CROSS-VESTING CIVIL PROCEEDINGS - A PRACTICAL ANALYSIS OF THE INTERESTS OF JUSTICE IN THE DETERMINATION OF CROSS-VESTING APPLICATIONS

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The Jurisdiction of Courts (Cross-Vesting) Act 1987 *(Cth) and legislation of the same name in each Australian State and Territory were introduced in 1987 to establish a uniform scheme for the cross-vesting of civil proceedings in Australia. Among other things, the cross-vesting scheme allows civil proceedings to be transferred from the Supreme Court of one State or Territory to the Supreme Court of another State or Territory if certain cumulative criteria are met. The exception in the legislation is s 5(2)(b)(iii), which provides that the 'interests of justice' is a separate and specific ground for a transfer. Judicial interpretation of this popular, apparently catch-all provision has given rise to an almost formulaic list of factors that a court will take into account when determining a cross-vesting application under s 5(2)(b)(iii).*

Unhelpfully, and despite the uniformity of the legislation itself, the cases indicate that State and Territory courts are not adopting a wholly consistent approach in their consideration and application of these factors. This paper examines the particular tests that have been developed to determine whether a proceeding should be transferred in the interests of justice, including the factors a court will take into account when applying the tests. The analysis necessarily covers a review of the case law across all the Australian jurisdictions.

Despite some judicial inconsistencies, the conclusion is reached that there are now some very clear, established considerations by which the courts assess the 'interests of justice'. As discussed in this paper, in the majority of cases, the courts' approach to these considerations should allow litigants to assess, with a reasonable degree of certainty, the prospective success or failure of a cross-vesting application under s 5(2)(b)(iii) of the Act.

I INTRODUCTION

This is an exposition and analysis of the law governing the determination of applications under s 5(2)(b)(iii) of the *Jurisdiction of Courts (Cross-Vesting) Act*

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1987 (Vic) ('Act') to transfer civil proceedings' between the Supreme Courts of Australian States and Territories. The sub-section permits a civil proceeding to be cross-vested where it is 'in the interests of justice' that this should occur. As an often-used ground in support of cross-vesting applications, the sub-section has given rise to a wealth of case law of which prospective applicants for the cross-vesting of proceedings (and respondents to their applications) should be aware. Broadly speaking, this paper discusses both the legislative requirements for the transfer of proceedings between Supreme Courts of the States and Territories and the tests for determining whether a proceeding should be transferred, including the factors a court will consider in making that determination.

The analysis covers a review of the case law across all Australian jurisdictions. This is appropriate having regard to the uniformity of the legislative scheme and as State and Territory courts readily consider and apply the decisions of other State and Territory courts when determining s 5(2)(b)(iii) applications.

Section 13 of the Act (and the same section under the equivalent State and Territory Acts) provides that there is no right of appeal from a decision on a cross-vesting application. Consequently, the authorities are first instance decisions made in relation to the identical ground unless, for example, they have been heard by a court constituted as an appellate court for a special reason.[2] Prudence therefore dictates a proper multi-jurisdictional review of the case law and all cases referred to involve applications under s 5(2)(b)(iii).

II BACKGROUND: THE CROSS-VESTING SCHEME

Section 5(2)(b)(iii) of the Act in Victoria allows civil proceedings to be transferred to the Supreme Court of another State or Territory if this is in the 'interests of justice', provided that certain criteria are satisfied. Generally, these criteria are cumulative and must be considered as a whole. The equivalent Acts in the other States and Territories operate reciprocally in this regard.

The 'interests of justice' test requires the court to determine which jurisdiction is the most appropriate forum once the various criteria are considered according to the facts of each cross-vesting application.

The purposes of the cross-vesting scheme can be characterised as:

(a) avoiding the inconvenience, uncertainty, delay and expense associated with different State and Federal jurisdictions and ensuring that one superior court can give complete relief in a proceeding; and
(b) ensuring that proceedings are heard and determined in the most appropriate court.

[1] Criminal proceedings are excluded from the operation of the Act: see the s 3(1) definition of 'proceeding' and s 4(5), which provides that the criminal jurisdiction of one State's or Territory's Supreme or Family Court cannot be vested in an equivalent court in another Australian jurisdiction.

[2] As was the case in one of the leading authorities, *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 (*'Bankinvest'*) for the reasons noted in the discussion relating to that case shortly.

The scheme has two components:

(a) the conferral of original and appellate jurisdiction by each of the participating courts on the others;[3] and
(b) providing a mechanism for transferring proceedings instituted in one of the participating courts to another.

It is the second component with which we are concerned.

While the legislation does provide that the 'interests of justice' is an independent ground for the transfer of proceedings, the case law suggests that this criterion requires the court to determine the 'degree of connection' between the proceeding and the jurisdiction of the court to which transferral is sought.[4]

III TRANSFER OF PROCEEDINGS

The key provision of each Act is s 5 which provides for the transfer of a proceeding where certain conditions are satisfied.

5. Transfer of proceedings

(1) ...

(2) Where–
  (a) a proceeding (in this sub-section referred to as the "relevant proceeding") is pending in the Supreme Court (in this sub-section referred to as the "first court"); and
  (b) it appears to the first court that–
    (i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of another State or of a Territory and it is more appropriate that the relevant proceeding be determined by that other Supreme Court;
    (ii) having regard to–
      (A) whether, in the opinion of the first court, apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first court and capable of being instituted in the Supreme Court of another State or Territory;
      (B) the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the State or Territory referred to in sub-sub-paragraph (A) and not within

[3] With some exceptions and exclusions.
[4] See in particular *Bankinvest* (1988) 14 NSWLR 711 discussed below. This was the first decision at appellate level (albeit at that level upon the court's own motion) to consider this provision of the Act.

the jurisdiction of the first court apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction; and

(C) the interests of justice–

it is more appropriate that the relevant proceeding be determined by that other Supreme Court; or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or of a Territory–

the first court shall transfer the relevant proceeding to that other Supreme Court.

A cross-vesting application to transfer a Victorian Supreme Court proceeding is made under O 13 of ch II of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998* (Vic). The process the applicant must follow in serving the required notice of its intention to rely upon, and to make an application under, s 5(2)(b)(iii) is set out in r 13.06.[5]

Section 5(2)(b)(iii) provides a stand-alone ground for the transfer of proceedings where 'it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or of a Territory'. Put simply, an applicant must demonstrate why the interests of justice dictate that the proceeding should be transferred.

IV THE SEMINAL AUTHORITY

The factors a court should consider in determining a cross-vesting application and the relative weight attributable to them have been debated in numerous authorities. The generally accepted seminal authority is *Bankinvest*,[6] in which Rogers AJA held that:

(a) the legislation does not require consideration of whether the court in which the proceeding has been instituted is an *inappropriate* forum (therefore, private international law principles are not the focus of inquiry);
(b) instead, the central question is whether the court to which the proceeding is sought to be transferred is a *more appropriate* forum. This question is to be answered having regard to a range of factors subsumed in the notion of 'the interests of justice';
(c) in general terms, the court's consideration of such factors enables it to establish the *degree of connection* between the proceeding and the jurisdiction of the court to which it is sought to be transferred (adopting the approach

5 A court may transfer a proceeding upon the application of a party to the proceeding or of its own motion: s 5(7). The actual step-by-step process of preparing or defending such an application is beyond the scope of this discussion.

6 (1988) 14 NSWLR 711.

taken in the English case of *Spiliada Maritime Corporation v Cansulex Ltd*[7]) and include:

(i) the place the relevant events occurred;
(ii) the place of residence and/or business of the parties;
(iii) the location and availability of witnesses and legal representatives; and
(iv) the likely duration of the trial and the date at which the trial can be heard.

In *Bankinvest*,[8] Rogers AJA held further that there should be no presumption in favour of the plaintiff's choice of forum. On this basis, his Honour found it inappropriate to ask whether the applicant had discharged an onus of establishing that the jurisdiction of that court should be displaced.

Bankinvest[9] involved an application to transfer a proceeding issued in New South Wales to Queensland, where related proceedings already had been commenced. The Court of Appeal unanimously held that the New South Wales proceeding should be transferred to Queensland. This judgment has not met with universal approval. In particular, there are cases in which the courts have given weight to the plaintiff's choice of forum and have proceeded on the basis that the applicant must bear the burden of persuading the court that the proceeding should be transferred.[10]

V THE VICTORIAN APPROACH

A *Overview of Factors Taken into Account*

In *Ross Mollison Group Pty Ltd v The Really Useful Co (Aust) Pty Ltd*,[11] Warren J considered that the relevant factors to be taken into account in determining the more appropriate forum have included at least three key factors. Firstly, the governing law of any contract in dispute. Secondly, the connection between the alleged conduct and the jurisdiction and thirdly, the cost and inconvenience to the parties associated with the forum selected by the plaintiff.[12] The view in *Ross Mollison*[13] was approved by Habersberger J in *IASbet Ltd v Worldgroup Consulting Pty Ltd*.[14]

Therefore, according to the Supreme Court of Victoria, these are the three primary factors a court will consider when determining whether it is in the interests of justice that a proceeding be transferred.

7 [1987] 1 AC 460.
8 (1988) 14 NSWLR 711.
9 Ibid.
10 See, eg, *Bourke v State Bank of New South Wales* (1988) 22 FCR 378 ('*Bourke*'); *Waterhouse v Australian Broadcasting Commission* (1989) 97 FLR 1; *Re Chapman & Jansen* (1990) 100 FLR 66 ('*Chapman*').
11 [2000] VSC 256 (Unreported, Warren J, 19 June 2000) [10] ('*Ross Mollison*').
12 Warren J confirmed the approach as to the factors relevant to determining the more appropriate forum in *Ross Mollison* in the subsequent decisions of *Toll (FHL) Limited v Finemore* [2001] VSC 467 (Unreported, Warren J, 4 December 2001) ('*Toll*') and *Rogan v Rushton (Qld) Pty Ltd* [2002] VSC 375 (Unreported, Warren J, 4 September 2002) ('*Rogan*').
13 [2000] VSC 256 (Unreported, Warren J, 19 June 2000).
14 [2002] VSC 587 (Unreported, Habersberger J, 20 December 2002) ('*IASbet*').

B *A Victorian Case Study Example*

In *Toll*,[15] the principal proceedings were instituted in Victoria and concerned breach of contract and directors' duties claims. The defendants made an application under s 5(2)(b)(iii) to have the proceeding transferred to New South Wales. The Court considered the following facts in applying 'the interests of justice' test in support of the application for transfer:

(a) the majority of the defendants resided in, were incorporated in or had their principal places of business in New South Wales;
(b) most of the disputed agreements were negotiated and executed in New South Wales;
(c) the governing law of the disputed agreements was New South Wales law;
(d) the majority of the agreements contained a jurisdiction clause which provided that the parties submitted to the non-exclusive jurisdiction of New South Wales;
(e) the disputed property was located in New South Wales;
(f) the evidence for the trial required a large number of New South Wales residents to be interviewed;
(g) related proceedings had been issued in New South Wales after the Victorian proceedings were issued and it was alleged that the institution of the Victorian proceedings purely was for tactical purposes;
(h) the Statement of Claim pleaded serious allegations of dishonesty against the defendants and might lead to the joinder of third parties located in New South Wales; and
(i) the misleading conduct allegations involved the application of New South Wales legislation.

For the plaintiffs, against the application for transfer, the Court considered the following facts:

(a) the majority of key witnesses were located in Victoria;
(b) the registered offices of the plaintiffs were in Victoria;
(c) all of the plaintiffs' negotiations in relation to the disputed agreements occurred in Victoria;
(d) the documents in dispute and documents relating to the dispute were located in or were being transferred to Victoria;
(e) the plaintiffs' solicitors were located in Victoria;
(f) not all of the defendants sought to transfer the proceeding; and
(g) the plaintiffs had issued proceedings in the Commercial List of the Supreme Court of Victoria with a view to expediting the trial. If the proceedings were transferred, it was likely the trial date would be delayed.

