction.⁵¹

As noted above, the Supreme Court of Canada in *Amchem* voiced general approval of *Spiliada's* approach to *fnc*. However, in neither *Amchem* nor any other *fnc* case has the Supreme Court of Canada dealt with whether and in what circumstances a Canadian court might issue an *fnc* stay when it knows that the action would be time-barred in the alternative forum.⁵²

Putting aside the uncertainty in Canadian law about when an *fnc* stay might issue even though the matter was statute-barred in the other possible forum, the fact remains that those cases will arise often. Thus, the possibility of a limitations defence in the foreign court is something that a judge contemplating an *fnc* stay of proceedings will want to address. English courts have been making *fnc* stays conditional on limitation defence waivers for about thirty years,⁵³ and American courts have long done the same.⁵⁴ Indeed, when the circumstances call for it, American courts have gone further, imposing the condition that the defendant not raise the defence of laches, which if successfully pleaded, might allow

51. *Supra* note 10 at 483.

52. The closest it has come is when it refused leave to appeal in *Cortese (Next friend of) v Nowasco Well Service Co*, 2000 ABCA 124 at para 7, 255 AR 381, leave to appeal refused, [2000] SCCA No 286 (QL). In that case the court had noted that it was "likely" that the foreign limitation period had passed but that the plaintiff had no one but himself (and perhaps his lawyers) to blame for that. See also *Maddaloni v ING Groupe Commerce* (2003), 43 CPC (5th) 377 at para 30, 6 CCLI (4th) 130 (Ont Sup Ct) (an unconditional *fnc* stay was issued despite "a chance" that the foreign court might stay the action due to a time bar—again because it was entirely the plaintiff's fault). The Ontario Court of Appeal has taken note of this line of authority. However, when it did so it held that since Ontario was the proper place to hear the action it did not have to decide what to do about the foreign limitation. See *BNP Paribas (Canada) v BCE*, 2007 ONCA 559 at para 30, 159 ACWS (3d) 818.

53. See *The El Amria and El Mina*, [1981] 2 Lloyd's Rep 539 at 543 (QB (Adm Ct)) [*The El Amria*]; *Smith Kline & French Laboratories Ltd v Bloch*, [1983] 2 All ER 72 at 83 (CA).

54. See Thomas, *supra* note 37.

the plaintiff's action to proceed but deny that plaintiff an equitable remedy such as specific performance.⁵⁵ Despite the absence of express consideration of this matter by the Supreme Court of Canada, lower courts in this country have in recent years followed their English and American counterparts and begun to attach conditions to *fnc* stays in order to deal with potential limitations problems in the foreign forum. They have even done so where the reason for the *fnc* stay was an exclusive jurisdiction clause in favour of a foreign court.⁵⁶

Several, sometimes interrelated questions arise about this practice of requiring waivers of defences on such matters, but none of those questions appears to have come in for systematic consideration by Canadian courts. Will such waivers be effective in the foreign court, and what happens if they are not? Which limitation period will the foreign court apply (a choice of law question)? Should plaintiffs get the benefit of waivers of all limitation periods in the foreign court, or only a subset of them? What happens if the plaintiff delays in launching the foreign action?

None of these questions will be considered at length here, but I will say something about each one, and about how Canadian lower courts have responded to it. The first complicating factor to note—parallel to the question of whether a defendant's submission to the foreign jurisdiction will in fact suffice to confer jurisdiction on that foreign court—is that the defendant's agreement to waive a given time bar may not in fact be enough to dispense with it. In some fora time bars may not be waivable. Of course, a simple way to address this matter is to phrase the condition so that the defendant must waive the foreign time bar *and* the foreign court must accept the waiver. Some Canadian courts have done this.⁵⁷ A different response is simply to refuse to grant the stay, because the expense and delay to the parties in litigating whether a time bar may

55. See *Fajardo v Tidewater Inc*, 707 F (2d) 858 at 862 (5th Cir 1983).

56. See *Transcontinental Sales Inc v Zim Container Service*, [1997] 72 ACWS (3d) 837 (available on QL) at para 12 (FCTD). There was an exclusive jurisdiction clause in favour of Israel. The plaintiff sued in Canada at a time when the Israeli limitation period may have run. The court granted the stay conditional on the defendant's waiving the time bar in the Israeli action.

57. See *Nissho Iwai Co v Shanghai Ocean Shipping Co*, 185 FTR 314 at para 19 (available on QL).

be waived in the foreign court is enough to make the foreign forum an inappropriate one.⁵⁸

The question of which limitation periods should be dispensed with is more complex. As noted above in *Spiliada*, the House of Lords at no point said that the plaintiff should be relieved of meeting all time bars—only that it should not be deprived of “the benefit of having started proceedings in this country”.⁵⁹ An appreciation of the variety of available responses may be gained by a quick tour of the conditions that Canadian courts have in fact imposed. A common formulation is to issue a stay “conditional upon the defendants waiving any relevant limitation period”,⁶⁰ “any applicable limitation period”⁶¹ or “any limitation defence that might be available to the defendants”.⁶² Such wording appears to absolve the plaintiffs from complying with any time bar the foreign court might otherwise apply, whether it ran out before the local action was started, after, or might run out at any time in the future. Subject to the possibility that waivers might prove ineffectual, this last possibility would appear to permit a plaintiff to delay indefinitely before starting its foreign action, since the defendant will have agreed to waive any limitation period. With this in mind, some American courts have crafted their conditions to require that the defendant waive all time bars, whenever they might arise, as long as the

58. See e.g. *Baghlaif Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co*, [2000] 1 Lloyd’s Rep 1 (CA). The Court of Appeal discharged a conditional stay. It acknowledged that if the parties went to the foreign (Pakistani) court and found that the time bar could not be waived then the plaintiff might return to England and ask for the stay to be lifted. But the Court thought that might entail a lot of wasted effort for what was, in that case, a modest claim. So it discharged the stay and allowed the matter to proceed in England.

