COMPARATIVE STUDY OF “RESIDUAL JURISDICTION” IN CIVIL AND COMMERCIAL DISPUTES IN THE EU
NATIONAL REPORT FOR:

ENGLAND

PREPARED BY:

CHRIS WOODRUFF & KAREN REED
MACLAY MURRAY & SPENS LLP
ONE LONDON WALL,
LONDON EC2Y 5AB – UNITED KINGDOM
(A) General Structure of National Jurisdictional Rules for Cross-Border Disputes

1. Main legal Sources

The primary legal sources for the rules regarding jurisdiction in England, disregarding the Brussels I Regulation and the Brussels/Lugano Conventions, are derived from the Civil Jurisdiction and Judgements Act 1982 ("the 1982 Act"). The primary purpose of this Act was to incorporate the Brussels/Lugano Convention and, more recently the Brussels I Convention, into UK Law.

Schedule 4 of the 1982 Act determines whether the correct jurisdiction in which proceedings should be brought, is England, Scotland, Wales or Northern Ireland when the Defendant is domiciled in the UK. Schedule 4 also allocates jurisdiction between Scotland, England, Wales and Northern Ireland in civil and commercial cases which have no non-UK element but in which a Defendant is domiciled in any part of the UK. There are a limited number of instances where the rules contained in Schedule 4 of the 1982 Act do not apply. These are specified in section 16 and Schedule 5 of the 1982 Act.

In areas where the 1982 Act is not applicable, the English jurisdictional rules derive from either specific principles contained in statues, statutory instruments of the UK or from common law. Common law in England is an unwritten body of law that is derived from precedent and case law as established in the English courts. One of the central features of the common law rules regarding jurisdiction in England, is that a Defendant, who is served with a claim form in England, is subject in personam to the jurisdiction of that Court, regardless of how fleeting his presence might be (H.R.H Maharanee Seethadevi Gaekwar of Baroda v Wildenstein [1972] 2 W.L.R 1077; Colt Industries Inc. v Sarlie [1966] 1 W.L.R 440). The jurisdictional rules have largely been codified in the Civil Procedural Rules ("CPR"), which govern all civil and commercial actions within England and Wales. Part 6.20 of the CPR establishes the provision for service of a claim form out of jurisdiction. This means that it is no longer a requirement for the Defendant to be present within the jurisdiction for proceedings to be commenced against him.

The full and current texts, in English, of the 1982 Act and the CPR Part 6 are attached to this report as Appendix 1.

2. Specific Rules (or Not) for Transnational Disputes

The English Courts' approach to cross border disputes has been heavily influenced by the notion that the English Courts intervention is justified internationally if the Court has personal jurisdiction over the Defendant. This, of course, arises when a claim form is served on the Defendant.

The question over jurisdiction in internal and European disputes is settled by the notion that a person shall be sued in the Courts where they are domiciled, subject to certain exceptions. Only in the circumstances where statute provides no guidance would the common law rules of jurisdiction be applied.
3. Specific Rules (or Not) for Article 4(1) Jurisdiction

There is no specific set of rules that have been designed to govern jurisdiction of the Courts in terms of Article 4(1) of the Brussels 1 Regulation. Instead it is the common law rules relating to jurisdiction and the CPR that are applied to cross border cases.

4. Influence of EU Law

The 1982 Act was introduced to incorporate the Brussels/Lugano Conventions into UK Law. As a result both the main body of the 1982 Act and Schedule 4 (referred to above) reflect the law of the Conventions. The Civil Jurisdiction and Judgement Order 2001 (UK Statutory Instrument 2001/3929) was passed in light of the Brussels I Regulation, to preserve the current position of European jurisdiction in the UK and to bring our legislation into line with the new regulation.

In addition, the 1982 Act makes specific provision for account to be taken by the judiciary of both the wording of the Brussels/Lugano Conventions and the Brussels I Regulation and of any decision of the European Court of Justice on the meaning or effect of the Conventions or Regulation.

Section 3 of the 1982 Act provides *inter alia* that:

“(1) Any question as to meaning or effect of any provision of the Brussels Convention shall...be determined in accordance with the principles laid down by and any relevant decision of the European Court.

(2) Judicial notice shall be taken of any decision of, or expression of opinion by, the European Court on any such question...”

Section 16 (3) of the 1982 Act goes on to provide *inter alia* that:

“ In determining any question as to the meaning or effect of any provision contained in Schedule 4 –

(a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 convention [or Chapter II of the Regulation] and to any relevant decision of that court as to meaning or effect of any provision of that Title [or that Chapter]; and

(b) without prejudice to the generality of paragraph (a), the reports mentioned in section 3(3) may be considered and shall, so far be relevant, be given such weight as in appropriate (i) the circumstances.”