After considering these factors, the Court found in favour of the plaintiffs and refused to transfer the proceeding. This is significant, particularly as the application was based on a number of meritorious grounds. According to Warren J, however, the reasons advanced by the applicant, including the non-exclusive

[15] [2001] VSC 467 (Unreported, Warren J, 4 December 2001).

jurisdiction clause, did not make a transfer *imperative* in 'the interests of justice'.

Further examples of the factors taken into consideration by the Victorian Supreme Court can be found in *Ross Mollison*[16] and *IASbet*.[17] Both decisions concerned unsuccessful cross-vesting applications.

C *Who Bears the Onus in a s 5(2)(b)(iii) Application?*

On balance, the better view appears to be that the applicant seeking the transfer bears the onus of demonstrating that it is in 'the interests of justice' that the proceeding be cross-vested.

In *Bankinvest*,[18] the New South Wales Court of Appeal held that there is no onus upon the applicant for the transfer. However, this statement subsequently was disapproved by the same court in *James Hardie & Coy Pty Ltd v Barry*.[19] The Supreme Court of Victoria also has questioned this aspect of the Bankinvest decision in several cases.[20]

In *Toll*,[21] Warren J cited the following opinion of Mason P in *James Hardie* with approval:

> One aspect of *Bankinvest* which has puzzled later courts is the statement ... that it is [inappropriate] to speak of any onus resting upon the applicant for transfer ... If one views the exercise as one of judicial discretion according to proper principle, then it is natural to regard the applicant for particular relief as carrying at least the persuasive onus ... Fortunately, 'onus' will seldom if ever be determinative at the end of the day.[22]

It seems reasonable to conclude that Victorian courts (and, at least persuasively, other Australian courts) will consider that the onus rests with the applicant to establish that an order for a transfer should be made. However, as Mason P indicated in *James Hardie*[23] this is unlikely to be determinative since the fundamental consideration is which forum will allow the interests of justice to be served better.

16 [2000] VSC 256 (Unreported, Warren J, 19 June 2000) [10]-[11].
17 [2002] VSC 587 (Unreported, Habersberger J, 20 December 2002) [19]-[21].
18 (1988) 14 NSWLR 711.
19 (2000) 50 NSWLR 357 ('*James Hardie*'). See also, *Patrick Badges Pty Ltd v Commonwealth of Australia* [2002] NSWSC 221 (Unreported, Howie J, 27 March 2002) ('*Patrick Badges*'); *West's Process Engineering Pty Ltd (Administrator Appointed) v Westralian Sands Ltd* (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997) ('*West's Process Engineering*') and *Aqua Technics (WA) Pty Ltd v Ferro Corporation (Australia) Pty Ltd* (Unreported, Supreme Court of New South Wales, Rolfe J, 12 March 1996).
20 *Realistech Consulting Pty Ltd v Westpac Banking Corp Ltd* (Unreported, Supreme Court of Victoria, Gillard J, 30 September 1998); *Global Technology Australasia v Bank of Queensland Ltd* [2001] VSC 230 (Unreported, Gillard J, 13 July 2001) ('*Global Technology*'); *McKee v Van Haften* [2001] VSC 251 (Unreported, Gillard J, 2 August 2001) ('*McKee*').
21 [2001] VSC 467 (Unreported, Warren J, 4 December 2001).
22 Ibid [13].
23 (2000) 50 NSWLR 357.

VI A ROAD MAP OF FACTORS RELEVANT TO DETERMINING S 5(2)(b)(iii) CROSS-VESTING APPLICATIONS

Having touched upon some of the primary factors relevant to the determination of cross-vesting applications under s 5(2)(b)(iii), what follows is a more detailed examination of the full matrix of the factors to be applied in addressing the 'interests of justice' question.

A *Location of Witnesses*

1 *The starting point*

As a general proposition, it can be argued that *not* cross-vesting a proceeding to another jurisdiction is in 'the interests of justice' if:

(a) cross-vesting would result in unreasonable cost and/or inconvenience for the witnesses of the respondent to the application; and
(b) it would result in lesser cost and/or inconvenience for the witnesses of the applicant.

However, there are particular issues that can affect the relevance of the location of witnesses being:

(a) the need to demonstrate that witnesses in fact will be required, particularly for cross-examination;
(b) a differentiation between party-associated witnesses and independent witnesses;
(c) the extent of a cost impost; and
(d) whether that cost impost falls disproportionately.

2 *The requirement for witnesses*

First it must be established that the witnesses are likely to be required. In *Jovista Pty Ltd v Bateman Project Engineering Pty Ltd*,[24] the Court considered that one possible approach to the conduct of the case involved only the interpretation of a certificate of completion. On that view, few witnesses would be required and the detriment from cross-vesting would be minimal. Therefore, the proceeding was cross-vested to the Supreme Court of the Northern Territory.[25]

In *Wholesome Bake Pty Ltd v Sweetoz Pty Ltd*,[26] the Court afforded significant weight to the likely impost on witnesses. The Court accepted that there would be between 40 to 50 witnesses and that cross-examination would be necessary.

The need to cross-examine witnesses arguably requires their presence.[27] However, in *Toll*, Warren J considered that 'appropriate technological aids to facilitate the

[24] (Unreported, Supreme Court of Western Australia, Wheeler J, 19 May 1998) ('*Jovista*').
[25] The possible approach to the conduct of the case involved an extensive factual dispute regarding the extent of work done. However, this was relevant to parallel proceedings issued earlier in the Northern Territory.
[26] [2001] NSWSC 248 (Unreported, Bryson J, 5 April 2001) ('*Wholesome Bake*').
[27] *West's Process Engineering* (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997).

giving of evidence from interstate', such as audio-video link conferencing, are available to minimise the impost.[28] Indeed, Warren J appeared to diminish the significance of the location of witnesses, at least where witnesses are in the same country, having regard to modern travel and technological arrangements.[29]

3 *The impost*

Normally courts examine the nature of the likely impost and assess its significance for both parties. In *West's Process Engineering*, the Court considered the difficulties associated with the absence of a number of executives. The Court took this into account because the burden fell primarily upon the first defendant. Further, the burden on one particular potential witness contributed significantly to the Court's ultimate decision. The witness would have been put to serious personal inconvenience if required to travel to Sydney to give evidence.[30]

In *McKee* the first defendant sought to have a proceeding for personal injury compensation transferred to Queensland. The plaintiff proposed to call at least seven medical expert witnesses, all of whom were treating the plaintiff in Victoria. There were also relevant medical witnesses residing in Queensland. In making its determination, the Court considered that it would not be difficult to obtain evidence by audio-visual link from the Queensland witnesses. Moreover, the Court thought it significant that other witnesses resided in Victoria.[31]

The decision in *McKee* suggests that a court might not consider the location of witnesses significant where witnesses can give evidence by audio-visual link and can be mobilised easily and quickly by air travel. Further, any travel would be at the plaintiff's cost, for which the plaintiff is assumed to have accounted before commencing proceedings.

Courts have adopted similar positions in *Global Technology*[32] and *Casey v Goliath Portland Cement Co Ltd*.[33]

On this point, the decisions in *McKee*,[34] *Global Technology*[35] and *Casey*[36] seem irreconcilable with the decision in *Mistral Mines NL v Ramsgate Resources Ltd*.[37] In *Mistral Mines*, McDonald J was not persuaded by the plaintiff's submission that it was appropriate to have regard to the readiness and willingness of a number of witnesses, being 'business people', to travel interstate.[38]

28 [2001] VSC 467 (Unreported, Warren J, 4 December 2001) [22].
29 Ibid [22]; see also *Contract Media Sales (Aust) Pty Ltd v Roads & Traffic Authority of New South Wales* [1999] VSC 391 (Unreported, Beach J, 15 October 1999).
30 *West's Process Engineering* (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997) [6].
31 *McKee* [2001] VSC 251 (Unreported, Gillard J, 2 August 2001) [37].
32 [2001] VSC 230 (Unreported, Gillard J, 13 July 2001).
33 (Unreported, Supreme Court of Victoria, Beach J, 22 April 1994) ('*Casey*').
34 [2001] VSC 251 (Unreported, Gillard J, 2 August 2001).
35 [2001] VSC 230 (Unreported, Gillard J, 13 July 2001).
36 (Unreported, Supreme Court of Victoria, Beach J, 22 April 1994).
37 (Unreported, Supreme Court of Victoria, McDonald J, 29 July 1991) ('*Mistral Mines*').
38 Ibid [100]-[102].

In considering the question of witnesses, McDonald J thought it to be in favour of granting the cross-vesting application that the plaintiff had employed expert geological consultants in Western Australia. His Honour also thought it significant that the majority of the principal witnesses resided in or conducted their businesses from Western Australia.[39] These included expert witnesses who had assessed voluminous documentary material situated in Western Australia. The Court held that their evidence would be relevant to determining what was disclosed to the defendants, in assessing what comprised the confidential information the subject of the dispute and as to the question of damages.[40]

It should be noted that in *Mistral Mines* McDonald J perhaps saw little point in accepting the plaintiff's submission when weighed against other factors which his Honour found favoured a transfer.[41] If the Court had not found these other factors so compelling, it may have viewed the readiness and willingness of witnesses to travel interstate as a factor militating against a transfer, at least in so far as the location of witnesses would have had any bearing upon the Court's decision.

4 *If witness inconvenience is a significant concern*

It may be important if the inconvenience to witnesses is a significant concern. *Bridge and Marine Engineering Pty Ltd v Taylor*[42] suggests that sometimes this may be determinative of the more appropriate forum. In *Bridge*, the Court cited witness inconvenience as the principal concern in refusing to transfer proceedings. In so doing, the Court applied the 'most real and substantial connection' test. Harper J stated that 'the convenience of the witnesses is ... one of the factors with which I must be principally concerned'.[43]

5 *Independent witnesses*

The cases differentiate between the effect on witnesses who are associated with the parties (such as employees) and independent witnesses. A significant cost or inconvenience on independent witnesses can count substantially against granting a cross-vesting application. Leading authorities on this point include *Wholesome Bake*[44] and *World Firefighters Games Brisbane, 2002 v World Firefighters Games Western Australia Inc*.[45] In *World Firefighters* the probability of affecting independent witnesses counted significantly against a court enforcing a contractually stipulated exclusive jurisdiction clause.

39 Ibid [100]-[102].
40 Ibid [98]-[99].
41 These factors are discussed at sections VI(D)(2) 'Relevant differences in the laws of each State or Territory'; VI(E)(2) 'The practical approach - the essence of the dispute' and VI(I) 'The location of the documents' below.
42 [2002] VSC 60 (Unreported, Harper J, 8 March 2002) ('*Bridge*').
43 Ibid [28].
44 [2001] NSWSC 248 (Unreported, Bryson J, 5 April 2001) [13].
45 [2001] QSC 164 (Unreported, Philippides J, 17 May 2001) [64], [73] ('*World Firefighters*').