59. *Supra* note 10 at 484, Lord Goff.

60. *United Oilseed Products Ltd v Royal Bank of Canada*, [1988] 5 WWR 181 at 192, 87 AR 337.

61. *Pre-Print Inc v Maritime Telegraph & Telephone Co*, 1999 ABQB 890 at para 33, 254 AR 336. See also *Sumisho Reftech Co Ltd v The Great Pride*, 2006 FC 388 at para 13 (available on CanLII).

62. *Rivas v Damacio*, 1998 ABQB 313 at para 14 (available on QL). See also *Oliviera v Manitoba Public Insurance Corp*, 2009 ONCA 435 at para 1 (available on QL).

plaintiff agrees to start its foreign action within a given time, for example, 120 days.⁶³ Canadian courts do not seem to have found this necessary.

Not all Canadian *fnc* stays with conditions related to time bars call for blanket waivers. An Ontario trial court judge in *Consbec Inc v Walker* made a stay conditional on there not being “in the British Columbia actions any limitation period that was not capable of being asserted in the Ontario actions”.⁶⁴ In *Rogers v Bank of Montreal*, the Supreme Court of British Columbia stayed proceedings before it in favour of proceedings to be started in Alberta.⁶⁵ It stipulated that the parties in the Alberta proceedings must agree to act as though the matter had been started on the same date as the British Columbia action. However, the BC court also said that the defendants had to agree not to “plead in those proceedings a statutory limitation which would not have been available to them in [British Columbia]”.⁶⁶ In *Jean Jacques v Jarjoura*,⁶⁷ an Ontario court’s solution was to impose a condition requiring that in the not-yet-filed foreign proceeding, the parties would treat the action as having been started on the same date as the local one.

All of these solutions contemplate (or at least might give rise to) situations where the stay has been made conditional on the waiver of some, but not all, time bars.⁶⁸ A problem that arises here is that of choice of law for the applicable period. For example, if the court contemplating the *fnc* stay concludes that, due to its choice of law rules, it would have to apply the limitation period of the proposed foreign court,⁶⁹ there is no need to consider limitation periods or any conditions related to time bars. However, choice of law rules do not always ensure that both the local and

63. See *Texaco* 2d Cir, *supra* note 33 (“defences based on statutes of limitation for limitation periods expiring between the institution of these actions and a date one year subsequent to the final judgment of dismissal” at 480). In other words, if the plaintiff waited more than a year after the American dismissal before starting its foreign action, it would run the risk of having nowhere to sue if there was then a dismissal due to the foreign limitation period.

64. 2011 ONSC 2944 at para 32 (available on QL) [*Consbec*]; see also *Nova Chemicals Corp v Ace Ina Insurance*, 2004 ABQB 318 at para 17, 130 ACWS (3d) 1118.

65. (1982), 40 BCLR 129 (available on QL) (SC).

66. *Consbec*, *supra* note 64 at para 36.

67. [1996] OJ No 5174 (QL) at para 17 (Ct J (Gen Div)).

68. One problem that might arise here is interpretation of the condition—that is, just which periods are waived and which are not. See e.g. *Ferdais v Vermeer Manufacturing Co* (1995), 167 AR 380, 54 ACWS (3d) 379 (QB).

69. See *BNP Paribas (Canada) v BCE*, *supra* note 52 at para 29.

foreign court will apply the same limitation period, as the Supreme Court of Canada acknowledged in *Castillo v Castillo*.⁷⁰ In any event, the court contemplating considering the *fnv* stay might not have good information about what time bars the foreign court might apply, since that could involve the application of choice of law rules. For instance, the court might issue a stay on a condition which, as in *Rogers* and *Consbec*, seeks to preserve any limitations defences which might have been raised before it, unaware that the foreign court applied no limitations periods but its own.⁷¹

However, the larger problem is justifying the variety of ways in which courts have responded to the “which limitation” question. Why should some plaintiffs be exempted from all time bars while others receive only a partial dispensation and still others receive none at all?

On its own, this variety of responses to the time bar problem may be no cause for concern. It may simply demonstrate the flexibility and adaptability of the courts’ inherent power to control their own process so as to do justice to the parties. Differing circumstances surrounding an *fnv* application might easily justify differing judicial responses. For example, as a *quid pro quo* for obtaining a local stay, the defendant in one case might be required to waive all limitations defences in the foreign forum, while the defendant in another case might only have to waive some of those defences. What is lacking in the case law, and hence what is troubling, is the absence of articulated reasons for such differing conditions, as well as the absence of any agreed default position.

(iii) On the Merits

A third and even broader form of condition is one stipulating that the foreign action must be decided “on the merits”.⁷² Another way of phrasing this idea is to say that the plaintiff must not be precluded from

70. 2005 SCC 83, [2005] 3 SCR 870.

71. See *Limitations Act*, SNL 1996, c L-16.1 (which “applies to actions in the province to the exclusion of laws of all other jurisdictions (a) which impose limitation periods for bringing actions”, s 23). No Ontario limitation period could ever be given effect in that province.