The reports mentioned above are the report by Mr P Jenard, the report by Professor Schlosser, the report by Professors Evrigenis and Kerameus and the report by Mr de Almeida Cruz, Mr Desantes Real and Mr Jenard.

5. Impact of Other Sources of Law

It is a requirement throughout the United Kingdom, that all UK legislation is to be interpreted in a manner compatible with the provisions of the European Convention on Human Rights which was adopted into UK law by the Human Rights Act 1998.
The 1982 Act is only applicable to civil and commercial matters and is therefore not applicable to constitutional law.

6. Other Specific Features

As previously stated, provided that the Defendant is served with the claim form in England, the English Courts will have jurisdiction. No leave of the English Courts is required to issue a claim form on a foreign Defendant provided that they are in England at the time of service. *(H.R.M Maharanee Seethadevi of Baroda v Wildenstein; Colt Industries Inc v Sarlie)*

It is also a feature of the English Courts that they can exercise jurisdiction over a Defendant who is outside of the jurisdiction, provided the Defendant has been duly served. In non-Brussels Convention cases, the Claimant must first satisfy the Court that the case should proceed in the English Courts. CPR Part 6.20 sets out when permission is required for service out of jurisdiction and the grounds on which permission may be sought.

The Courts have the power, whenever it is necessary to prevent an injustice, to stay or strike out proceedings in England under the principle of *forum non conveniens*. This principle will be considered in detail in section E of this report, but in essence it works on the assumption the English Courts should have the power to stay proceedings if they believe that England is an inappropriate forum to bring the action. The case of *Spilada Martitime Corporation* held that there are three main issues to be considered before staying proceedings: (i) whether there is another forum available which is more appropriate; (ii) whether England is not a natural or appropriate forum and the alternative forum is more natural and appropriate (this will involve looking at which forum will have the most real and substantial connection to the action); and (iii) whether it is just that the Claimant be deprived of the right to trial in England.

7. Reform

At the time of writing, we are not aware of any proposed or contemplated changes to England’s national rules of jurisdiction in relation to cross-border transactions.

(B) Bilateral and Multilateral Conventions

8. Conventions with Third States

Although there are no Conventions to which England is party, which specifically relate to jurisdictional matters, there are a number of international conventions to which England is party which, in relation to the particular subject matter of the Conventions, establish special rules as to the Courts which are to have jurisdiction to hear and determine any disputes. These conventions all relate to one specific subject area, namely the international carriage of passengers and goods by either air, road, rail or sea. The relevant conventions are:

- The Warsaw Convention, 1929, as amended by the Hague Convention, 1955 – applies to the carriage of passengers, baggage and cargo by air
- The Guadalajara Convention, 1961 – provides clarification on the rules relating to carriage by air being perform by someone different to the contracting carrier
- The Berne Convention, 1980 – relates to international carriage by rail
- The Geneva Convention, 1956 – relates to international carriage of goods by road
• The Athens Convention, 1974 – relates to the carriage of passengers and luggage by sea
• The Chicago Convention, 1944 – relates to international civil aviation
• Brussels Convention, 1952 – relates to civil jurisdiction in matters of collision at sea.

The United Kingdom is also party to two conventions in relation to the recognition and enforcement of maintenance orders issued by a foreign Court. These conventions are:

• Convention on the recognition and enforcement of decisions relation to maintenance obligations – The Hague, 2 October 1973
• Convention for the recovery abroad of maintenance – New York, 20 June 1956

In addition, there are a number of countries that are party to the Administration of Justice Act 1920 and the Foreign Judgements (Reciprocal Enforcements) Act 1933 (please refer to section D of this report).

9. Practical Impact of international conventions with third states

The above conventions have all been enacted in UK legislation and subscribed by all member states of the EU. For this reason, service out of the jurisdiction without permission of the Court is permissible by virtue of CPR 6.19.

(C) Applicable National Rules Pursuant to Article 4 of Brussels I Regulation

10. Structure

The general structure of the English jurisdictional rules relating to actions against Defendants in non-EU states is rather complex due to the lack of uniformity in the rules.

The primary rule relating to cross-border jurisdiction is based on common law rules which are now largely reiterated in the CPR. Part 7 of the CPR provides that a Defendant should be sued in the jurisdiction where the claim form is served on him. CPR Part 6.20 allows for the possibility of serving notice on a Defendant outside of the jurisdiction, in certain circumstances and with the permission of the Court.

11. General Jurisdiction

The general rule of jurisdiction, as mentioned above, is that the Defendant shall be sued where the claim form is issued. While the English Courts can issue a claim form against anyone who is in England, no matter on the length of stay, the rules regarding service outside of the jurisdiction are more stringent.