B *Contractual Jurisdiction Clauses*

1 *Overview - enforcement of jurisdiction clauses*

In *West's Process Engineering*, Rolfe J cited Rogers AJA from *Bankinvest*: 'The only lodestar that a judge may steer by is, what do the interests of justice dictate should be done?'[46]

While a jurisdiction clause purports to confer either exclusive or non-exclusive jurisdiction, the wording of the clause alone does not necessarily determine the nature and effect of the clause with respect to the applicable jurisdiction.[47]

In the present context, the interpretation of contractual jurisdiction clauses is predicated on the rejection of the notion that private international law applies to cross-vesting applications under s 5(2)(b)(iii). The private international law 'choice of law' principles would, if applicable, require significant weight to be given to jurisdiction clauses. Instead, within the 'interests of justice' test, jurisdiction clauses generally have been considered as a relevant factor but with no special weight.[48]

This is the position in Victoria, as the Supreme Court has accepted that private international law does not apply to cross-vesting applications.[49]

It seems that the weight of judicial opinion supports the following propositions:

(a) exclusive jurisdiction clauses[50] are not definitive of cross-vesting applications but are likely to prevail unless there are good reasons to the contrary.[51] However, the weight of the clause as a factor will depend on the circumstances;[52] and
(b) non-exclusive jurisdiction clauses have less weight than exclusive jurisdiction clauses.

Arguments can arise as to whether a jurisdiction clause is in effect exclusive or non-exclusive. The formulation of Giles CJ in *FAI General Insurance*[53] provides

46 (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997) [4].
47 An example of a non-exclusive jurisdiction clause is as follows: 'This contract shall be governed by and shall be interpreted in accordance with the laws from time to time in force in the State of Victoria. The parties hereby irrevocably and unconditionally submit to the non-exclusive jurisdiction of the courts of Victoria and all courts which are competent to hear appeals in that jurisdiction'.
48 *World Firefighters* [2001] QSC 164 (Unreported, Philippides J, 17 May 2001) [18]-[29].
49 *Schmidt v Won* [1998] 3 VR 435 ('*Schmidt*').
50 These are clauses that either express the jurisdiction to be exclusive or are construed by the courts as conferring exclusive jurisdiction where the clause is silent on the matter. As to the latter, see the comments of Giles CJ in *FAI General Insurance Company Ltd v Ocean Marine Mutual Protection & Indemnity Association Ltd* (1997) 41 NSWLR 559 ('*FAI General Insurance*'); *Jovista* (Unreported, Supreme Court of Western Australia, Wheeler J, 19 May 1998); *Air Attention WA Pty Ltd v Seeley International Pty Ltd* (Unreported, Supreme Court of New South Wales, Walsh J, 3 September 1996) ('*Air Attention*') and *Patrick Badges* [2002] NSWSC 221 (Unreported, Howie J, 27 March 2002). In these cases, the courts developed indicia they apply to determine whether a clause that is silent on the subject of exclusivity is in fact exclusive.
51 See, eg, *West's Process Engineering* (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997) [13].
52 See, eg, *World Firefighters* [2001] QSC 164 (Unreported, Supreme Court of Queensland, Philippides J, 17 May 2001) [18].
53 (1997) 41 NSWLR 559.

the basic test for determining whether a jurisdiction clause is exclusive or non-exclusive. In summary:

(a) it is a question of construction of the particular contract, having regard to the circumstances surrounding its execution;
(b) the word 'exclusive' is not determinative, and a clause may be deemed an exclusive jurisdiction clause despite the absence of that word or a similar word or expression;
(c) mutuality, in the sense that both parties have agreed to the relevant jurisdiction, indicates that the clause is intended to confer exclusive jurisdiction;
(d) other language in the clause or the nature of the contract may point towards the contractual intention;
(e) if the courts of the relevant jurisdiction would have jurisdiction in the absence of the clause, that may indicate that it was intended to confer exclusive jurisdiction.[54]

These factors were applied by Wheeler J in *Jovista*.[55] In addition, Wheeler J raised other points in relation to the test propounded by Giles CJ:

(a) with regard to mutuality, if the agreement is a standard form agreement, presumably designed to work under a great variety of circumstances and potentially enforced in many jurisdictions, then 'there would be some reason for supposing that the parties were doing no more than identifying at least one forum which would be beyond dispute';[56] and
(b) with regard to construction, the words 'accept' and 'submit to' can be seen either as mere surplusage or as evincing an intention that the parties accept or submit to the nominated jurisdiction as the appropriate one for the resolution of contractual disputes.[57]

2 *Case study examples of jurisdiction clauses*

In *Jovista*, the jurisdiction clause was '[the parties] accept the laws of the Northern Territory as the proper law of the Contract and submit to and accept the jurisdiction of the courts of that Territory.'[58]

In *West's Process Engineering*, the relevant clause was similar:

> The contractor and WSL accept the laws of the State of Western Australia in Australia as the proper law of the contract and submit to and accept the jurisdiction of the courts of that State.[59]

In both *Jovista* and *West's Process Engineering*, the jurisdiction clause was held to be exclusive.

54 Ibid 569-70.
55 (Unreported, Supreme Court of Western Australia, Wheeler J, 19 May 1998).
56 Ibid [5].
57 Ibid [6].
58 Ibid [4].
59 (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997) [4].

In *Atwood Oceanics Australia Pty Ltd v BHP Petroleum Pty Ltd*[60] the defendant sought to stay an action in Western Australia on the basis of a clause that provided 'the parties agree to submit to the jurisdiction of the courts of Victoria'.[61] The Court applied *Contractors Ltd v MTE Control Gear Ltd*[62] and held that the clause conferred only non-exclusive jurisdiction upon Victorian courts. According to the Court, a non-exclusive jurisdiction clause:

> ... does no more than provide that if the plaintiff were sued in the Victorian courts it would accept their jurisdiction. It is not ... an agreement that disputes shall be determined in that jurisdiction and therefore not a case in which the bargain of the parties is to be given weight.[63]

3 *Meaning of 'irrevocably' in jurisdiction clauses*

The use of the word 'irrevocably' in jurisdiction clauses does not necessarily import some degree of mandatory compliance nor will it necessarily increase the weight that a court may give to it.[64] In *FAI General Insurance*, Giles CJ referred to *Continental Bank NA v Aeokos Compania Naviera SA*,[65] where a loan contract provided that each borrower would submit irrevocably to the jurisdiction of the English courts. It was held that the clause should be read in a transitive sense, although that did not necessarily mean that it was an exclusive jurisdiction clause.[66]

In *Rick Manietta Pty Ltd v National Mutual Life Association of Australasia Ltd*,[67] the jurisdiction clause was as follows:

> 15.1. This deed shall be governed by and construed in accordance with the law of New South Wales.
> 15.2. The borrower hereby irrevocably agrees any legal action or proceeding ... shall be instituted in the court of competent jurisdiction in the State of New South Wales and the borrower irrevocably submits to the exclusive jurisdiction of the courts in that jurisdiction...[68]

In *Manietta*, no special meaning was given to the word 'irrevocably' to confirm an argument of exclusivity.

4 *Exclusive jurisdiction clauses*

Courts have tended sometimes to give effect to exclusive jurisdiction clauses - even where the balance of convenience favours a trial elsewhere.[69]

60 (Unreported, Supreme Court of Western Australia in Chambers, Master Seaman, 6 August 1987) ('*Atwood Oceanics*').
61 Ibid [3].
62 [1964] SASR 47 ('*MTE Control Gear*').
63 (Unreported, Supreme Court of Western Australia in Chambers, Master Seaman, 6 August 1987) [10].
64 *FAI General Insurance* (1997) 41 NSWLR 559.
65 [1994] 2 All ER 540.
66 Ibid 544, 547 (Steyn LJ).
67 (Unreported, Supreme Court of Victoria, McDonald J, 8 September 1995) ('*Manietta*').
68 Ibid [3].
69 See, eg, Ibid.

In *Sykes v Povey Corporation*,[70] the Victorian Supreme Court granted a stay on the basis of a Western Australian exclusive jurisdiction clause, even though significant evidence existed in Victoria. The Court applied the test from *Huddart Parker v Ship Mill Hill*[71] which requires the plaintiff to show strong reasons an exclusive jurisdiction clause should not be enforced. Proof that another jurisdiction was more convenient than the agreed forum was inadequate.[72]

As Wheeler J stated in *Jovista*, 'the balance of authority appears to favour the view that parties in such a case, in the absence of good reason to the contrary, should be kept to their bargain'.[73] This view was supported, although in a more diluted way, by Rolfe J in *West's Process Engineering* where his Honour held that such a clause was not determinative but that 'the weight to be attributed to an exclusive jurisdiction clause may be sufficient to override other relevant considerations'.[74]

5 *Non-exclusive jurisdiction clauses*

Case law regarding non-exclusive jurisdiction clauses is more opaque. In *Power & Water Authority v McMahon Contractors Pty Ltd*,[75] Angel J said that a 'non-exclusive jurisdiction clause is indicative, not determinative'.[76]

In *Atwood Oceanics*,[77] the Court observed that a non-exclusive jurisdiction clause is not an agreement that disputes must be determined in the specified jurisdiction. Accordingly, the Court did not give weight to the bargain of the parties.

Richard Garnett argues that in the context of non-exclusive jurisdiction clauses, courts appear to have taken the view that s 5(2) constitutes a statutory command to stay proceedings whenever the preponderance of evidence lies in another jurisdiction, regardless of jurisdiction clauses.[78]

Dicta from the Supreme Court of Western Australia in *Air Attention*[79] appears to be contrary to the above treatment. *Air Attention* was determined on the basis of the clause being exclusive. Walsh J considered that full weight should be given to the clause, even if it is non-exclusive, because it 'evidences the basic intent of the contracting parties that their obligations were to be determined in accordance

70 (Unreported, Supreme Court of Victoria, Tadgell J, 8 April 1988) ('*Sykes*').
71 (1950) 81 CLR 502.
72 *Sykes* (Unreported, Supreme Court of Victoria, Tadgell J, 8 April 1988) [3].
73 (Unreported, Supreme Court of Western Australia, Wheeler J, 19 May 1998) [4].
74 (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997) [12]. A circumstantially similar case is *Bond Brewing Holdings v National Australia Bank* (1990) 1 ACSR 616 where an action commenced in Western Australia was transferred to Victoria in reliance upon what the Court considered to be a Victorian exclusive jurisdiction clause.
75 (Unreported, Supreme Court of Northern Territory, Angel J, 21 September 1995).
76 Ibid [14]. This statement was cited by Rolfe J in *West's Process Engineering* (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997) [13].
77 (Unreported, Supreme Court of Western Australia in Chambers, Master Seaman, 6 August 1987).
78 Richard Garnett, 'The Enforcement of Jurisdiction Clauses' (1998) 21 *University of New South Wales Law Journal* 1, 1. See also *Nilsen Electric (WA) Pty Ltd v Jovista Pty Ltd* (Unreported, Supreme Court of Victoria, Byrne J, 8 March 1995) where the Court transferred a proceeding commenced in Victoria (the jurisdiction stipulated by a non-exclusive jurisdiction clause) to Western Australia where the majority of the evidence was located.
79 (Unreported, Supreme Court of Western Australia, Walsh J, 3 September 1996).

with the laws of [the nominated jurisdiction]'.[80] This decision suggests that non-exclusive jurisdiction clauses will carry as much weight as exclusive jurisdiction clauses.

It is submitted that insofar as it could influence Victoria, *Air Attention* is bad law. First, it is dicta. More significantly, the Court's conclusion that a non-exclusive jurisdiction clause determined the matter relies on the proposition that private international law applies to cross-vesting applications. That proposition is problematic and clearly is not the law in Victoria.[81] It is interesting that Garnett noted that this dicta represented the high water mark in Australian judicial attitudes toward jurisdiction clauses. Garnett writes:

> What is important, according to the court, is that parties have included a clause indicating a place and method of dispute resolution and courts should seek to give effect to this intention and not look for means of circumvention.[82]

6 *Practical considerations*

Rolfe J in *West's Process Engineering* provides a good summary of the general approach adopted by the courts when considering a jurisdiction clause in this context, stating:

> ... it is appropriate to give substantial weight to the jurisdiction clause for it represents the bargain of the parties. The one with the advantage of it should not be subjected to the inconveniences ... unless the other relevant factors are powerfully in favour of another jurisdiction.[83]

What can be distilled from all of this is that a jurisdiction clause is a factor to be considered but that the weight to be given to such clauses 'will vary depending on the other surrounding and countervailing circumstances'.[84]

7 *Recent Victorian Supreme Court decisions on jurisdiction clauses*

It is useful to consider three recent decisions of the Victorian Supreme Court in the context of jurisdiction clauses.