72. See *Pan-Afric Holdings Ltd v Ernst & Young LLP*, 2007 BCSC 685, 73 BCLR (4th) 355.

pursuing her foreign claim due to “any time period *or other procedural objection*”,⁷³ or “by reason of a limitation period *or any other reason*”.⁷⁴

Again it should be noted that there is no need for courts to deal with such matters by way of condition. A judge issuing an *fnc* stay can simply remind the parties of the possibility of returning to the original forum to have the stay lifted. For instance, a court might grant a stay in the terms used in *TR Technologies v Verizon Communications Inc*:

[T]here will be a stay of proceedings issued against this Action pending further directions of this Court as may arise from the outcome of the Verizon New Jersey Action either by way of final judgment or such other disposition as would affect the exercise of this Court’s assessment of whether the stay should remain in effect. Factors in that regard could include proof of alternate dispute resolution, inordinate delay, or difficulties in advancing a counterclaim.⁷⁵

Despite the availability of this wait-and-see approach, some courts prefer the more definite approach of making the stay conditional on the foreign court resolving the matter “on the merits”.

Phrases such as “on the merits” and “any procedural reason” obviously cover time bars. They embrace more, however, and that gives rise to two problems. The first, illustrated by the House of Lords case *Black-Clawson International Ltd v Papierwerke Waldof-Aschaffenburg*,⁷⁶ is that there can be debate about whether a foreign court’s dismissal of a proceeding should be regarded as having been done “on the merits”. Following an *fnc* stay in Canada, a foreign court might assume jurisdiction over a case and hold for the defendant, but do so on the basis of some defence that the Canadian court had failed to foresee and which strikes the Canadian court as being of a technical nature rather than going to the merits. For example, in a contract action, the foreign court might hold for the defendant on the basis of its sovereign immunity or because the contract did not meet some requirement of form (writing, witnessing, notarization, etc.) demanded in the foreign jurisdiction but not in Canada. Would Canadian courts

73. *United Oilseed Products Ltd v Royal Bank of Canada*, *supra* note 60 at 192 [emphasis added].

74. *Doran v Nevada Goldfields Corp* (1987), 16 BCLR (2d) 66 at 70, 6 ACWS (3d) 111 (SC) [emphasis added] citing *Nationale-Nederlanden Financing Co BV v Jones*, [1985] 1 WWR 664 at para 12, 36 Sask R 246 (QB).

75. 2011 ABQB 390 at para 84, 50 Alta LR (5th) 258.

76. [1975] AC 591 HL (Eng).

regard such a decision as having been made “on the merits”? The same problem arises from the expression “for any other reason”, which would seem to refer to technical, non-merits defences analogous to limitations periods. In sum, phrases such as “on the merits” or “limitations periods or any other reason” lack precision and conditions which use them can give rise to further litigation should the defendant prevail in the foreign proceeding.

The second and more fundamental problem is that it is not clear whether such conditions accord with the leading *fnc* authorities. In *Amchem*, the Supreme Court of Canada did not say that it was a prerequisite for an *fnc* stay that the foreign forum must be able to address the matter “on the merits”. Rather, it twice stated that the requirement was that the foreign forum had to be one in which “substantial justice will be done”.⁷⁷ It is not clear whether the Supreme Court thought that substantial justice might ever be done in a case that was disposed of on some pre-merits or non-merits basis. Likewise, the *CJPTA*’s *fnc* codification requires only that “a court of another state is a more appropriate forum in which to hear the proceeding”.⁷⁸ Nowhere, either expressly or by implication, does it guarantee the plaintiff a trial “on the merits”. It is clear enough that the availability requirement entails that the foreign court both has jurisdiction and will not dismiss the action on the basis of some limitations defence that the local court would not give effect to.⁷⁹ Whether it also entails that the foreign court must decide the matter “on the merits” (whatever that might mean) is unclear. Certainly, the British Columbia Court of Appeal thought that it did in *Olney v Rainville*.⁸⁰ The court of first instance had held that it lacked territorial competence, so it did not reach the question of *fnc*. The Court of Appeal held that the trial court did have competence in the matter, but was prepared to issue an *fnc* stay in favour of a Quebec action. It seemed clear to the Court of Appeal that the Quebec courts had territorial jurisdiction over the matter, and there appeared to be no fear of a limitation defence in either forum. Nevertheless, the plaintiff requested a condition that the stay be lifted if Quebec refused to deal with the

77. *Supra* note 2 at 917.

78. *Supra* note 4, s 11(1).

79. But see *The El Amria*, *supra* note 53 and accompanying text (on the time bar point we have seen that in some cases a court might properly do so).

80. 2009 BCCA 380, 95 BCLR (4th) 118.

matter “on the merits”.⁸¹ The British Columbia Court of Appeal refused the request: “It would be presumptuous of this Court, having found that the courts of Quebec are the appropriate forum for this matter, to limit its deference to those courts to decisions which it considers to be ‘on the merits’.”⁸² So, at least in BC, the foreign court need not be prepared to entertain the dispute “on the merits” in order to be considered available and more appropriate for the purpose of an *fnf* stay.

Of course, even if *Amchem* does not require courts to refrain from issuing *fnf* stays unless the foreign court can decide the matter “on the merits”, that need not stop a motions court from exercising its discretion to add that requirement in a given case. What is unclear is whether that hypothetical lower court is imposing such a condition because (1) it thinks (wrongly, I suggest) that the Supreme Court of Canada’s decision in *Amchem* requires it or (2) it believes that some special feature in the case before it requires such a condition.