To serve a claim form on a Defendant out of the jurisdiction, the Claimant must first seek permission of the Courts, if required. CPR part 6.19 identifies the situations where permission of the Court is not required. These are:

(i) cases where the Court has jurisdiction under the Regulation or the Brussels or Lugano Conventions

(ii) similar cases as in section (i), but where the Defendant is domiciled in Scotland and Northern Ireland
(iii) cases where the Defendant is not within the jurisdiction of the Court, but Court has been given jurisdiction by statute to consider a claim

Conversely, permission from the Court is required where the case falls outside situations (i) to (iii) above and under one of the general or specific jurisdictional grounds of CPR 6.20. In addition it is also required that a Court in England can be shown to be the most appropriate forum for the dispute.

If permission is required, the Claimant must lodge an affidavit setting out the facts which justify the granting of permission. There is no oral hearing and a case will only be declared proper if: (i) if falls within at least one of the categories of the Rules of the Supreme Court Order 11 (see below); (ii) the Claimant has a serious issue to be tried on the merits; and (iii) the Court is satisfied that it should exercise its discretion to make the order.

The Rules of the Supreme Court Order 11, have been re-enacted in the CPR (Part 50 and Schedule 1) and are as follows:

- the Defendant is domiciled in England, but is present abroad;
- the action is seeking an injunction that the Defendant do or refrain from doing anything in England;
- the Defendant is a necessary party or proper party to a claim brought against another person who has been duly served in England;
- the action concerns a contract which was made in England or was made by or through an agent trading or residing in England or is governed by English law or contains a jurisdiction clause in favour of the English Courts;
- the action was made in respect of a breach in England of a contract, wherever the contract was made;
- in a tort action, the damage was suffered or resulted from an act committed, in England.

12. Specific Rules of Jurisdiction

CPR Part 6.20 lists cases where permission may be given for service out of jurisdiction. These rules broadly resemble the provisions of the Convention/ Regulation.

a) Contract

A claim form may be served out of the jurisdiction with permission of the Court. As explained above the Rules of the Supreme Court Order 11 provide guidance as to when jurisdiction should be accepted by a Court in contract cases, these are as follows:

- the contract was made within the jurisdiction;
- the contract was made by or through an agent trading or residing within the jurisdiction
- the contract is governed by English law;
• the contract contains a term to the effect that the Court is to have jurisdiction to determine any claim in respect of the contract;
• the action relates to a breach which occurred in England.

When the parties have expressed their intention as to the law governing the contract then in general it is determined that this is the proper law of the contract. Where there is no express selection then it is inferred from the terms and the nature of the contract and the general circumstances of the case i.e. the system to which the contract had the closest and most real connection.

b) Tort

CPR Part 6.20(8) states that permission for service out of jurisdiction can be given for a claim made in tort when:

"(i) Damage was sustained within the jurisdiction; or (ii) the damage sustained resulted from an act committed within the jurisdiction"

c) Criminal Proceedings

In accordance with the 1982 Act, a person may be sued, as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the Court seized of those proceedings, to the extent that the Court has jurisdiction to entertain civil proceedings. While this rule does not govern jurisdiction between England and a non-EU party, it will provide the Courts with guidance when deciding whether England is the proper place for the action to be heard.

d) Secondary Establishment

Under s.695 of the Companies Act 1985, if a foreign company has an established place of business within the jurisdiction, proceedings can be served on it there, in order to give the English Courts jurisdiction.

CPR 6.16 states that it is possible to serve a claim form on an agent whose principal is overseas provided that certain conditions are satisfied, namely:

" (i) the contract to which the claim relates was entered into within the jurisdiction with or through the Defendant's agent; and (ii) at the time of the application either the agent's authority has not been terminated or he is still in business relations with his principal “.

The above rules should be read alongside the rules relating to tort and contract, depending on the type of action.

e) Trust

Part 6.20 of the CPR, provides for five occasions when permission can be sought for service out of jurisdiction with regard to claims concerning trusts:

CPR 6.20(11):

“a claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument where (a) the trusts ought to be executed according to English law; and (b) the person on whom the claim form is to be served is a trustee of the trust”

There is no requirement that the trust property need be situated in England
CPR 6.20(12):
“a claim is made for any remedy which might be obtained in proceedings for the administration of the estate of a person who dies domiciled within the jurisdiction”

CPR 6.20(13):
“a claim is made in probate proceedings which includes a claim for the rectification of a will”

CPR 6.20(14):
“a claim is made for a remedy against the Defendant as constructive trustee where the Defendant’s alleged liability arises out of acts committed within the jurisdiction”

CPR 6.20(15):
“a claim is made for restitution where the Defendant’s alleged liability arises out of acts committed within the jurisdiction”

f) Arrest and/or location of Property

CPR Part 6.20(10) states that permission for service outside of the jurisdiction can be sought where:

“the whole subject matter of a claim relates to property within the jurisdiction”.