(a) Ross Mollison[85]

In *Ross Mollison*, which concerned a non-exclusive jurisdiction clause, the applicant sought to have proceedings transferred to New South Wales. The applicant submitted that a key factor in support of the application was the existence of a jurisdiction clause in the agreement in dispute, under which the

[80] Ibid [6].
[81] See, eg, the decision in *Schmidt* [1998] 3 VR 435.
[82] Garnett, above n 78, 25.
[83] (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997) [14].
[84] *World Firefighters* [2001] QSC 164 (Unreported, Supreme Court of Queensland, Philippides J, 17 May 2001) [38].
[85] [2000] VSC 256 (Unreported, Warren J, 19 June 2000).

parties agreed to submit to the 'non-exclusive jurisdiction of the courts of the State of New South Wales'.[86]

Warren J considered the effect of the choice of law clause. In doing so, her Honour considered whether there was any distinction between the relevant law in New South Wales and Victoria and distinguished *Bankinvest* on the basis that there was no New South Wales statute governing the alleged agreement between the parties.

Warren J found that a non-exclusive jurisdiction clause was not, of itself, sufficient to justify New South Wales as the more appropriate forum.

(b) Toll[87]

The applicant in *Toll* applied to have the proceeding transferred to New South Wales. The majority of the agreements in dispute contained clauses specifying the governing law to be that of New South Wales and provided that the parties submitted to the non-exclusive jurisdiction of the courts of New South Wales. The applicant submitted that the non-exclusive jurisdiction clause was a factor in favour of granting a transfer. However, Warren J's decision indicates that this was not an important issue. Her Honour stated that the fact that the majority of the subject agreements provided that the relevant law was that of New South Wales is merely 'a factor to be weighed into the overall equation of determining where the interests of justice lie'.[88]

Her Honour considered the question of the governing law of the contract.[89] Notably, the decision of *Ross Mollison* suggests that the Victorian Supreme Court requires there to be some distinguishing feature of the governing law of the contract before a non-exclusive jurisdiction clause is considered to be persuasive. This may be why Warren J found it unnecessary to consider specifically the effect of the non-exclusive jurisdiction clause.

(c) Rogan[90]

Rogan involved a complex commercial dispute. The contract in question contained a jurisdiction clause which provided that the parties submitted irrevocably to the exclusive jurisdiction of the courts of Victoria and that they waived any objection to the forum on the ground of inconvenience. Regardless, the Court ordered a transfer for the principal reason that there were related proceedings in Queensland.[91]

Importantly, this judgment applies *Ross Mollison*. Warren J held that the exclusive jurisdiction clause was no bar to a transfer of proceedings where there

86 Ibid [10]. In *Ross Mollison* the actual existence of the agreement also was in dispute. This dispute, however, had no material effect on the decision of Warren J. Her Honour stated that her reasons would apply even if the plaintiff subsequently proved the existence of the agreement.

87 [2001] VSC 467 (Unreported, Warren J, 4 December 2001).

88 Ibid [25].

89 Ibid [26].

90 [2002] VSC 375 (Unreported, Warren J, 4 September 2002).

91 The concept of 'related proceedings' is addressed in detail below.

is no distinction between the law in the jurisdiction where the proceeding has been instituted and that of the jurisdiction nominated in the clause.[92]

8. *Practical effect of recent Victorian Supreme Court decisions on jurisdiction clauses*

From these three Victorian decisions, a number of conclusions regarding the position of the Supreme Court of Victoria can be drawn:

(a) *Ross Mollison*, *Toll* and *Rogan* all are consistent with *MTE Control Gear* and *Atwood Oceanics* and in finding that non-exclusive jurisdiction clauses do no more than provide that if a party is sued in the nominated jurisdiction, then it will not object to that jurisdiction;[93]
(b) the Court does not seem to draw a distinction between non-exclusive and exclusive jurisdiction clauses whereby one type of clause is more persuasive than the other when determining the more appropriate forum;[94]
(c) the Court appears to have moved away from the *Sykes* approach, where Tadgell J held that a plaintiff must show strong reasons against the enforcement of an exclusive jurisdiction clause;[95] and
(d) instead, the Court now appears to take the approach that exclusive or non-exclusive jurisdiction clauses are merely one factor to be weighed into the overall equation in determining where the interests of justice lie as to the forum for trial.

C *Delay*

Courts will consider whether cross-vesting a proceeding will result in delay. Where delay is likely to cause injustice, it will be a factor militating against granting a cross-vesting application.

The fixing of a trial date was considered pivotal, indeed apparently determinative, in *Sim v Williams*.[96] In that case, Bryson J concluded the matter as follows:

> Considerations of convenience relating to conduct of the trial and attendance of witnesses and the state of preparation of the litigation for hearing in this Court under arrangements made for expedition, and for the hearing to take place later this month, support retaining the proceedings here ...[97]

1 *The principal authorities*

This question arose in *West's Process Engineering*, where the concern was that the ability of the Western Australian Supreme Court to deal with the proceeding would disadvantage the plaintiff in the particular circumstances. Indeed, there

92 [2002] VSC 375 (Unreported, Warren J, 4 September 2002) [17].
93 In other words, a non-exclusive jurisdiction clause is not an agreement that disputes only can be determined in accordance with that clause.
94 Cf *Jovista* (Unreported, Supreme Court of Western Australia, Wheeler J, 19 May 1998) and *West's Process Engineering* (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997).
95 (Unreported, Supreme Court of Victoria, Tadgell J, 8 April 1988).
96 [2002] NSWSC 37 (Unreported, Bryson J, 1 February 2002) ('*Sim*'). This view was approved by Bryson J in *Wholesome Bake* [2001] NSWSC 248 (Unreported, Bryson J, 5 April 2001).
97 Ibid [31].

was evidence that excessive delay would risk bankruptcy. The Court noted that:

(a) the Commercial Division of the New South Wales Supreme Court had four judges;
(b) the average time for a hearing was about 12 months;
(c) the Western Australian Expedition List was administered by a single judge although other judges could be co-opted where necessary;
(d) there was the prospect of the proceeding not entering the Western Australian Expedition List at all – this was dependent on the Court's discretion; and
(e) there was evidence that the proceeding would not come on for hearing before October.[98]

A similar consideration was discussed in *Toll*.[99] What should be considered is whether the applicant demonstrated urgency in that case and whether that is a prerequisite for this factor being afforded any weight.

Leal Boss Computer & Office Supplies Pty Ltd v Boss Computer & Office Supplies Pty Ltd[100] supports this proposition. In *Leal Boss*, Debelle J's view was that:

> The interests of justice would be denied if a party was required to postpone the prosecution of the action and wait a relatively long time for another court to determine the issues ... When dealing with applications under cross-vesting legislation ... it can be fairly stated that, if the parties proceed with reasonable expedition to prosecute each action, the likelihood is that the action in this Court will be heard a good deal earlier than the action in the Supreme Court of Western Australia. Leal Boss is entitled to pursue its action in the court in which it is most likely to receive an earlier determination of the issues ... The transfer of proceedings to Western Australia will, in all likelihood, delay the resolution of those issues and thus defeat the interests of justice.[101]

2 *The requirement to demonstrate that delay will cause hardship*

There is authority for the proposition that presumptions of delay should not be given much weight, at least in so far as such presumptions relate only to how one court might be thought to handle proceedings when compared with another. This is a separate question from actual financial prejudice which a plaintiff can demonstrate would be likely to be suffered from delay if a transfer is ordered. The authority on point is *Dawson v Baker*.[102]

In *Dawson*, the Court referred to *Chapman*,[103] which involved applications in the Family Court in which the de facto husband applied to transfer property claims

98 (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997) [10]-[11].
99 [2001] VSC 467 (Unreported, Warren J, 4 December 2001) [24].
100 (Unreported, Supreme Court of South Australia, Debelle J, 17 February 1993) ('*Leal Boss*').
101 Ibid [10].
102 (1994) 123 FLR 194 ('*Dawson*').
103 (1990) 100 FLR 66.

to the Victorian Supreme Court.[104] The Court noted, among other things, that in *Chapman* Nicholson CJ did not consider that comparative court delays and procedures should be given great weight and that it would be inappropriate for one court to reflect adversely on such matters in relation to another court.[105] However, the Court in *Dawson* noted that comparative cost and delay would be relevant and that delay resulting from the transfer itself also would be a relevant consideration.

This reasoning in *Dawson* to the effect that what is relevant is delay resulting from the transfer itself as opposed to presumptions about the efficacy of a particular court suggests a need to point to a concrete reason giving rise to such delay. For example, the likelihood that a later trial date might cause undue financial prejudice or a lost business opportunity. The words of Wilcox J, in considering the meaning of 'the interests of justice' in *Bourke*,[106] support this conclusion:

> [T]his phrase ought to be read widely. Under that rubric ... the court is entitled to consider not only the ability of a particular court to deal with all aspects of a matter, ... but also adjectival matters such as the availability of particular evidence, the procedures to be adopted, the desirable venue for trial and the likely hearing date. It is not 'in the interests of justice' to adopt a course, in relation to those matters, which places unnecessary burdens and delays upon the parties to the litigation.[107]

This seems to be supported by the general assumption by the courts that other courts will be effective unless demonstrated otherwise.[108]

The view of Wilcox J in *Bourke* was not shared by Northrop J in Re *Monadelphous Engineering Assurance (NZ) Ltd (in liq); Ex parte McDonald*,[109] where the Court held that the question of which court can grant the more expeditious hearing is not a relevant matter for determining the interests of justice.[110] However, Northrop J's view was rejected expressly in *Leal Boss*, where Debelle J favoured the view of Wilcox J in *Bourke*.[111]

3 *The importance of evidence*

In relation to the delay question, a party seeking a transfer will need to persuade the court that the alternate court to which the proceeding is sought to be transferred will be likely to generate an earlier trial date, or that a failure to transfer will delay the trial unduly or prejudicially.

It is worth emphasising the necessity for 'hard evidence' on the delay criterion, with reference to the words of Hedigan J in *Alambie Wine Co Pty Ltd v*

[104] (1994) 123 FLR 194, 205 (Higgins J).
[105] Ibid.
[106] (1988) 22 FCR 378.
[107] Ibid 394.
[108] See, eg, *Dawson* (1994) 123 FLR 194.
[109] (1988) 7 ACLC 220 ('*Monadelphous*').
[110] Ibid 225.
[111] (Unreported, Supreme Court of South Australia, Debelle J, 17 February 1993) [10].

Austflavour Pty Ltd.[112] In refusing an application for transfer, his Honour noted the *lack of evidence* presented to assist the Court in assessing the interests of justice. In seeking to determine the comparative cost and expediency of the matter proceeding in Victoria or South Australia, his Honour said:

> There is no material before me to suggest that even in that court's expedited list the matter would get on more quickly for trial than it would in the Victorian Supreme Court. There is simply no evidence about this ... I am not persuaded that ... the interests of justice would be other than appropriately served by the retention of the proceeding in this court.[113]

D *Proper Law*

A contractual choice of law or a governing law clause is a further consideration relevant to determining the justice of cross-vesting a proceeding. There is ample authority, however, that this is neutralised as a consideration if:

(a) the relevant law of the referring and referred jurisdictions is the same or even substantially similar in relation to the matters in dispute;
(b) even where that is not the case, the peculiarity of the transferee jurisdiction will not be of any significance if that peculiarity is not a prominent factor in the resolution of the issues; and
(c) the lack of any special reason for the choice of law.