B. Compensating the Plaintiff for the Staying of its Local Action

Some conditions have little to do with ensuring the effective availability of the foreign forum. Rather, they appear aimed at compensating (or perhaps consoling⁸³) the plaintiff for the loss or disadvantage flowing from being denied access to his preferred forum. Some of these conditions are innocuous and anodyne, requiring the defendant to agree to “proceed expeditiously”⁸⁴ in the foreign action or to abide by any interim orders the foreign court might make.⁸⁵ Others are more specific and onerous, such as agreeing to pay the cost of transporting certain witnesses to the

81. *Ibid* at para 55.

82. *Ibid* at para 56. The court went on to say in the next paragraph that it “would unconditionally stay the proceedings in British Columbia”. *Ibid* at para 57.

83. The consolation aspect is nicely captured in the title of Thomas Main’s article on the subject. *Supra* note 37. The phrase “lovely parting gifts” refers to the low-value prizes given to the losers in television game shows who are sent home, but not quite empty-handed.

84. See *Lavitch v Lavitch*, [1985] 34 Man R (2d) 188, 46 RFL (2d) 310 at 315 (QB); *Magic Sportswear Corp v The Mathilde Maersk*, 2006 FCA 284 at para 102, 2 FCR 733.

85. See e.g. *Follwell v Holmes* (2006), 152 ACWS (3d) 821 (available on QL) at para 41 (Ont Sup Ct (Fam Div)) (the condition was that the defendant “comply promptly with all procedural orders and rules” of the foreign court). See also *Cheng v Liu*, 2010 ONSC 2221 at para 26, 83 RFL (6th) 62.

foreign location,⁸⁶ or even paying the plaintiff's living expenses in the foreign jurisdiction during the pendency of litigation.⁸⁷

The chief question presented by such compensatory conditions is what should justify a departure from the normal way of handling the harm the defendant causes the plaintiff obtaining an *fnc* stay. Consider a condition requiring the defendant to pay for transporting the plaintiff's witnesses to the foreign forum. Typically, each party in a civil suit must foot the bill for transporting her own witnesses to court. Usually this does not change when an *fnc* stay is granted. That is, although the *fnc* stay may affect the cost of transporting witnesses to the foreign forum, it will not affect the general rule that determines which party will bear those costs. Yet with some *fnc* applications courts seem motivated by the defendant's having prevailed in her motion for a stay to grant some solace to the plaintiff and inflict some corresponding penalty or deprivation on the defendant.

The Supreme Court of Canada has not ruled on whether such *fnc* conditions are permitted or forbidden, encouraged or discouraged. Pursuant to *Amchem*, an *fnc* stay is typically granted if the foreign forum is the clearly more appropriate place to hear the dispute, bearing in mind matters such as location of evidence, location of witnesses, the difficulties of applying foreign law, and so on. Obviously a foreign forum might be the cheaper, more efficient place to hear a dispute all things considered—for instance, because it is far cheaper for the defendant to litigate there—but still the more expensive place for the plaintiff to litigate. In such circumstances does a plaintiff who is denied his preferred forum and forced to proceed in a jurisdiction that to him is more costly have any entitlement to compensation? The cases that impose conditions of this

86. See *Owers v Owers* (2008), 58 RFL (6th) 209 at para 23, 170 ACWS (3d) 286 (Ont Sup Ct J). It should be noted that sometimes when courts refuse to grant *fnc* stays they do so by extracting compensating conditions from the plaintiff. See e.g. *Henderson v Pearlman* (2006), 151 ACWS (3d) 425 (available on QL) at para 48 (Ont Sup Ct J) (the court required the plaintiff to delete part of its claim); *Paterson v Hamilton* (1991), 115 AR 73, 79 Alta LR (2d) 111 (CA) [cited to Alta LR] (“[i]f the plaintiffs should obstruct attempts by the defendants to secure commission evidence for use in the Alberta suit, the defendants may renew their application in Queen’s Bench for a stay” at 118). These defendant-favouring conditions imposed in conjunction with the denial of *fnc* applications raise concerns similar to the more frequent plaintiff-favouring terms discussed in the text.

87. See *Shortridge-Tsuchiya v Tsuchiya*, 2010 BCCA 61 at paras 125, 132, 315 DLR (4th) 498.

sort appear to do so on the basis that the answer to this question is yes; however, they do not take the trouble to say so in express terms.

Perhaps courts that impose compensatory conditions are giving expression to a vestigial remnant of concern for the plaintiff's once near-absolute right not to be discretionarily deprived of the forum of her choice. Once upon a time, *fnv* stays were a rarity and courts would not easily dispossess plaintiffs of their choice of forum, even if a foreign forum seemed more convenient. This attitude is nicely captured by Bowen LJ in the 1883 case *Peruvian Guano Co v Bockwoldt*: "We have no sort of right, moral or legal, to take away from a plaintiff any sort of real chance he may have of advantage."⁸⁸ Of course, that does not represent the attitude today; we *do* sometimes take away those advantages from plaintiffs when we grant *fnv* stays. So it may be appropriate to regard the conditions under consideration as some small compensation for doing so. Alternatively, perhaps what motivates a court to, in effect, award the plaintiff some sort of reparation for being deprived his preferred forum is an effort to level the playing field between two litigants of unequal resources. The defendant may have deeper pockets than the plaintiff, something that the court can normally do little to alter, but when the defendant prevails in an application for an *fnv* stay the court may be able to take a small step toward evening things up by requiring the defendant, as a price of its *fnv* stay, to finance some of the plaintiff's litigation expenses.