This section is interpreted very broadly and includes claims relating to the ownership or possession of property and claims for relief provided that the property is located in the jurisdiction.

13. Protective Rules of Jurisdiction

In England there are no specific protective rules for non-EU Defendants. The common law position is that if the Defendant is within the jurisdiction, then he can be served with a claim form. The Court may decide to decline jurisdiction on the basis of forum non conveniens if it finds that it is not the most appropriate forum to hear the case.

a) Consumer Contracts

The rules regarding service out of jurisdiction in contract cases are applicable here. However, when exercising its discretion as to whether to accept jurisdiction the Courts will consider the impact on the non-EU consumer being brought to trial in the English Courts when the Claimant is a professional.

b) Individual Employment Contracts

Depending upon the nature of the right to be enforced, claims arising out of an employment relationship may be brought before the general court system or more commonly, specialist Employment Tribunals. The forum will depend entirely upon the nature of the right to be enforced. The majority of the rights of employees and workers in the UK are created in primary or secondary legislation. Statutory rights include such rights as the right to a minimum wage, to a maximum working week and time off, the right not to be unfairly dismissed, the right to a redundancy payment and the right not to be discriminated against on the basis of, amongst others, sex, race, disability or age. A smaller group of rights arise in common law principally in connection with the contract of employment or service.
These two categories of right are enforced before either, or occasionally both, courts and the specialist Employment Tribunals. In general, and subject to exception, those rights which arise in legislation may be enforced only before the Employment Tribunals. The jurisdiction of the Employment Tribunal is provided in the Employment Tribunals Act 1996 (“ETA 1996”) and is, in effect, the jurisdiction conferred by that Act and any other Act whether passed before or after the ETA 1996.

On the other hand the jurisdiction of Employment Tribunals to hear contractual claims is limited in extent and significantly in value. The courts have a generally unlimited jurisdiction in contractual claims. As a result, any assessment of territorial jurisdiction in employment matters in the UK must begin with a consideration and categorisation of the right which is to be enforced. With that in mind, the following discussion considers the questions on the basis of (first) statutory claims; and (second) claims arising at common law in connection with the contract of employment.

### Statutory Claims

Jurisdiction for statutory claims, i.e those which can be brought in the Employment Tribunal is set out in the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2004 and in particular at Regulation 19 which provides that

Employment Tribunals in England and Wales have jurisdiction to deal with proceedings only where

- the Respondent (generally the employer) or one of the Respondents resides or carries on business in England and Wales;
- had the action been brought in the county court the cause would have arisen wholly or partly in England and Wales;
- the proceedings are to determine a question which has been referred to by a court in England and Wales
- in certain special claims arising from health and safety and discrimination notices where the proceedings relate to matters arising in England and Wales.

As a result, an employee working in the UK for an employer domiciled outside the UK or the EU cannot generally bring a statutory claim before the Employment Tribunal. That is not to say that there could not be situations where if a worker carried out work in the UK for a non EU domiciled employer for period of time an Employment Tribunal might not be persuaded that the employment of the worker in the UK constituted carrying on business. However, as a general rule the Employment Tribunal has no jurisdiction to hear claims against employers domiciled outside the EU.

There are no circumstances where an Employment Tribunal has jurisdiction to hear a claim by an employer against an employee.

### Common Law Claims relating to Contract of Employment

In general the rules of jurisdiction which apply in the courts under the Regulation or the Conventions will apply to contractual employment claims. The range of contractual employment claims include debts, such as a failure to pay notice under a contract, breach of contract claims and the like.

The Conventions will not, of course, apply to those states outside the EU and EEA. As a result the common law rule that a defender must be sued in his domicile will apply. Therefore, an employee who works for an employer domiciled outside of the EU and EEA will have no basis to bring a claim before the courts in the UK. That of course is not the case for an employer domiciled within the EEA or EU to whom the conventions will apply and who as a result may be pursued where the contract is performed.
The courts in the UK will generally not consider a claim where the defendant is domiciled outside the EU or EEA. Unless there were some close connection between the employee and the EU or EEA, the circumstances where a claim could be brought in the courts of the UK to vindicate an employers rights are minimal.

c) **Insurance Contracts**

For insurance matters, it is again necessary to look at the rules regarding service out of jurisdiction for contract cases. Provided that the insurance matter has some relation to England and the Courts believe themselves to be the most appropriate forum to bring the matter, a non-EU defendant can be sued in the English Courts. The Court will again consider the practical impact on the policyholder when considering whether England is or is not the most appropriate forum.