There is also authority for the proposition that even if law (whether common law or statute) specific to another State or Territory must be considered, this is not necessarily a justification, or even a significant consideration, in favour of granting a transfer to that State or Territory. A review of the relevant decisions reveals that it is not uncommon for courts to take the view that they can consider the common law or legislation unique to another State or Territory in the refusal of a cross-vesting application. This question may arise regardless of whether the contractual parties in fact have nominated the governing law of the contract.

1 *Authority for the key proposition*

The authority for the proposition that a proper law selection will be neutralised as a consideration if there is no relevant difference in the laws of the relevant jurisdictions includes *Wholesome Bake*,[114] *World Firefighters*,[115] *Ross Mollison*,[116] *Toll*,[117] *Rogan*,[118] *McKee*,[119] *Jambrecina v Pioneer Building Products Pty Ltd*[120] and *Sim*.[121]

[112] (Unreported, Supreme Court of Victoria, Hedigan J, 1 November 1993).
[113] Ibid [14].
[114] [2001] NSWSC 248 (Unreported, Bryson J, 5 April 2001).
[115] [2001] QSC 164 (Unreported, Philippides J, 17 May 2001) [59].
[116] [2000] VSC 256 (Unreported, Warren J, 19 June 2000).
[117] [2001] VSC 467 (Unreported, Warren J, 4 December 2001).
[118] [2002] VSC 375 (Unreported, Warren J, 4 September 2002).
[119] [2001] VSC 251 (Unreported, Gillard J, 2 August 2001).
[120] [1999] ACTSC 105 (Unreported, Higgins J, 13 October 1999) ('*Jambrecina*').
[121] [2002] NSWSC 37 (Unreported, Bryson J, 1 February 2002).

In *Sim*, the plaintiff had commenced an action for specific performance of a clause in a contract relating to mining leases in circumstances where the proceeding had been set down for an expedited hearing in New South Wales due to the prospective loss of commercial opportunities. In refusing an application by the defendant to transfer proceedings to Western Australia, Bryson J said:

> I have not been referred to any element in the contract law of Western Australia which it will be necessary to apply and can be expected to be significantly different or different at all from the law of this State, nor have I been referred to any significant departures in the law relating to the grant of injunctions or remedies of specific performance.[122]

In *Sim*, the contract specified Western Australian law as the governing law but with an agreement to submit to the jurisdiction of the New South Wales courts.[123] The parties and witnesses resided in New South Wales. It is noteworthy that the application in *Sim* was refused even though there were related proceedings pending in the Warden's Court in Western Australia, and even though the *Mining Act 1978* (WA) conferred jurisdiction on the Western Australian Warden's Court relevant to the issues in dispute.[124]

Jambrecina suggests that:

> [w]here the change of jurisdictions makes no jurisprudential difference, i.e. if there is no real difference in applicable legal principles, the factors of geographic and court system convenience assume greater weight.[125]

In *Jambrecina*, the defendant's application to transfer the proceeding from the Australian Capital Territory to New South Wales was refused. In that case, a personal injury occurred outside the Australian Capital Territory, but nearby. Most of the witnesses who were likely to be called by the defendant resided in New South Wales. The plaintiff was a resident of the Australian Capital Territory. According to Higgins J, the place of injury and the residence of witnesses out of the jurisdiction did not mandate removal.

2 *Relevant differences in the laws of each State or Territory*

It appears that a difference between the laws in the two jurisdictions will be a factor which potentially can favour the transfer of a proceeding to the jurisdiction to which the choice of law clause applies. However, it is well established that the difference in the law must go to the heart of the matters in dispute. In addition,

[122] Ibid [29].

[123] Ibid [14]. The governing law clause was as follows: 'Governing Law and Courts: This agreement shall be governed by and construed in accordance with the laws of Western Australia. The parties will be agreed [sic] to submit to the non-exclusive jurisdiction of the courts, [sic] State of New South Wales, and all Courts competent to hear appeals therefrom.'

[124] Ibid [18].

[125] [1999] ACTSC 105 (Unreported, Higgins J, 13 October 1999) [78]. His Honour referred also to the earlier decision in *Tart v Tart* (Unreported, Supreme Court of the Australian Capital Territory, Higgins J, 19 January 1995) in which his Honour held that the balance of convenience was sufficient to warrant refusal of an application to transfer proceedings, there being no legal issue peculiar to New South Wales law and with the balance being based purely on geographic considerations.

there is authority indicating that differences in local conditions – if they are relevant to the better determination of the proceeding – will operate in a similar way.

As noted earlier, in *Sim*, Bryson J refused the defendant's application to transfer proceedings from New South Wales to Western Australia. Bryson J held that while knowledge of Western Australian mining law might be more readily available in a Perth court, the central questions did not revolve around the application of Western Australian mining laws and even if it were required, such knowledge would be available in New South Wales through research and perhaps expert practitioners.[126]

The position in *Sim* can be distinguished from the decision in *Mistral Mines*,[127] in which it was held that the provisions of the *Mining Act 1978* (WA) ('*Mining Act*') were central to the dispute. In that case, the plaintiff issued proceedings in Victoria. The defendant sought to rely upon provisions in the *Mining Act* and applied successfully for an order that the proceeding be transferred to Western Australia.

McDonald J agreed with the defendant's submission that it was more appropriate for the Western Australian Supreme Court, rather than the Victorian Supreme Court, to interpret Western Australian legislation. In granting the transfer, his Honour emphasised that the forum for judicial consideration of legislative provisions specific to that State was an important factor in determining the interests of justice.

It is implicit in the judgment of McDonald J that when it comes to legislation regulating a discrete area of State or Territory law that is pleaded by one or more parties and the application of that law goes to the heart of the issues in dispute, a court is more likely to regard that as a significant factor favouring a transfer to the jurisdiction in which that legislation operates.

Furthermore, although not referred to explicitly in *Mistral Mines*, the fact that the transferee court previously or historically has considered such legislation or has a relevant specialist list arguably would bolster such an argument. Conceivably these might be specific 'local conditions' that could favour a transferral of proceedings.

This point is made more generally in *Bankinvest* where the Court explored the relevance of local conditions for the cross-vesting application:

> In the present case, first and foremost, the law governing the guarantees is specified to be the law of Queensland ... Nonetheless, in the context of reopening a money lending transaction, local circumstances may play an important role. To that extent ... a Queensland court is better able to gauge the validity of the application for re-opening and if the transaction is reopened, what relief should be granted.[128]

[126] [2002] NSWSC 37 (Unreported, Bryson J, 1 February 2002) [21].
[127] (Unreported, Supreme Court of Victoria, McDonald J, 29 July 1991).
[128] (1988) 14 NSWLR 711, 729 (Rogers AJA).

In *Howden Sirocco Pty Ltd v Transfield Technologies Pty Ltd t/as Ical Products*,[129] O'Keefe CJ refused to grant an application to have a New South Wales proceeding transferred to Victoria for consolidation with a Victorian proceeding. His Honour placed emphasis on the fact that no issue or point of Victorian law which relevantly was different from New South Wales law arose. In that case, the fact that the head contract and the subcontracts were subject to the law of Victoria did not carry any real weight in favour of a transfer.[130]

Finally, in *Dawson*,[131] Higgins J cited a checklist of factors of significance in determining whether it is in the interests of justice to order a transfer of proceedings.[132] Higgins J said, in relation to the 'application of substantive law' factor:

> If the law to be applied is that of the transferee jurisdiction, transfer will be favoured if that law is peculiar to that jurisdiction. This would be particularly significant if the validity or interpretation of local legislation was in issue.[133]

According to Higgins J, therefore, the fact that the relevant law is *not* peculiar to a particular jurisdiction and that there is *not* a question about the validity of the interpretation of the law of a particular jurisdiction are factors militating *against* a transfer to that jurisdiction.

3 *The requirement to plead the law*

There is strong authority for the proposition that any differences between the relevant laws of the jurisdictions will not be relevant to the determination of a cross-vesting application unless the law in question is in fact *pleaded*. In *McKee*, the case did not involve a choice of law/governing law clause, however the Court considered the defendant's contentions as to the relevance of Queensland law compared with that of Victoria. In dismissing the application to transfer the proceeding to Queensland, the Court thought it significant that '[t]here is no suggestion that the applicable law in both States will be different. Indeed, the defendants have not pleaded foreign law'.[134] The Court stated further that:

> [t]he defendants have not pleaded that the laws of Queensland apply to the proceeding and accordingly, the issues shall be considered and determined in accordance with the laws of this State, unless the proceeding is transferred.[135]

[129] (Unreported, Supreme Court of New South Wales, O'Keefe CJ, 12 July 1994) ('*Howden*').
[130] Ibid [7].
[131] (1994) 123 FLR 194.
[132] (1994) 123 FLR 194, 207-8. The checklist of factors suggested by Higgins J is: (a) the application of substantive law; (b) any forensic advantage or detriment conferred by procedural law; (c) the choice made by the plaintiff of the forum and the reasons for the plaintiff's choice; (d) the balance of convenience to the parties and to the witnesses and (e) the convenience to the court system. The checklist was cited with approval in *James Hardie* (2000) 50 NSWLR 357, *Alchin v TJ & RF Fordham Pty Ltd* [1997] ACTSC 15 (Unreported, Higgins J, 26 March 1997) and *McKee* [2001] VSC 251 (Unreported, Gillard J, 2 August 2001). In *McKee* Gillard J noted the checklist was not exhaustive. See also, *Guttershield Systems Australia Pty Ltd v LBI Holdings Pty Ltd* [2003] NSWSC 241 (Unreported, Campbell J, 24 March 2003) [4].
[133] (1994) 123 FLR 194, 207.
[134] [2001] VSC 251 (Unreported, Gillard J, 2 August 2001) [27].
[135] Ibid [12].

In *McKee*, the Court also turned its mind to the 'straightforwardness' of the issues to be resolved (or, by implication, the lack of any special reason for the choice of forum to be displaced by the nature of the issues in dispute). In summary, therefore, *McKee* demonstrates that:

(a) it is insufficient for an applicant to assert that because other factors have their origin in the State or Territory to which the proceedings are sought to be transferred that the law of that jurisdiction would apply automatically, or that any application of that jurisdiction's law will favour a transfer to that jurisdiction. Rather, the applicant must demonstrate that it has pleaded law that is in fact different or, at least, that the law the court would be obliged to consider is in fact materially different; and
(b) having demonstrated that, it is likely that the applicant must prove also that one State or Territory court is unable to consider the laws unique to another State or Territory. It may have difficulty doing so, since a number of cases demonstrate a judicial willingness to permit the 'original' court to consider the law of the 'foreign' State or Territory.

E *The Location of the 'Subject Matter' of the Proceeding*

The degree of connection between the subject matter of the proceeding and a particular jurisdiction is relevant to determining whether the proceeding should be transferred. Surprisingly, there appears to be little authority as to how a court clarifies what is the 'subject matter' of the proceeding for the purposes of a cross-vesting application. While the decisions indicate that the location of the subject matter is relevant, the authorities do little to explain how 'subject matter' is defined, or appear to assume that the subject matter is self-evident. An awareness of how 'subject matter' is likely to be characterised is somewhat liable to be overlooked in pursuing or defending cross-vesting applications. This should be avoided.