While these may be plausible explanations, and perhaps even justifications, for compensatory conditions, the fact remains that they are arbitrarily imposed. No explanation is given as to why such conditions are laid down in one case but not the next. If a stay in favour of a more appropriate forum means that a plaintiff's litigation expenses are substantially increased, then a non-arbitrary law of *fnv* should at least offer a position as to whether that is just tough for the plaintiff or whether the staying court should seek to, in effect, reimburse that plaintiff through the imposition on the defendant of some condition. At present it does not.

88. (1883), 23 Ch D 225 at 234 (CA).

C. Facilitating the Enforcement of the Foreign Court's Orders

Some conditions imposed on *fnc* stays seek to guarantee—or at least increase the likelihood of—the enforceability of any interim or final judgment the foreign tribunal might hand down. In particular they focus on cross-border recognition, that is, enforcement in jurisdictions other than that of the foreign court that heard the case. In some instances, such conditions seem crafted to ensure that the *fnc* stay does not inflict on the plaintiff any reduced chance of eventual enforcement. The local forum might also be the location of the defendant's assets,⁸⁹ and the defendant might have no property in the foreign jurisdiction where the defendant proposes the action should proceed. If the plaintiff in such a case were allowed to remain in her original preferred forum then she would face no problems related to cross-border enforcement of any judgment she might obtain. Since the defendant's assets would be located in the jurisdiction that handed down the judgment, the plaintiff would confront only the usual hurdles that all judgment creditors face. However, if the defendant received an *fnc* stay and the plaintiff was obliged to pursue her claim in the foreign jurisdiction where the defendant had no property then, even if successful, the plaintiff would have to deal with the uncertainties, costs and delays of cross-border judgment enforcement. Imposing an enforcement condition on the *fnc* stay can reduce this disadvantage. The claim can be litigated in a more appropriate forum without impairing the claimant's capacity to collect on any judgment.

One long-standing way of achieving this result does not technically involve use of a condition. In admiralty cases involving the arrest of a ship, the defendant shipowner typically posts security to obtain the ship's release during the litigation, giving the plaintiff an asset against which a judgment could be enforced. Following English precedent, Canadian courts issuing *fnc* stays in such cases can opt to keep that security in

89. Alternatively, in a child custody case the local forum might be the place where the children are or might be later. See *Follwell v Holmes*, *supra* note 85 at para 4 (as a condition of obtaining a stay in Ontario in favour of Nicaragua the respondent had to agree she would immediately consent to the issuing of an Ontario order in the same terms as any order the Nicaraguan court might issue). See also *Cheng v Liu*, *supra* note 85 (where a custody matter was stayed in favour of China).

place, even after they put their own proceedings on hold.⁹⁰ The action proceeds elsewhere but the plaintiff's capacity to enforce is undiminished. A comparable course in non-admiralty actions involving real property is to grant a stay but leave in place a certificate of *lis pendens* in respect of local land.⁹¹ Conditions can be used to similar effect: a court can simply say that as a term of receiving an *fnc* stay, the defendant must agree to leave money in a local account.⁹² This effectively achieves the same result as a *Mareva* injunction in aid of foreign proceedings, but without requiring all the findings associated with that extraordinary relief. Courts can go further, as in *Mohler v Dairy Queen of Western Canada Ltd*,⁹³ where, in order to receive an *fnc* stay in Alberta, the defendant was required to transfer certain assets from Alberta to the foreign jurisdiction. There, the assets acted as an assurance of the enforceability of any ultimate judgment. Another example is the Federal Court of Appeal's judgment in *Apotex Inc v AstraZeneca Canada Inc*, where a stay was granted on the defendant's undertaking that it would ensure the other court would have the same remedial power as the Federal Court of Canada.⁹⁴

In both cases, the condition's effect, or at least its goal, was to ensure that the stay did not reduce the plaintiff's capacity to enforce any favourable judgment. It is hard to identify any strong objection to this, though—as with the other conditions discussed above—one might wonder why such terms are not imposed consistently. Once again, Canadian practice around the issuance of conditional *fnc* stays seems arbitrary and disordered.

In addition, such requirements may be unnecessary given Canada's generous approach to enforcement of foreign judgments. Moreover, depending on their phrasing they have the potential to give rise to confusion. The Union Carbide/Bhopal litigation, referred to earlier,

90. See *A Paschos – K Katsikopoulos SA v Bodyguard Shipping Ltd*, 2003 FCT 584 at para 29, 2003 CFPI 584. This has long been common in English admiralty cases. See *The Kislovodsk*, [1980] 1 Lloyd's Rep 183 at 186 (QB (Adm Ct)); *The Star of Luxor*, [1981] 1 Lloyd's Rep 139 at 141 (QB (Adm Ct)); *The El Amria*, *supra* note 53 at 542; *The Benarty*, [1985] QB 325 (CA).

91. See *Design Recovery Inc v Schneider*, 2003 SKCA 94, 126 ACWS (3d) 45.

92. See *Branco v Veira* (1995), 8 ETR (2d) 49 at paras 8, 11, 54 ACWS (3d) 882 (Ont Ct J (Gen Div)).

93. *Supra* note 42 at para 42.