d) **Distribution Contracts**

Again there are no specific rules regarding jurisdiction in agency matters and so again the rules regarding contracts are the most appropriate source of law.
14. Rules for the Consolidation of Claims

a) Co-Defendants

CPR 6.20(3) makes it clear that if proceedings have been or are to be commenced against the original Defendant within the jurisdiction then it is possible to serve proceedings out of the jurisdiction against another party provided that (i) there is a real issue between the Claimant and the original Defendant, which is reasonable for the Courts to try and (ii) the other party is an necessary and proper party to the claim.

b) Third Party Proceedings

Whilst there are no specific rules regarding third party proceedings, with regard to warranty and guarantee claims the above rules can be applied, provided that the third party is a proper and necessary party to the claim.

c) Counter-Claims

Permission is not needed to serve a counterclaim (known as a Part 20 counterclaim) on a foreign Claimant, as by suing in England, he is regarded as submitting to the jurisdiction in relation to any counterclaim. This was stated in Derby & Co v Larsson [1976] 1 W.L.R. 202 and is reiterated in the Practice Direction to CPR 6.20.

d) Related Claims

At the time of writing, we are not aware of any further rules apart from those mentioned above.

e) Any Problems Pertaining to Lack of Harmonisation

At the time of writing, we are not aware of any specific problems that have arisen in practice relating to the above mentioned rules.

15. Rules of Jurisdiction Pursuant to Annex I of Brussels I

a) The rules listed in annex I

There are three jurisdictional rules of the United Kingdom which are listed in Annex 1 to the Regulation. These are:

- A rule allowing jurisdiction to be founded on service of papers on a party during his temporary presence in the United Kingdom
- A rule allowing jurisdiction to be founded on the presence in the United Kingdom or property belonging to the Defendant
- A rule allowing jurisdiction to be founded upon seizure by the Claimant of property situated in the United Kingdom
b) Practical use of the rules listed in Annex I

These are the rules that govern matters relating to cross-border jurisdiction in England and are therefore used whenever the action involves a question of cross border jurisdiction. How this law has been applied in the English Courts, has been examined in the preceding paragraphs.

c) Extension of jurisdiction pursuant to article 4(2) of Brussels I

The three rules that are set out in Annex 1 are discussed below together with any relevant case law:

- The rule allowing jurisdiction to be founded on service of papers on a party during his temporary presence in the United Kingdom. The case of *H.R.H Maharanee Seethadevi Gaekwar of Baroda v Wildenstein* ([1972] 2 W.L.R 1077) was referred to in part A of this report. In this case a French Defendant arrived in the UK to attended Ascot races and while he was at the races he was served with a claim form. It was held that the claim form had been properly served on him and only if he could prove that the case being held in the English Courts would be oppressive on him could the action be stayed. A full copy of this case can be found as Appendix 1. In the case of *Colt Industries Inc. v Sarlie* [1966] 1 WLR 440 an American Defendant arrived in the UK for a few days. The Claimant, an American firm, served the Defendant with proceedings on the basis of a judgement that had previously been granted in New York. It was held that the Courts had jurisdiction and that it was immaterial that the cause of action arose outside of the jurisdiction or that the Defendant was only in the jurisdiction for a short period.

- The rule allowing jurisdiction to be founded on the presence in the United Kingdom of property belonging to the defendant. The CPR makes it clear that jurisdiction can not be founded on mere presence of property, it is necessary to apply to the Courts for permission to serve a defendant out of jurisdiction, even if the property to which the case relates is in the jurisdiction. Therefore, there is no case law which demonstrates the use of this rule.

- The rule allowing jurisdiction to be founded upon seizure by the Claimant of property situated in the United Kingdom – As noted in point 2 above, it is necessary to apply to the Courts for service out of jurisdiction.

16. Forum necessitatis

The principle of *forum necessitatis* is not familiar to the English Courts. However, when looking at whether to accept jurisdiction or not the Courts will consider the availability and suitability of other foreign forums for the case to be heard. If the English Courts find that an alternative forum is more suitable the Courts will stay the proceedings in England.

(D) National Jurisdiction & Enforcement of Non-EU Judgments

17. National rules of jurisdiction barring the enforcement of a non-EU judgment

The rules relating to whether the English Courts can recognise and enforce the judgment of a foreign Court, are derived from three sources, English common law, the Administration of Justice Act 1920 (“the 1920 Act”) and the Foreign Judgements (Reciprocal Enforcement) Act 1933 (“the 1933 Act”).