1 *The central proposition - characterising subject matter*

From the authorities available, the central proposition seems to be that courts are more likely to define the subject matter in light of the specific issues pleaded to be in dispute as opposed to having regard to what might be said to be more superficial connecting factors.[136] Although connected with the dispute, these superficial factors do not characterise the disputed issues or the subject matter of the dispute.

Construction, engineering and power generation cases particularly are illustrative of the courts' approach. As will be seen, in a construction contract dispute where, for example, only declarations are sought as to the variations regime under the contract, the fact that the construction work was performed in a State or Territory other than that in which the proceeding was instituted is unlikely to be a persuasive factor favouring a transfer. This is because the court is likely to characterise the 'subject matter' as the *contract* and the proceeding merely as one

[136] For example, the location of assets.

for the seeking of declarations. Such a proceeding can be heard in the court in which it was instituted.

2 *The practical approach - the essence of the dispute*

In *Howden*,[137] declarations were sought as to a contract's pricing regime including the basis for variations. It was sought to have a New South Wales proceeding transferred to and consolidated with a Victorian proceeding. In refusing the application to transfer and consolidate from New South Wales to Victoria, O'Keefe CJ said:

> No question of a view of the locus arises since the questions involved are substantially questions of construction both of the contract and the relevant awards as well as dealings between the parties and matters of estoppel. The fact that the site of the project is in Victoria is not therefore a consideration which favours transfer. Indeed ... it is substantially irrelevant.[138]

In the recent Victorian decision of *Bridge*,[139] Harper J noted that the applicant for the transfer alleged that the connection with the proposed transferee jurisdiction arose through the assets in question. In applying the 'most real and substantial connection' test, Harper J said:

> [T]he dispute concerns the breach of a contract involving the misuse of intellectual property. It is not a breach which involves the conduct of either party towards physical objects situated out of the jurisdiction nor are the breaches otherwise such as to bring this proceeding into a class that can be said to have a physical connection with New South Wales.
>
> It seems to me that the fact that the project was to be carried out in New South Wales is irrelevant to the claim as pleaded. Accordingly it cannot on that basis be properly said that this proceeding has a real and substantial connection with that State.[140]

The reasoning in *Bridge* supports the proposition that courts will overlook superficial connecting factors in favour of the real substance of the dispute in identifying the subject matter. To that end, a purely 'interpretation/construction of contract' argument could be heard in a court foreign to the jurisdiction which contains the assets the subject of the contract,[141] assuming there are no other factors supporting a transfer.

Hansen J's decision in *Lurgi (Australia) Pty Ltd & Lucon (Australia) Pty Ltd v South Pacific Insulations Pty Ltd*[142] seems to reflect an analogous approach. His Honour looked precisely to the issue at hand in forming a view as to the subject matter of the dispute, as opposed to relying on a broad characterisation of the proceeding. His Honour noted that the subcontracts were for work in Queensland

[137] (Unreported, Supreme Court of New South Wales, O'Keefe CJ, 12 July 1994).
[138] Ibid [7]. See also [6]-[10] where O'Keefe CJ lists numerous reasons for refusing the application.
[139] [2002] VSC 60 (Unreported, Harper J, 8 March 2002).
[140] Ibid [17]-[19].
[141] For example, a mine or a power station.
[142] (Unreported, Supreme Court of Victoria, Hansen J, 8 December 1995) ('*Lurgi*').

but rejected South Pacific's characterisation of the proceeding as a 'building case' involving the calling of witnesses to give evidence, including Queensland based workers. Rather, Hansen J said that 'the more appropriate characterisation [is] that the case is one in which the issue comes down to whether certain transactions were fraudulent'.[143]

The most recent decision on point is that of the Victorian Supreme Court in *Pacific Hydro Group Two Pty Ltd v Argyle Diamond Mines Pty Ltd*.[144] In this case, the plaintiffs agreed to construct a hydro-electric power station in Western Australia and to sell to the defendants the electricity it produced.[145] The plaintiffs issued proceedings in Victoria seeking declarations as to the meaning and effect of pricing provisions in the power purchase agreement between it and the defendants.

The defendants applied to transfer the proceeding to the Western Australian Supreme Court. The defendants argued that the subject matter of the proceeding comprised the hydro-electric power station and the Argyle Diamond Mine, both located in Western Australia. Byrne J said:

> The argument against transfer rested upon the submission that this case really is one which involves no more than the construction of a written document in accordance with common law principles. There being no relevant difference in the substantive law on this matter, there was no reason to suppose that this task might be more appropriately undertaken in Western Australia, or indeed any particular location.[146]

Accordingly, Byrne J refused to transfer the proceeding to Western Australia.

The subject matter criterion in *Mistral Mines* needs to be distinguished. *Mistral Mines* involved arrangements for an exploration, mining and development joint venture and an agreement for the use of confidential information. Even though the case involved contractual negotiations, the Court found that the subject matter of the proceeding comprised the mining tenements in Western Australia because the confidential information was connected with those tenements. In this regard, McDonald J said that 'the situation of the mining tenements, the situation of the documents which are clearly the subject of the proceedings and the amount of the same' were two significant factors justifying a transfer to Western Australia.[147]

F *The Plaintiff's Choice of Forum*

1 *The general rule*

The plaintiff's choice of jurisdiction will be relevant to the determination of a cross-vesting application provided that the court does not perceive it to be 'forum shopping'. In other words, there must be a valid connection between the plaintiff

[143] Ibid [27].
[144] [2003] VSC 229 (Unreported, Byrne J, 27 June 2003) ('*Pacific Hydro*').
[145] Ibid [2].
[146] Ibid [7]-[8].
[147] (Unreported, Supreme Court of Victoria, McDonald J, 29 July 1991) [102].

and the chosen jurisdiction. That connection can be established by the fact that the plaintiff has litigated previously in the jurisdiction,[148] or by the fact that the plaintiff's main residence is in that same State or Territory.

Some Victorian decisions have taken this matter into consideration. In *Ross Mollison*,[149] for example, Warren J referred to a number of conflicting observations in earlier cases as to whether the original choice of forum should be taken into account. Warren J concluded that the plaintiff's choice should be considered and in so doing cited the views of Wilcox J in *Bourke*, so that:

> [f]or an applicant's choice of forum to be overridden, there must be some objective factor which makes it possible to say that the interests of justice will be better served by transfer than by non-transfer.[150]

In the subsequent Victorian Supreme Court case of *IASbet*,[151] Habersberger J quoted Warren J's decision in *Ross Mollison* with approval and stated:

> ... the fact of original choice of forum ought not to stand alone as a determinative factor. It is a factor that ought to be considered in the context of the reasons underlying the original choice of forum and on that basis forms part of the balancing process.[152]

There is contrary authority to the effect that a consideration of the plaintiff's choice of forum is not relevant. In *Bankinvest*,[153] Rogers AJA held that the plaintiff's choice of venue was irrelevant when determining the question of the most appropriate forum. A similar view also was expressed in *Overall v Permanent Trustee Co Ltd*,[154] where Ryan J considered that the Court is required to carry out a balancing exercise and, in so doing, should not attribute any particular weight to the plaintiff's choice of forum.

However, it is apparent that the Victorian courts prefer the approach taken in *Ross Mollison*[155] and *IASbet*.[156] Therefore, in Victoria, the plaintiff's choice of forum is a relevant factor in determining a cross-vesting application.

2 *The weight afforded to the choice of forum*

There is authority to the effect that the plaintiff's choice of forum should be accorded *substantial* weight, especially if the plaintiff has litigated in the chosen jurisdiction. In *Patrick Badges*, the Court noted the plaintiff's prima facie right to litigate in the chosen jurisdiction.[157] However, ultimately the Court decided that this right was displaced by a contractual exclusive jurisdiction clause.[158]

148 Particularly where that litigation has been frequent.
149 [2000] VSC 256 (Unreported, Warren J, 19 June 2000).
150 (1988) 22 FCR 378, 396.
151 [2002] VSC 587 (Unreported, Habersberger J, 20 December 2002).
152 Ibid.
153 (1988) 14 NSWLR 711.
154 [1999] FCA 1385 (Unreported, Ryan J, 29 September 1999).
155 [2000] VSC 256 (Unreported, Warren J, 19 June 2000).
156 [2002] VSC 587 (Unreported, Habersberger J, 20 December 2002).
157 [2002] NSWSC 221 (Unreported, Supreme Court of New South Wales, Howie J, 27 March 2002) [23].
158 Ibid.

In refusing the defendant's application to transfer the proceeding to Queensland in *McKee*,[159] Gillard J noted the plaintiff:

> is entitled to have his choice of forum accorded substantial weight. In my opinion, the plaintiff's choice of the particular court and the reasons for it are relevant to the application. They must be given due weight in the absence of forum shopping.[160]

Further, the Court accorded substantial weight to the fact that one of the reasons the plaintiff chose Victoria was the availability of a trial by judge and jury, which was not available in Queensland.[161]

The judgment of Beach J in *Casey*[162] strengthens this point. In *Casey*, Beach J adopted the High Court's comment in *Voth v Manildra Flour Mills Pty Ltd*[163] that 'a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise'.[164] Although acknowledging that *Voth* concerned private international law and not cross-vesting legislation, Beach J nevertheless considered the observations in *Voth* as pertinent to the applications before him.[165]

The decision in *Casey* is interesting because despite a number of indicia which arguably might have favoured a transfer from Victoria to Tasmania,[166] the Court afforded significant weight to the plaintiff's choice of forum and to the location of most of the plaintiff's witnesses.

The authorities conflict as to whether the weight to be afforded to the choice of forum depends on the circumstances. In *Rossi Gearmotors Australia Pty Ltd v Continental Conveyor & Equipment Pty Ltd*,[167] proceedings were issued firstly in Western Australia and then further proceedings were issued by the defendant in New South Wales arising out of the same circumstances and events. The applicant sought to transfer the proceedings to New South Wales. Roberts-Smith J refused the application, stating:

> [t]he plaintiff's choice of jurisdiction is a relevant factor. The weight to be given to it will depend upon the circumstances of the particular case. I also agree ... that the expressions 'the more appropriate court' and 'in the interests of justice' are meant to encompass a wide variety of practical considerations, not all of which may be present in every instance, but which should be

159 [2001] VSC 251 (Unreported, Gillard J, 2 August 2001).
160 Ibid [19].
161 Ibid [33], [43].
162 (Unreported, Supreme Court of Victoria, Beach J, 22 April 1994).
163 (1990) 171 CLR 538 ('*Voth*').
164 Ibid 554 (Mason CJ, Deane, Dawson and Gaudron JJ).
165 (Unreported, Supreme Court of Victoria, Beach J, 22 April 1994) [3].
166 For example, the plaintiff resided in Tasmania, the plaintiff's entire period of employment with the defendant was in Tasmania, any injury suffered by the plaintiff was suffered in Tasmania and neither the injury nor the cause of action had any connection at all with Victoria, the defendant's registered office and place of business were in Tasmania, the defendant would be required to call a number of witnesses who resided in Tasmania, including retired and elderly witnesses and the Supreme Court of Tasmania apparently could have dealt with the claim.
167 [2003] WASC 42 (Unreported, Roberts-Smith J, 17 February 2003) ('*Rossi Gearmotors*').

considered and applied objectively and be given such weight as is appropriate in the individual case.[168]

The case of *Dawson* involved three applications under s 5(2)(b)(iii) of the Act. Each case involved a motor vehicle accident that occurred in New South Wales but in respect of which proceedings were instituted in the Supreme Court of the Australian Capital Territory. There were no related proceedings in New South Wales and it was not contended that the proceedings would, but for the cross-vesting legislation, be incapable of being instituted in the Australian Capital Territory. On the choice of forum question, the judgment of Miles CJ, Gallop and Higgins JJ stands for the following propositions:

(a) a legitimate reason for the plaintiff's choice of the jurisdiction will be a factor against granting a transfer; and
(b) a court may be persuaded that a transfer is required 'in the interests of justice' for reasons which have nothing to do with the appropriateness of the transferee court or the inappropriateness of the transferor court.