94. 2003 FCA 235 at para 25, 226 DLR (4th) 422. The other court in this case was an Ontario one.

provides an elaboration of both of these concerns in the American context. In that case, one of the terms imposed at first instance was that, as a condition of receiving a stay of the American proceedings, Union Carbide would “agree to satisfy any judgment rendered by an Indian court against it and upheld on appeal, provided the judgment and affirmance ‘comport with the minimal requirements of due Process’”.⁹⁵ In eliminating this condition, the Second Circuit noted two things. The first was that dealing with judgment recognition at the *fnc* stage was unnecessary because there would normally be no difficulty in enforcing an Indian judgment in the US.⁹⁶ The second was that the District Court’s requirement—that to be enforceable the Indian judgment had only to comport with the *minimal* requirements of due process—had the potential to “create misunderstanding and problems of construction”.⁹⁷ This was because the general criteria for enforceability in the absence of any condition included the requirement that the foreign judgment meet a due process standard. Thus, the District Court’s condition that included the addition of the adjective “minimal” could be interpreted as providing for a lower standard of procedural fairness than American enforcement law would otherwise require. Attempting to deal with the enforcement question at the early *fnc* stage, at least in that case, was unnecessary and, due to the phrasing of the condition, could have given rise to litigation as to whether its intent was to alter the existing enforcement standard or merely render it more explicit.

Another set of concerns arises from the fact that some *fnc* conditions go beyond dealing with enforcement of the foreign court’s judgment. That is, while some conditions attached to *fnc* stays focus only on facilitating enforcement of the foreign court’s judgment in the local forum,⁹⁸ others appear to go further and require that the defendant must, in effect, acquiesce in *worldwide* enforcement of any judgment

95. *Union Carbide*, *supra* note 18 at 198.

96. *Ibid* at 205.

97. *Ibid*.

98. See e.g. *Larson-Martin v Martin*, 2002 BCSC 1666 at para 41, 120 ACWS (3d) 94 [*Larson-Martin*].

the foreign court might hand down.⁹⁹ A condition of that sort would appear to provide the plaintiff with more than it had in the original proceeding. For example, if an action is tried in Nova Scotia, any resulting judgment may or may not be enforceable in, say, Sweden. If the defendant in that Nova Scotia proceeding successfully maintains that the action is more appropriately brought in Ontario, then why should a Nova Scotia court's stay of the proceedings before it be conditioned on the defendant's agreeing that any judgment of the Ontario court be enforceable in Sweden? A condition demanding worldwide enforcement requires that, as a consequence of ensuring that the case proceeds in the foreign forum, the defendant must concede his right to resist judgment enforcement on any grounds available under Swedish law. There is nothing in *Spiliada* or *Amchem* that requires such a concession from defendants. Although the facts and context of a given *fnc* case might provide the justification for adding a requirement of this sort, some judicial clarification of what this justification would be is desirable, and the existing cases supply none.

Other kinds of problems may arise if the condition requires the defendant to waive all defences to enforceability of the foreign action, including the so-called impeachment defences: fraud, public policy and violation of natural justice. If the foreign court seemed likely to ignore one of the parties' rights to natural justice in its proceedings, then a Canadian court would be unlikely to grant an *fnc* stay in favour of that court in the first place. But gross procedural irregularities can arise even where they are not anticipated. A condition that seems to require ignoring those irregularities because the defendant has obtained an *fnc* stay presents a couple of difficulties. One difficulty is whether the court that imposed the condition really intended such a consequence; perhaps it never turned its mind to such an eventuality. Another is the justification for requiring the defendant to waive such important defences for merely seeking to defend in the more appropriate forum. Why should the defendant be required to bear the risk that, with respect to enforcement against his assets in the original jurisdiction, the foreign court will proceed contrary to natural justice or apply a deeply offensive law simply because he

99. Most commonly, the court simply will not put any territorial limitation on the place at which the defendant must agree to facilitate enforcement. See e.g. *Follwell v Holmes*, *supra* note 85 at para 41; *Cheng v Liu*, *supra* note 85 at para 26.

has argued that a given matter could be more efficiently litigated in a foreign court?¹⁰⁰ Perhaps that risk is a fair quid pro quo for depriving the plaintiff of her preferred jurisdiction. That position has been taken by Christopher Whytock and Cassandra Burke Robinson in the American context, where *fnc* doctrine is heavily influenced by American corporate defendants preferring to defend in third-world courts rather than American ones.¹⁰¹ They maintain that the price defendants pay for obtaining *fnc* dismissals and thus avoiding the vagaries of American juries should include the risk of procedurally deficient (even corrupt) courts in other lands, even when it comes to enforcement of those courts' judgments back home in the US.

Canadian courts might adopt this position. Its obvious defect, however, is that by basing its response on what seems like a fair deal between the parties—that is, the defendant agreeing to waive her impeachment defences to cross-border enforcement of the foreign court's judgment in exchange for an *fnc* stay—it ignores the fact that Canadian courts have an interest in not giving effect to foreign judgments arising from unfair procedures or odious laws.

A further set of problems arises when the enforcement condition is imposed not by the original court but a foreign one. This occurred in the Chevron/Ecuador litigation,¹⁰² where an American court, as part of its *fnc* dismissal, imposed on the defendant Chevron a condition that allowed for enforcement anywhere in the world of any judgment the courts of Ecuador might render. The Ecuadorian courts did deliver a judgment in favour of the plaintiffs, a large one, and in due course they sought enforcement in Ontario. This raises a host of questions. Should a condition imposed by an American court alter the approach a Canadian court takes toward recognizing a judgment granted in Ecuador? Does that condition operate only between the US court and the parties—so that Chevron's resistance to enforcement of the Ecuadorian judgment should, if it is indeed a breach of the condition, permit the plaintiffs to restart

100. Of course, with respect to the defendant's exigible assets in that foreign jurisdiction she will bear that risk, but why should she, in effect, be required to bear that risk with respect to property in other jurisdictions?

101. Christopher Whytock & Cassandra B Robinson, "Foreign Non Conveniens and the Enforcement of Foreign Judgments" (2011) 111:7 Colum L Rev 1444 at 1503.