At common law, subject to certain qualifications, a judgment *in personam* of a foreign Court in a competent jurisdiction is capable of recognition and enforcement in England. A foreign judgment will not be recognised if it shows on its face a perverse and deliberate refusal to apply generally accepted
doctrines of private international law. In addition, a judgment will not be recognised or enforced in England if, (i) it was obtained by fraud, (ii) its recognition or enforcement would be contrary to public policy (iii) it was obtained in proceedings which were contrary to natural or substantial justice.

Under the Administration of Justice Act 1920 ("the 1920 Act"), where a judgment has been obtained in a superior Court in any of Her Majesty's dominions, outside of the UK, the judgment creditor may apply to the High Court in England, anytime within 12 months after the date of the judgment, or a lengthier period should the Court allow, to have the judgment registered in the Court. The Court may order the judgment to be registered if it thinks, in all the circumstances, that it is just and convenient that the judgment should be enforced in the UK. The 1920 applies to judgments made in Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Botswana, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Christmas Island, Cocos (Keeling) Islands, Cyprus, Dominica, Falkland Islands, Fiji, Gambia, Grenada, Guyana, Hong Kong, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, Newfoundland, New Zealand, Nigeria, Norfolk Island, Papua New Guinea, St. Christopher and Nevis, St Helena, St Lucia, St Vincent and the Grenadines, Seychelles, Sierra Leone, Singapore, Solomon Islands, Akrotiri and Dhekelia in Cyprus, Sri Lanka, Swaziland, Tanzania, Trinidad and Tobago, Turks and Caicos Islands, Tuvalu, Uganda, Zambia and Zimbabwe.

The 1933 Act establishes the principle whereby foreign judgements are registered on a reciprocal basis. The 1933 Act extended the geographical area from the previous 1920 Act to include India, Pakistan, Australia and the states and territories of Australia, the federal Court of Canada and the Canadian provinces except Quebec, Tonga, Guernsey, Jersey, and the Isle of Man.

(E) Declining Jurisdiction

18. Forum Non Conveniens

Section 49 of the 1982 provides that:

"Nothing in the Act shall prevent any Court in the United Kingdom from staying, sistng, striking out or dismissing any proceedings before it, on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 convention"

Where the Convention is inapplicable, i.e. the matter is not within the scope of the Convention, the Courts in England will be able to apply their rules on stays of action (whether these are based on forum non conveniens, or on a foreign choice of jurisdiction clause) as well as their traditional bases of jurisdiction.

The stay of proceedings must not, because of section 49 of the 1982 Act, be inconsistent with the Convention. It follows that once it has been decided that the English Court should stay or decline jurisdiction under Articles 21 or 22 of the Convention, it becomes immaterial to consider whether England is the appropriate or inappropriate forum for trial.

The basic principle is that a stay will only be granted on the ground of forum non conveniens where the Court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

It is a two stage inquiry

1. Another available forum which is clearly more appropriate.
The burden of proof is on the Defendant to show that there is another available forum which is clearly or distinctly more appropriate than the English forum.

It is not enough just to show that England is not the natural or appropriate forum for trial. Nor is it enough to establish a mere balance of convenience in favour of the foreign forum.

The appropriate forum will be the country with which the action has the most real and substantial connection (as stated per Lord Keith in *Rockware Glass Ltd v MacShannon* [1978] AC 795 at 829). The Court will look for connecting factors "and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction...and the place where the parties respectively reside or carry on business" (*Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 478).

Furthermore, where there is no clearly more appropriate forum abroad, the Courts will ordinarily refuse a stay of proceedings. This will be the case where an action arises out of a collision on the high seas and accordingly no natural forum exists. Similarly, where England is identified as the natural forum, a stay will be refused. Where the Court has exercised its jurisdiction to permit service of proceedings out of the jurisdiction, the Court has already decided that England is the appropriate forum.

(2) The requirements of justice

"if there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it [the court] will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted." (as per Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 478.)

Once it has been shown that there is clearly a more appropriate forum for trial abroad the burden of proof shifts to the Claimant to justify coming to England. As a general rule, the Court will not refuse to grant a stay simply because the claimant has shown that no financial assistance (eg legal aid) will be available to him in the appropriate forum, whereas such financial assistance will be available to him in England. However, in *Connelly v RTZ Corp* [1999] C.L.C. 533, where no financial assistance was available to the Claimant and the House of Lords refused to stay proceedings despite the fact, which was accepted by the Claimant, that Namibia was the jurisdiction with which the action had the closest connection. This was an exceptional case since it was clear that the nature and complexity of the case was such that it could not be tried at all without the benefit of financial assistance.