Weight can be given to the plaintiff's choice of forum because it is the plaintiff's regular choice of jurisdiction. This is apparent from *Leal Boss*[169] and *Casey*.[170] In *Leal Boss*, Debelle J in the South Australian Supreme Court gave considerable weight to the plaintiff's regular choice of forum in the absence of related proceedings and absent any demonstrated injustice to the defendant.[171]

The High Court's decision in *Voth* contains a helpful statement of the considerations relevant to determining whether a particular forum is appropriate or inappropriate. Although *Voth* concerned private international law and not cross-vesting legislation, by virtue of it having been endorsed in *Casey* on this question, the decision carries some weight in the context of cross-vesting applications under s 5(2)(b)(iii). Mason CJ, Deane, Dawson and Gaudron JJ held:

> First, a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise. Secondly, the traditional power to stay proceedings which have been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case.
>
> Thirdly, the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay. Finally, the jurisdiction to grant a stay or dismiss the action is to be exercised 'with great care' or 'extreme caution'.[172]

168 Ibid [29]-[32].
169 (Unreported, Supreme Court of South Australia, Debelle J, 17 February 1993).
170 (Unreported, Supreme Court of Victoria, Beach J, 22 April 1994).
171 (Unreported, Supreme Court of South Australia, Debelle J, 17 February 1993) [17].
172 (1990) 171 CLR 538, 554 (Mason CJ, Deane, Dawson and Gaudron JJ).

3 *'Acceptance' of the jurisdiction*

A defendant's 'acceptance' of the jurisdiction can be an important consideration. In *McKee* the Court noted that the defendant had filed a conditional appearance and a defence and that the parties did not dispute the Court's jurisdiction to hear the claim.[173]

Further, even if questions arise as to the application of the law of the State or Territory favoured by the applicant for transfer, it would be significant if there is no suggestion that such question would be beyond the jurisdiction of the court (in which proceedings were instituted originally) to determine.[174] It was conceded in *Dawson* that the law of New South Wales would govern the substantive questions, wherever in Australia the proceeding would be heard. The same reasoning applies if the court's authority is based on the defendant's unconditional appearance. In *Dawson* it was significant also that there was unlikely to be any question as to the validity or construction of legislation of the State favoured by the applicant for transfer.

G *The Location of the Solicitors*

Generally, the location of a party's solicitors is a relatively unimportant, or perhaps one of the least important considerations, particularly if a cross-vesting application is made early in the proceedings. In *World Firefighters*, Philippides J noted that the plaintiff's solicitors had been involved only in the pre-litigation stages. In those circumstances, there was no detriment to the plaintiff in having the proceeding cross-vested, with the possible consequence that new solicitors might have to be appointed.[175]

Needless to say, where a plaintiff has retained solicitors with various interstate offices, any prejudice in having the proceeding transferred is diminished significantly, assuming that the same solicitors are available to act in that other jurisdiction. Where no interstate offices exist, the possibility of the plaintiff's current solicitors engaging local agency legal representation in the jurisdiction to which the proceeding is to be transferred might be seen by a court as another factor neutralising any potential prejudice, as long as (arguably) there is not an undue cost impost associated with that. Of course, that would depend on the overall circumstances and the nature of the claims.

H *The Location of the Negotiation and Execution of any Contract in Dispute and the Place of the Parties' 'Dealings' with Each Other*

The location of the negotiation and execution of any contract in dispute, as well as the place of the parties' dealings with each other, are factors relevant to determining a cross-vesting application. In *Toll*[176] Warren J accepted that

[173] [2001] VSC 251 (Unreported, Gillard J, 2 August 2001) [10].
[174] *Dawson* (1994) 123 FLR 194.
[175] [2001] QSC 164 (Unreported, Philippides J, 17 May 2001) [74].
[176] [2001] VSC 467 (Unreported, Warren J, 4 December 2001).

negotiations occurred in Victoria 'and that of itself provides further basis for determining that Victoria is the more convenient forum'.[177]

In *Howden*[178] one of the reasons of O'Keefe CJ for refusing an application to transfer a proceeding from New South Wales to Victoria was the fact that the relevant contracts were negotiated and administered by both parties in Sydney. However, that did not appear to be the significant factor influencing his Honour's decision.

Further authority for the relevance of the location of contractual negotiations includes *Wholesome Bake*,[179] *Patrick Badges*[180] and *Swanson v Harley*.[181]

In *Swanson*, the defendant was a solicitor who practised in South Australia. All dealings between the plaintiff and the defendant (which comprised the subject matter of the proceeding) took place in South Australia. The Court held that the 'dealings' between the parties comprised the plaintiff's provision of instructions to the defendant given in Adelaide to prepare contracts for the purchase of land in Darwin and shares in a Victorian company, as well as the performance of all work by the defendant in South Australia.[182] These were significant factors influencing the decision to transfer proceedings from the Northern Territory to South Australia.

However, the location of negotiations or dealings is not a conclusive factor. In *Toll*, Warren J noted that the fact that the subject contracts were negotiated and executed in New South Wales 'of itself is not sufficient to command the transfer of the proceeding to New South Wales. Rather, it is a factor to be weighed up in determining [the interests of justice]'.[183]

I *The Location of the Documents*

Unless the court is confronted with a situation such as that in *Mistral Mines* where voluminous documentation is situated in the jurisdiction to which the proceeding is sought to be transferred, arguably the location of the documents is largely irrelevant. Generally, the courts take the view that documents are portable.[184]

A similar position was adopted by Warren J in *Toll* as follows:

> In this day and age I do not consider that the transfer of documents is such an overwhelmingly burdensome task that it provides a foundation for determining that the interests of justice support one forum over another.[185]

[177] Ibid.
[178] (Unreported, Supreme Court of New South Wales, O'Keefe CJ, 12 July 1994).
[179] [2001] NSWSC 248 (Unreported, Bryson J, 5 April 2001).
[180] [2002] NSWSC 221 (Unreported, Supreme Court of New South Wales, Howie J, 27 March 2002).
[181] (1995) 125 FLR 182 (Supreme Court of the Northern Territory) ('*Swanson*').
[182] Ibid 190.
[183] [2001] VSC 467 (Unreported, Warren J, 4 December 2001) [25].
[184] *World Firefighters* [2001] QSC 164 (Unreported, Philippides J, 17 May 2001) [69].
[185] [2001] VSC 467 (Unreported, Warren J, 4 December 2001) [19].

However, an exception can arise where the quantity of documents is substantial, making the movement of documents difficult, costly or impractical. In *Mistral Mines*, the vast majority of the documentation in issue was located in Western Australia. McDonald J said:

> In determining what justice dictates, in my view it is not only appropriate to have regard to that which will take place at trial but it is necessary to have regard to the whole management of the proceedings, including all interlocutory steps and also the trial of the proceedings. It would appear probable that this very large amount of documentary material [will need to be considered] ... It is highly probable that the court will be called upon to supervise interlocutory steps in these proceedings relating to that material. For that to take place from Victoria, in regard to material of this nature which is situated in Western Australia, would seem to me to be impractical and to be fraught with difficulties.[186]

J *The Existence of 'Related Proceedings'*

1 *Basic principles*

The fact that 'related proceedings' are on foot in another jurisdiction is a relevant consideration in determining a cross-vesting application. The following principles can be distilled from a review of the case law:

(a) to have any relevance in a cross-vesting application, the other proceeding between the parties must be 'related';
(b) the existence of a related proceeding is not a factor which is afforded any prima facie significant weight in relation to the other usual factors to be applied in determining the application. It is simply another relevant consideration;
(c) the onus is still on the applicant for the transfer to demonstrate justification for a transfer on related proceedings grounds;
(d) if there is a real risk of concurrency of proceedings such that two courts may be required to decide the same issues, then the existence of 'related proceedings' will be a significant factor in favour of a transfer;
(e) it may not be enough that the general subject matter of both proceedings apparently is the same or similar, rather there must be a real and substantial similarity between the issues in dispute to justify a transfer;
(f) the extent to which the proceeding sought to be transferred has progressed in terms of interlocutory steps and in the setting down for trial will be relevant, such that the more advanced a proceeding has become, the lesser chance there will be of it being transferred. However, if the related proceeding in the 'foreign' State or Territory jurisdiction already has a trial date set down and the other proceeding has not taken significant steps, then this can favour cross-vesting the proceeding; and
(g) the existence of a contractual arbitration clause (arguably, even one not invoked by the parties) specifying an exclusive jurisdiction can be taken as an

[186] (Unreported, Supreme Court of Victoria, McDonald J, 29 July 1991) [99].

indication of the parties' view of the most appropriate jurisdiction.

2 *What are 'related proceedings'?*

The concern in allowing 'related proceedings' to be decided in different jurisdictions is expressed in *Rickham Pty Ltd & Rosenhain v Duralla Creek Pty Ltd.*[187] In *Rickham* the defendant applied for an order that the proceeding commenced by the plaintiffs in Victoria be transferred to the Family Court of Australia with a view to it being tried in New South Wales. The question was whether the Sydney registry of the Family Court was the more appropriate venue.

Hansen J held that the proceeding should be transferred to avoid the possibility of inconsistency between judgments and because of the convenience of having one court with a capacity to determine all issues.[188]

In other words, for the proceeding to be 'related', the parties and the issues must be in common as opposed to a mere perception of actual or potential common questions.[189]

The requisite commonality was found to exist in *Bankinvest.* In *Bankinvest*, the plaintiffs commenced proceedings in New South Wales seeking judgment against the defendants who were guarantors of money lent by the plaintiffs. Several of the defendants also were engaged in litigation in Queensland to seek a declaration that the home units and shares which had been transferred by unit holders to allow for the discharge of the allegedly fictitious loan were held on trust for it. The defendants were successful in seeking to have the proceedings transferred to Queensland. The Court held:

> [I]t is apparent that the Queensland proceedings tender issues which are all comprehended within the present proceedings. The New South Wales action enlarges the ambit of the issues and, of course, includes parties who are not involved in the Queensland proceedings.
>
> None the less, it is clear beyond argument that, if both the New South Wales and Queensland proceedings were to proceed, there would be two courts in Australia required to make a determination of many of the same issues.[190]

And further that:

> ... it is quite unacceptable to contemplate the concurrent prosecution of proceedings in both Queensland and New South Wales.
>
> Realistically, there can only be one means of avoiding duplication and that is by transferring the New South Wales proceedings to Queensland.[191]

[187] (Unreported, Supreme Court of Victoria, Hansen J, 15 December 1995) ('*Rickham*').
[188] Ibid [9].
[189] Ibid [7].
[190] (1988) 14 NSWLR 711, 721 (Rogers AJA).
[191] Ibid 729 (Rogers AJA).

The decision of O'Keefe CJ in *Howden* appears to require the issues in proceedings to be identical. The question in that case was whether the proceeding in New South Wales was to be taken in isolation or considered as related to a Victorian proceeding. The plaintiff's claim related to contracts for the design, manufacture and delivery of certain equipment for the Loy Yang 'B' Power Station in Victoria. Shortly after, the defendant commenced proceedings in Victoria against the State Electricity Commission of Victoria ('SECV') claiming a declaration that it was entitled to certain indemnities from the SECV with respect to claims from subcontractors, including the plaintiff.