102. *Chevron*, *supra* note 27.

their US action—or does it operate directly to affect a Canadian court’s approach to enforcing an Ecuadorian judgment?

The answer is unclear, though there is some support for the latter approach. In *Ferdais v Vermeer Manufacturing Co*, a North Dakota court had given an *fnv* dismissal on the condition that the “defendants waive any statute of limitations defense that did not exist prior to the respective bates [*sic*] of commencement of this action against them”.¹⁰³ Later, in the Alberta proceeding, the defendants sought to rely on Alberta’s limitations statute. Master Funduk’s response was to inquire directly into whether, in light of those conditions, limitations defences could be pleaded in the Alberta action.¹⁰⁴ That is, rather than leaving it up to the North Dakota court to police its undertaking by allowing the plaintiff to restart his North Dakota action, he seemed prepared to accord the undertaking a direct effect and either allow or disallow the limitations defence depending on whether it was properly covered by the condition in question.

The same result could conceivably follow in the Chevron/Ecuador matter. Arguably, however, giving effect to the condition ignores the harm to the Canadian justice system caused by recognizing foreign judgments that would otherwise be regarded as unenforceable due to procedural irregularities or the application of offensive substantive law. It is unnecessary to discuss the question here. The concern is simply that, while Canadian courts have been prepared to impose conditions dealing with the enforcement of foreign court judgments, they have not yet seen fit to address this concern one way or the other.

Concerns of this nature have prompted some American courts to qualify any such conditions they issue in conjunction with their *fnv* stays. For instance, in the Chevron case, the actual condition imposed on the defendant was that he consent to worldwide enforceability of any judgment the Ecuadorian courts might issue, “reserving its right to contest their validity only in the limited circumstances permitted by New York’s *Recognition of Foreign Country Money Judgments Act*”.¹⁰⁵ These defences include, inter alia, fraud and public policy—matters which might arise in the foreign proceedings after the granting of the local stay and which the court granting the stay would not want to pre-

103. *Supra* note 68 at para 15.

104. *Ibid* at para 54.

105. *Chevron US*, *supra* note 33 at 389, citing NY CVP § 5301–5309 (1963).

judge. So, if the enforcement action in Ontario should proceed then the question would not be whether the defendant had waived *all* defences to enforcement of an Ecuadorian judgment, but only whether the defences it had *not* waived permitted it to resist enforcement in Ontario. However, this would not change the nature of the two questions discussed above: (1) should the parties be permitted to waive all defences to enforcement of foreign judgments and (2) should a Canadian court be so directly bound by such a waiver imposed by a foreign court that it must alter its general approach to the recognition of foreign-country judgments.

D. Affecting How the Foreign Proceeding is Conducted

The foregoing types of conditions might have consequences for the foreign proceeding, but, by and large, none of them directly intrudes on how the foreign court should go about its business.

However, as seen in *Union Carbide*¹⁰⁶ and *The Sofia B.*,¹⁰⁷ the judges granting *fnc* applications in some countries have occasionally employed conditions dictating how some elements of the foreign proceedings should be conducted. For instance, American judges have laid down conditions to ensure that, although the matter will proceed in a foreign court, the local court's standards of discovery or costs should apply.¹⁰⁸ In fact, there are US *fnc* cases where Canada has been considered the more appropriate forum but where Canadian standards of discovery have been regarded as inadequate. In those cases, the dismissal of the American proceeding was conditioned on

106. *Supra* note 17.

107. *Supra* note 21.

108. Sometimes, instead of requiring that American discovery standards apply in the foreign proceeding, the American courts simply require that the defendant must make available all the evidence the foreign court requests. See e.g. *Re Air Crash At Madrid, Spain, On August 20, 2008*, 893 F Supp (2d) 1020 (CD Cal 2011) (the court dismissed the plaintiffs' action on the condition that the defendants "make available in Spain all evidence and witnesses located in the US within their possession, custody, or control that the Spanish court deems relevant" at 1026). It is far from clear what such conditions add.

Another condition American judges have added is that the foreign court not only take jurisdiction but entertain and quickly resolve an application for interim relief. See e.g. *Borden Inc v Meiji Milk Products Co*, 919 F (2d) 822 (2d Cir 1990), cert denied, 500 US 953 (1991) (the court conditioned its *fnc* dismissal on the foreign court's deciding an interim relief application within sixty days of its being submitted).

discovery in Canada taking place with American criteria.¹⁰⁹ This sort of practice has become sufficiently common in the US to prompt one American court to voice the concern that foreign plaintiffs injured at home might start their actions in the United States knowing that they faced a high likelihood of an *fnv* dismissal but hoping that the dismissal would include a condition that their home court must conduct the action in accordance with US discovery standards.¹¹⁰ Such plaintiffs might file suit in the US with full awareness that it is an inappropriate forum but with the hope of salvaging from the inevitable *fnv* dismissal a condition that gives them some advantage in the foreign court.