In determining whether justice requires that a stay should not be granted, all of the circumstances of the case will be taken into account, for example; (i) where the judiciary is not independent; (ii) where a Claimant, who had an arguable claim, finds his claim summarily rejected; (iii) an inordinate delay before the action comes to trial (ie 10 years); (iv) the imposition of a derisory low limit on damages; (v) where the Claimant would be liable to imprisonment if he were to return to the alternative forum.

**LIS ALIBI PENDENS or MULTICIPlicity OF PROCEEDINGS**

In *Cleveland Museum of Art v Capricorn Art International SA* [1990] 2 Lloyd’s Rep. 166 there were concurrent proceedings in Ohio and England, Hirst J applied the basic principle stated in the Spiliada case. He examined all the factors in the case, including the undesirable consequences of concurrent litigation and granted a stay of the English proceedings.

In contrast, in *E I Du Pont de Nemours & Co v Agnew and Kerr* [1987] 2 Lloyd’s Rep 585 it was not shown that Illinois was clearly more appropriate than England. The undesirability of concurrent litigation was outweighed by the other factors including that the contract was governed by English law, that questions...
of English public policy would arise and doubts as to whether any foreign Court could fairly resolve them and accordingly, a stay was refused.

In *The Coral Isis* ([1986] 1 Lloyd’s Rep 413), a case involving a collision in international waters between two ships of different nationalities, a stay was refused on the basis that no country was the natural forum for trial.

The weight to be attached to the factor of multiplicity of proceedings will depend on the circumstances of the case. It is not a decisive factor. An English choice of jurisdiction clause may outweigh the multiplicity of proceedings factor and a stay may be refused.

19. Declining Jurisdiction when the Defendant is Domiciled in a Third State

Pursuant to Article 4, where the Convention applies, but none of the bases of jurisdiction set out therein come into play (ie the Defendant is domiciled in a non-Contracting State and neither Article 16 nor 17 applies) the same principles as outlined above in paragraph 18 apply. It was held in *Sarrio SA v Kuwait Investment Authority* [1997] 1 Lloyd’s Rep 113 that in light of what Article 4 provides, the doctrine of *forum non conveniens* can also operate in cases where Article 4 applies.

The *Sarrio* case involved the situation where the alternative forum was a Contracting State. It is clear that if the alternative forum is a non-Contracting State the *forum non conveniens* discretion can still be used, but it is not entirely clear whether this is simply because it is an Article 4 case, and therefore whether the alternative forum is a Contracting or a non-Contracting State becomes irrelevant or because the principle in *Re Harrods (Buenos Aires) Ltd*, (which states that there is no inconsistency with the Convention in staying proceedings in favour of a non-Contracting State), would extend beyond Article 2 cases to Article 4 cases.

a) Non-EU Jurisdiction Agreements

In determining the “appropriateness” of forum, an agreement by the parties to trial in a foreign country is a strong indication that the appropriate forum is abroad and operates as a weighty factor in favour of a stay of the English proceedings being granted under the doctrine of *forum non conveniens*.

Where the English Court has undoubted jurisdiction over actions properly instituted here, there is an inherent discretion for the court to disregard an express foreign jurisdiction clause. Nonetheless, in accordance with the principle that a contractual undertaking should be honoured, there is a prima facie rule that an action brought in England in defiance of an agreement to submit to a foreign jurisdiction will be stayed. However, the Court has a discretion in the matter and may allow the English action to continue if it considers that the ends of justice will be better served by a trial in this country.

The principle that the parties should abide by their agreement is of great importance in cases involving an exclusive jurisdiction clause. The starting point is that the English proceedings should be stayed if there is such a clause providing for the exclusive jurisdiction of a foreign Court. Under the *forum non conveniens* discretion the starting point is that an action properly commenced in England should be allowed to continue.

b) Parallel Proceedings in a non-EU court

It does not matter, in principle, whether the action was commenced first in England or abroad (see *The Coral Isis and E I Du Pont de Nemours & Co*).

20. Declining Jurisdiction When the Defendant is Domiciled in the EU

a) Non-EU Choice of court clause
The English Courts are reluctant to permit service out of jurisdiction, if the parties have agreed to submit all their disputes to a foreign Court. The English Courts will require very strong arguments for the submission to the foreign Court to be overlooked (Mackender v Feldia AG [1967] 2 QB590).

b) Non-EU Parallel proceeding

Section 49 of the 1982 Act provides that nothing in the Act shall prevent any UK Court from staying or dismissing any proceedings before it on the ground of forum non conveniens or otherwise. It appears therefore, that this clause preserves the pre-existing common law plea of lis alibi pendens. In these circumstances it is at least theoretically possible that an English Court could refuse jurisdiction or stay proceedings in circumstances where proceedings had already been raised in another, albeit non-EU state.

c) Non-EU Exclusive jurisdiction

Where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal, the English Courts will stay proceedings instituted in England in breach of such an agreement, unless the Claimant proves that it is just and proper to allow them to continue.