In support of the cross-vesting application for a consolidation of the two actions to Victoria, the defendant argued the utility of hearing simultaneously the New South Wales proceeding involving the plaintiff and the defendant and the Victorian proceeding involving the defendant and the SECV. O'Keefe CJ was of the view that the defendant essentially sought to have one hearing in relation to a number of the price adjustment clauses included in various contracts between it and the SECV on the one hand and its subcontractors on the other.[192]

While the present New South Wales proceeding raised questions that were similar to those which may have been involved in the Victorian proceeding, it was not established that the issues in dispute were identical. Indeed, the contrary seemed to be more likely. The application for a transfer from New South Wales to Victoria therefore was refused.

In giving reasons, O'Keefe CJ said that even if the present New South Wales proceeding was not taken in isolation but was taken to be 'related' to the Victorian proceeding, there were additional reasons still militating against a transfer.[193] His Honour considered that if a transfer were granted, the plaintiff likely would be caught up in lengthy proceedings in which its interest was that of a minor player when compared with the interests of the defendant and the SECV. Furthermore, his Honour thought that this would likely delay the finalisation of the plaintiff's claim and that if the actions were consolidated, the prospects of appeals being instituted would be increased.

The Victorian decision of *Rogan*[194] supports the approach in *Howden*. *Rogan* demonstrates that if there is a real risk of duplication of proceedings, this will be the pivotal factor in determining that the proceeding be transferred.

3 *The weight to be afforded to a related proceeding*

In *Lurgi*[195] the plaintiffs instituted proceedings for the recovery of money alleged to have been paid to the defendant subcontractor on purportedly fictitious invoices. Five other proceedings had been commenced arising out of the activities of those who the plaintiff alleged had procured improper payments during the same period.

[192] (Unreported, Supreme Court of New South Wales, O'Keefe CJ, 12 July 1994) [3].
[193] Ibid [6]-[10].
[194] [2002] VSC 375 (Unreported, Warren J, 4 September 2002).
[195] (Unreported, Supreme Court of Victoria, Hansen J, 8 December 1995).

The defendant, South Pacific Insulations Pty Ltd ('SPI') applied to have the proceeding transferred to the Queensland Supreme Court. The defendant had instituted proceedings in Queensland to satisfy legislative requirements for obtaining a subcontractor's statutory charge in that State. The defendant's writ named one of the plaintiffs and the Queensland Generation Corporation ('QGC') as defendants. Hansen J considered the following matters relevant in refusing to transfer the proceedings to Queensland:

> In the circumstances now come to be exposed one has the following: an overlap of issues and oral and documentary evidence ... all such parties are resident in Victoria with the exception of SPI; the case against SPI will involve proof of documents ... and the tracing of moneys ... the documents of these parties and of their banks other than SPI are in Victoria; further, documents of Gratz, Dietrich, PRs and Sandess are in the possession of the Victoria Police ... and if the plaintiffs require the production of them at the trial concerning SPI they will have to be produced on subpoena by arrangement with the owner (each of whom is Victorian) of the document, and which production would be more conveniently handled in Victoria ... [and] much of the evidence will be from witnesses resident in or documents located in Victoria.[196]

Lurgi demonstrates that if there are sufficient other factors favouring the retention of the proceeding in the State or Territory in which it was issued originally, the fact that there are also proceedings in another jurisdiction dealing with the same or similar subject matter is not necessarily a sufficient basis to displace the collective weight already afforded to those other factors. In other words, the fact that there are related proceedings is not a matter *prima facie* to be afforded any significant weight. Rather, it becomes simply another relevant consideration.

The case of *Sim* involved an application by the defendant to transfer the proceeding from New South Wales to Western Australia. The plaintiff had commenced an action for specific performance of a clause in a contract related to mining leases and the matter had been set down for an expedited hearing in New South Wales.[197] At the same time there were 22 plaints brought by the defendant that were pending in the Warden's Court in Western Australia for forfeiture of leases. The plaintiff was subject to time constraints as it was unable to complete a proposed sale while the plaints were awaiting determination.

The application to cross-vest to Western Australia was refused. The Court considered that there was:

> a clear case of urgency requiring the plaintiff to seek to have a judicial determination of his claim in sufficient time for the result to be available when the plaints come before the Mining Warden at Perth in May. The urgency arises out of the prospective loss of the commercial opportunity presented by

[196] (Unreported, Supreme Court of Victoria, Hansen J, 8 December 1995) [26].
[197] [2002] NSWSC 37 (Unreported, Bryson J, 1 February 2002) [21].

> the contract ... if the leases are forfeited but also if there is undue delay in achieving resolution of the plaints.[198]

Ultimately in *Sim* the court considered that:

> Considerations of convenience relating to conduct of the trial and attendance of witnesses and the state of preparation of the litigation for hearing in this Court under arrangements made for expedition, and for the hearing to take place later this month, support retaining the proceedings here.[199]
>
> ...
>
> There are indeed respects in which the interests of justice would be served by transfer of the proceedings to Western Australia, but I do not see them as, on the whole, outweighing the matters to which I have already referred which support the plaintiff's choice and support maintaining the course which the court has already established by directions for a hearing later this month.[200]

It is clear from *Sim* that if the party opposing the transfer would face the loss of a commercial opportunity by the delaying of a determination in its case, by a transfer of its case and/or if the proceeding sought to be transferred is in a state of preparation approaching readiness for trial, then that will militate against granting a transfer, despite the fact of even substantial or numerous related proceedings being on foot in another jurisdiction.

In *Global Technology*[201] Global instituted proceedings in Victoria on 3 May 2001. The Bank issued proceedings in Queensland on 25 May 2001. The Bank applied unsuccessfully for an order that the Victorian proceeding be transferred to Queensland. However, it is useful to note the words of Gillard J as to weight accorded to a plaintiff's choice in the related proceedings context:

> Another matter which has caused some controversy in the past is the question whether the person first issuing the proceedings is entitled to have his [sic] choice of forum accorded substantial weight, on an application such as the present. In my opinion, the plaintiff's choice of the particular court and the reasons for it are relevant to the application. They must be given due weight in the absence of forum shopping. But in circumstances where the plaintiff, as in this case, managed to issue its proceeding first, in circumstances where both parties were gearing up to go to litigation, the weight that should be attached to those factors is minimised. A party should gain little advantage by beating the other party to 'the draw'.[202]

4 *The onus*

In the related proceedings context, the onus appears to be on the applicant seeking a cross-vesting of the proceeding. In *Global Technology*, Gillard J said that

198 Ibid [4].
199 Ibid [20].
200 Ibid [31].
201 [2001] VSC 230 (Unreported, Gillard J, 13 July 2001).
202 Ibid [30]-[31].

'where the application is made in circumstances where there are two competing courts ... the applicant does carry the burden of persuading the Court to exercise its jurisdiction'.[203]

Rossi Gearmotors supports the proposition in *Global Technology* that the onus rests with the applicant for the transfer. Roberts-Smith J said:

> It is in that context and against that background of principle that I approach the application on the basis that where a plaintiff has chosen a venue which is lawfully open to it, there is an onus on a party seeking an order for transfer of the proceedings to a different jurisdiction to demonstrate some cogent reason why such an order should be made.[204]

5 *The stage of progression of the proceedings*

The extent to which proceedings are advanced in the transferee jurisdiction is relevant. The Victorian decision of *Rogan*[205] involved a complex commercial dispute and an application for a transfer from Victoria to Queensland where there were existing and apparently related proceedings in Queensland.

Rogan demonstrates that if there is a real risk of duplication of proceedings, this will be the pivotal factor in determining that the proceeding should be transferred. In that case, the Court held that it was appropriate for all causes of action to be heard at once and granted the application to cross-vest to Queensland. Critical to the Court's determination were the following factors:

(a) the interlocutory steps in the Queensland proceeding had progressed expeditiously and were well advanced;
(b) there was a possibility of the Queensland proceeding being fixed for trial in the latter part of 2002;[206]
(c) the conduct alleged and the matter of cost and inconvenience fell equally between Queensland and Victoria;[207]
(d) it was undesirable for the various issues for determination to be dissected between different courts;[208] and
(e) no specific aspect of the subject agreement was governed by a law unique to a particular jurisdiction. There was no special reason preventing a Queensland court from considering Victorian law.[209]

Rogan demonstrates that a court is less likely to order that a case be cross-vested if it is well advanced in the jurisdiction in which it was issued originally, particularly if it is set down for trial. However, if it is fair and practicable to transfer a proceeding to the jurisdiction of the related proceeding where that related proceeding is sufficiently advanced, then this may favour a transfer.

[203] Ibid [30].
[204] [2003] WASC 42 (Unreported, Roberts-Smith J, 17 February 2003) [30].
[205] [2002] VSC 375 (Unreported, Warren J, 4 September 2002).
[206] Ibid [8], [17], [20].
[207] Ibid [17].
[208] Ibid [17], [18].
[209] Ibid [17], [21].

K *The Relevance of Contractual Arbitration Agreements*

Authority suggests that the existence of a contractual arbitration agreement (or, by implication, a contractual agreement for any other type of alternative dispute resolution mechanism) that specifies an exclusive jurisdiction for the arbitration (or another alternative dispute resolution mechanism) is highly persuasive towards cross-vesting the proceeding to that jurisdiction.[210]

In *Global Technology* Gillard J noted:

> In my opinion, it is a matter of considerable substance, when addressing the question whether it is more appropriate that the proceedings be determined by the Supreme Court of Queensland or, that otherwise, it is in the interests of justice that the proceedings should be determined by that Court, that the parties agreed that any arbitration should take place in Melbourne.[211]

It should be noted that in *Global Technology* the defendant had taken steps to invoke the 'amicable resolution' process pursuant to the contract's preliminary dispute resolution regime, however the plaintiff issued proceedings in the Victorian Supreme Court. It is not clear from the judgment why the parties chose to ignore the arbitration agreement. His Honour made no mention of any application to stay the proceeding on account of there being an apparently binding arbitration agreement but simply referred to the existence of the arbitration agreement and accorded that significant weight.

VII CONCLUSION

Given the subject matter of this exposition, it seems somewhat artificial to seek to draw an overarching conclusion on the law governing cross-vesting applications under s 5(2)(b)(iii) of the Act. It is true (and perhaps trite) to say that 'the interests of justice' will be the ultimate guiding consideration. However, some final observations still can be made.

Firstly, given the volume and nature of the case law, one might query whether the courts are adopting sufficiently consistent approaches in their consideration and application of the factors relevant to the determination of cross-vesting applications. It may be that the very case-by-case nature of the process makes that task more difficult. In a number of respects, the courts appear to be converging in their approach but it seems that a wholly consistent judicial approach is lacking.

[210] However, as far as arbitration agreements are concerned, that conclusion would appear to be predicated on the assumption that the court does not exercise its discretion to stay the proceedings under the *Commercial Arbitration Act 1984* (Vic) (or other equivalent State Acts) notwithstanding the existence of an arbitration agreement, so that the dispute rather is regulated by the courts in the event of there being a transfer of the proceeding - for example where neither party has sought to rely on the arbitration agreement and has proceeded to litigate instead as apparently was the case in *Global Technology*.

[211] [2001] VSC 230 (Unreported, Gillard J, 13 July 2001) [64].

Secondly, it is clear that the impact of technological developments means that some of the considerations formerly attributed significant weight, such as the location of witnesses, are no longer as important as they once might have been. Various courts have introduced video-conferencing facilities for the taking of evidence from interstate witnesses. It seems safe to say that, except in special circumstances, the need for a witness actually to appear in court as a ground in favour of a cross-vesting application is not absolute.

Set out above are the identifiable processes by which the courts assess the interests of justice in these applications, with some very clear factors for consideration now established. This should assist parties in assessing their respective positions when either making or defending a cross-vesting application. For parties considering making such an application, it is clear that such a step is not to be embarked upon lightly.