The motivation behind conditions of this sort seems clear: while a judge considering an *fnv* stay might regard the foreign tribunal as the more appropriate forum, that judge also might regard some aspect of the foreign court's procedural or substantive law as being less fair—so much so that the unfairness should be overcome through the imposition of a condition. Several concerns may arise here. One is the spectre of unequal

109. See e.g. *Stewart v Dow Chemical Co*, 865 F (2d) 103 (6th Cir 1989) (the Court granted an *fnv* dismissal on the condition "that Dow allow discovery in the Canadian court of any materials which would be available under the Federal Rules of Civil Procedure in a United States Court" at 104–05). See also *Lacey v Cessna Aircraft Co*, 849 F Supp 394 (WD Pa 1994) [*Lacey* WD Pa 1994]. The history of the case is long. An *fnv* dismissal was first granted in *Lacey v Cessna Aircraft Co*, 674 F Supp 10 (WD Pa 1987) but the plaintiff's appeal was allowed at *Lacey v Cessna Aircraft Co*, 862 F (2d) 38 (3rd Cir 1988) and sent back to the District Court for reconsideration. The District Court then issued a dismissal conditional on US-style discovery in British Columbia. *Lacey v Cessna Aircraft Co*, 717 F Supp 365 at 366 (WD Pa 1989). But again the plaintiff appealed. This time the Third Circuit ordered the District Court to inquire more deeply into whether the condition could be fully satisfied. *Lacey v Cessna Aircraft Co*, 932 F (2d) 170 at 189 (3rd Cir 1991). At this point, "[r]ather than grant the defendant's Sisyphian motion to dismiss under *forum non conveniens*" the District Court agreed to hear the case, finding that, in the circumstances, British Columbia was an inadequate forum. *Lacey* WD Pa 1994, *supra* note 109 at 397. For a detailed account of the multiple remands in this case, see Douglas Dunham & Eric Gladbach, "Forum Non Conveniens and Foreign Plaintiffs in the 1990s" (1999) 24:3 Brook J Int'l L 665 at 691–704.

110. See *Doe v Hyland Therapeutics Div*, 807 F Supp 1117 (SDNY 1992). Justice Connor expressed concern that "this District court not become a way-station for plaintiffs worldwide, who choose to stop [here] just long enough to obtain a grant of federal discovery with their *forum non conveniens* dismissal". Accordingly, he imposed conditions requiring the plaintiffs to submit to the jurisdiction of the foreign (Irish) court and to waive certain (but not all) limitations periods, but declined to insist on the application of US discovery standards. *Ibid* at 1132–33.

treatment of the parties—a discovery condition might be imposed on the defendant but not the plaintiff.¹¹¹ Another is the propriety of interfering with another jurisdiction’s administration of justice. Such interference, at its extremes, has the potential to violate comity in the same way that the Supreme Court of Canada thought the anti-suit injunction did in *Amchem*.¹¹²

While these concerns should not be downplayed, we have already seen instances where this sort of control or interference takes place indirectly. Consider the matter of rules relating to court costs, for example. Some American courts, disliking the loser-pays costs rule that prevails in much of the rest of the world, have made their *fnc* dismissals conditional on the parties’ agreement that the foreign court must abandon its loser-pays rule on costs and apply the US rule whereby each party bears her own legal expenses.¹¹³ To Canadian eyes this might seem parochial and chauvinistic. American courts are not alone, however, in seeking to ensure that a defendant’s successful *fnc* application does not deprive the parties of their own approach to costs. Canadian courts have reached that result too. They have done so, however, not by directly interfering in the foreign (American) proceedings. Rather, they have imposed a condition providing that, following the American trial, the parties may return to Canada for a supplementary costs award.¹¹⁴ Such a condition leaves the American court free to conduct its proceedings, including the costs ruling, in its own manner. It simply preserves the Canadian court’s capacity to conduct a subsequent hearing whereby it can impose the Canadian costs rule. In the United States, where success in an *fnc* application results in a dismissal, this route is not easily available. In Canada, this option of returning to the original court to “correct” the perceived inadequacies of the foreign court offers, at least in some cases, the possibility of less direct influence in the foreign court’s proceedings.

This may explain why Canadian courts have kept conditions of this sort modest, eschewing their American counterparts’ proclivity to dictate that foreign proceedings must employ American discovery or costs rules.

111. See *Union Carbide*, *supra* note 18 at 205.

112. *Supra* note 2 at para 67.

113. See *Mercier*, *supra* note 18 at para 19 (the proposed condition was one that would seek to impose American costs rules on a trial in Turkey, which had the loser-pays approach).

114. See *Larson-Martin*, *supra* note 98 at para 41.

Canadian judges have imposed conditions to ensure that in the foreign proceeding the defendant must “comply promptly”¹¹⁵ with the foreign court’s orders for disclosure of documents, but they have not sought to prescribe the standards that should govern the making of such orders.

Conclusion

If there is a tone of criticism or dissatisfaction in the foregoing it does not flow from a claim that any of the cases mentioned above were wrongly decided, nor from any conviction that Canadian courts impose conditions on their *fnc* stays too often, or not often enough. Rather, its source is that, even given the needed flexibility to temper discretionary stays (and dismissals of stay applications) to suit the circumstances of each case, the disarray and arbitrariness that presently attends the use of such conditions is too great.

Conditions crucially affect the decision to grant or deny an *fnc* stay. Once imposed, they alter the balance of power between the parties. Moreover, these matters have consequences beyond the parties: they affect which jurisdiction will bear the expense of resolving a given dispute and how it will go about doing so. Finally, in an era where the dry, technical doctrines of private international law are coming to be recognized for their effect on contested matters of global public policy—such as the responsibility of transnational business entities for environmental and human rights abuses—the factors which dictate where disputes will be tried should not be hidden in the interstices. When a Canadian court considers granting an *fnc* stay, the question of conditions should be explicitly weighed. What is needed is an *fnc* doctrine that reminds judges that conditions should not be tacked haphazardly onto *fnc* stays, but rather integrated into the justificatory analysis.

115. *Follwell v Holmes*, *supra* note 85 at para 41.