(F) The Adequate Protection (or lack thereof) of EU Nationals and/or Domiciliaries through the Application of Domestic Jurisdictional Rules

21. Use of National Jurisdictional Rules to Avoid an Inadequate Protection in Non-EU Courts

It is possible to apply for permission for service outside of the jurisdiction retrospectively and in an appropriate case this may be granted. An example of when this was successfully achieved was the case of Comminoa v Prudential Assurance Co Ltd [2000] 1 W.L.R. 603, the full case can be found as Appendix 1.

22. Lack of Jurisdiction Under National Rules Having the Effect to Deprive EU Plaintiffs of an Adequate Protection

As far as we are aware, there is no reported case or practice where the English Courts have found not to have or have declined jurisdiction, in an action brought by an EU domiciliary either in a claim brought by a consumer against a professional domiciled in a non-EU state, an employer against an employer domiciled in a non-EU states and claim brought by a EU domiciliary in a Community related matter.

23. Lack of Adequate Protection as a Consequence of Transfer of Domicile to or from a Third State

As far as we are aware there are no reported or known cases where an English national has not been able to invoke the protection of Community legislation due only to the fact that the person involved was no longer domiciled in the EU at the time the proceedings were instituted.


As far as we are aware there is no known case or circumstance where the application of domestic jurisdictional rules have led in practice or are likely to lead to the jeopardisation of the application of mandatory Community legislation, or the proper functioning of the internal market or the adequate judicial protection of EU nationals and domiciliaries.
(G) Residual Jurisdiction under the new Brussels II Regulation

25. Applicable National Rules Pursuant to article 14 of the New Brussels II Regulation (Parental Responsibility)

We note that in terms of the Brussels II regulation the term “parental responsibility” includes custody and guardianship of children but does not include either adoption or the question of legitimacy of a child. We shall deal only with custody and guardianship in this report.

The English rules of jurisdiction in relation to both custody and guardianship are found in the Family Law Act 1986 (“the 1986 Act).

By virtue of Section 2 and 3 of the 1986 Act, the English Courts have jurisdiction in respect of a child, if he is (i) habitually resident in England or (ii) is present in England and is not habitually resident in any other part of the United Kingdom. However, under Section 5 the English Courts may refuse an application for a custody order, if the matter in question has already been decided outside of England and Wales. In such a case the English Courts have the right to stay the proceedings.

In addition the English Courts will also have jurisdiction over a child who has British nationality, even though he may not be present in England, as seen in the cases of Hope v Hope [1968] N.I. 1 and Re. Willoughby (1885) L.R.30.Ch.D. 324. This jurisdiction may prove useful when the Court of the foreign country where the child resides refuses to exercise jurisdiction over aliens.
26. NA

27. Conventions with Third States in Matters of Parental Responsibility (and maintenance of children)

*What are the international (and in particular bilateral) conventions concluded between your country and non-EU countries that include rules of jurisdiction in matters of parental responsibility (and maintenance of children)?*

- Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children
  
  Please note: This convention has been signed but not yet ratified by the UK.


28. Jurisdiction as a Ground for Resisting the Enforcement of non-EU Judgment in Matters of Parental Responsibility

*Can the judgment of a non-EU State relating to matters of parental responsibility (for instance, a judgment given the guardianship of a child to one of the parents) be denied recognition or enforcement in your country on the basis that the courts of your country are the only ones who have jurisdiction to entertain the matter? If so, what is (are) the ground(s) of these “exclusive” rules of jurisdiction (e.g., habitual residence of the child in your country, citizenship of one or several of the parties, etc.)?

The welfare of a child as well as its nationality/habitual residence are the principal grounds upon which an English court can assume jurisdiction over a case and deny recognition or enforcement of a non EU state Judgment.

The general common law position is that there is no automatic recognition or enforcement of International Orders/Judgment.

Section 1 of the Children Act 1989 states:

"When a court determines any question with respect to-

a) the upbringing of a child; or

b) the administration of a child’s property or the application of any income arising from it, the child’s welfare shall be the court’s paramount consideration."

The case of McKee v McKee [1951] A.C. 352 clearly illustrates and empowers English courts to decline to be bound by a custody order made by a foreign court, where the welfare of the child may be prejudiced in any way.

In addition, English Courts will have inherent jurisdiction in matters where a child is both a British national and habitually resident in England or if the child is either a British national or habitually resident in England and had no such connection with the State in which the Judgment was given.

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