PRIVATE INTERNATIONAL LAW : CONFLICT OF LAWS

Staying of actions and Restraining Foreign Proceedings:
The Impact of Forum Non Conveniens

Aim:
To determine the principle(s) under which the English courts will decline jurisdiction over a case in favour of the courts of another more appropriate forum; and /or the principle(s) under which the English courts instruct litigants in other jurisdictions to cease their actions there in favour of the courts of another forum.

Objectives.
After carefully studying the following notes and other prescribed readings for this lecture, you should be able to:

1. Explain the basis on which an English court stays an action and discuss the ***Spiliada*** judgment;
2. Discuss the principles expounded in the ***Eleftheria*** on whether to stay an action in breach of a foreign jurisdiction clause; and
3. Discuss the principles relating to the restraining of foreign proceedings as established in the ***SNIA*** and ***Airbus*** cases.

Introduction

Where two different legal systems appear to have equal claim to the jurisdiction over the same case, there must be some sound (overriding) principle(s) underlying the decision of an English court to grant leave to serve a writ out of the jurisdiction and secure the case for a hearing before the English courts when the defendant is neither present in England nor has he submitted to the court. Equally, if the English court decides not to exercise jurisdiction over a case which it is entitled to hear, i.e., it decides to *stay the action*, there must be some (perhaps the same) principle for referring the case for decision to the other forum.

To have the jurisdiction to hear a case but to refuse to do so because other factors make the other forum more appropriate, means that those factors make England a less appropriate forum or *forum non-conveniens.* The authoritative case on *forum non-conveniens* is a case which, in fact, wasn't a case on stay of proceedings but which was concerned with an application for leave to serve a writ on a defendant abroad under ***RSC O.11.*** The reason why the particular case, ***Spiliada,*** became the authoritative case is because the principle of forum non-conveniens has always applied in O.11 cases and ***Lord Goff*** said that the doctrine applies in the same way to applications to serve out of the jurisdiction and to stay English proceedings brought as of right, notwithstanding the distinction in the burden of proof, i.e., that whereas it is the plaintiff who asks the court to exercise its discretion to allow service out of the jurisdiction it is the defendant who seeks a stay of action.

THE SPILIADA[1] **:** A cargo of sulphur was shipped from British Columbia to India on board the '**Spiliada**'. Severe corrosion was caused to the vessel, allegedly because the cargo was wet when loaded. The shipowners, Spiliada Maritime Corporation, a Liberian Company, decided to sue the British-Columbian registered shippers, Cansulex Ltd., in England, and thus sought leave to serve Cansulex outside the jurisdiction. The bills of lading contained an express choice of English law, so the case plainly fell within ***RSC 0.11, r.(1)(d)(iii)***; but the question to answer was whether the court would exercise its discretion and allow service outside the jurisdiction. At the same time a very similar action for sulphur damage (involving the same shippers but a different vessel, the 'Cambridgeshire') was being litigated in England and the *Cambridgeshire* action involved many of the same solicitors, counsel and expert witnesses as were involved in the *Spiliada* action. (This suggested that trial in England of the ***Spiliada*** action might be more convenient). If the shipowners were forced to sue in British Columbia, they would be faced with a defence of limitation in the British Columbian courts but were in time in England.

HELD: Following an extensive review of the applicable law, the House decided that it should exercise its discretion in the interests of the parties and for the ends of justice. In the circumstances, taking the '*Cambridgeshire factor*' into account, and the fact that English law was the proper law of the contract, England was the appropriate forum for the more suitable trial of the action. Leave would, therefore, be granted. As to what constituted the applicable law was summarized by ***Lord Goff*** in six propositions, viz;

[1] **Spiliada Maritime Corporation v. Cansulex** [1987] AC 460

(a) *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 competent jurisdiction, which is the appropriate forum for the 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. [Note that the search is for an* appropriate *rather than a convenient forum.]*

(b) *In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay ... [but] if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country ...*

(c) *[Contrary to what was then the position in the United States and Canada] ... I can see no reason why the English court should not refuse to grant a stay ... [where no particular forum can be described as the natural forum]. It is significant that in all the leading English cases where a stay has been granted there has been another clearly more appropriate forum ... In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum, but to establish that there is another available forum which is clearly or distinctly more appropriate ... [If] the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas. [See now* **Airbus** *(1998) for the doctrine of* forum non-conveniens *in Texas].*

(d) *Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors Lord Diplock described (in* **MacShannon v Rockware Glass**) *as indicating that justice can be done in the other forum at "substantially less inconvenience or expense". [Though] ... it may be more desirable ... to adopt the expression used by* **Lord Keith** *in* **The Abidin Daver** *... when he referred to the "*natural forum*" as being "*that with which the action has the most real and substantial connection.*" So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as the availability of witnesses), but also other factors such as the law governing the relevant transaction ... and the places where the parties respectively reside or carry on business.*

(e) *If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay ... It is difficult to imagine circumstances when, in such a case, a stay may be granted.*

(f) *If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with the other jurisdiction. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice, in the foreign jurisdiction ... [but here] the burden of proof shifts to the plaintiff ...'*

With regard to proposition (f), in ***Purcell v Khayat*** (1987), a case decided a year after ***Spiliada***, it was decided that, whereas Lebanon was clearly the more appropriate forum, a stay of action was refused because it could not be considered an irrelevance that the plaintiff had been convicted in his absence of a crime there and sentenced to three years imprisonment.

The overall effect of the propositions summarized by ***Lord Goff*** in ***Spiliada*** is expected to be that, in future, a trial judge who abides by them will be able to decide a case quickly, relatively cheaply, and with little likelihood of his decision being reversed on appeal. These points were addressed in ***Spiliada*** by ***Lord Templeman*** who said that:

"the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge ... I hope that in future the (trial) judge will ... study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not in days. An appeal should be rare and the appellate court should be slow to interfere ..."

Differences Between the Staying of Actions and the Granting of Leave Under RSC 0.11 r.1(1)

Notwithstanding the substantial unification of principles applicable to these areas of the law, *Lord Goff* identified three remaining differences, viz;

RSC O.11 r.1(1)	**Stay of Actions**
Burden of proof is on P	Burden of proof is on D
Leave is not granted 'unless it shall be made sufficiently to appear to the court that the case is a proper one for service cut of the jurisdiction:' ***RSC O.11, r.4(2)***	[No corresponding provision]
Gives rise to 'exorbitant jurisdiction' which is to be exercised with 'extreme caution and with full regard in every case to the circumstances': ***Cordova Land Co. Ltd. v Victor Brothers*** (1966). (See, now: ***Seaconsar***)	[Not applicable]

The conclusions to be drawn from these differences is that it is likely to be more difficult to obtain leave to serve outside the jurisdiction than it will be to obtain a stay of proceedings begun by service of a writ in England.

Lis Alibi Pendens

With regard to cases in which proceedings between the same parties and involving the same issues have been commenced both in England and in a foreign forum, the English court has jurisdiction to stay the English proceedings at the request of the defendant or order the proceedings abroad to be discontinued. Concurrent actions involving the same issues between the same parties are referred to as *lis alibi pendens, i.e.* suit pending elsewhere. The actions may involve either: (a) P suing D both in England and abroad; or (b) P suing D in England whereas D is suing P in the same action in the foreign forum. The effect of a request for a stay which is refused gives rise to trial in England *and* trial abroad (situation (a)); or trial in the foreign forum only (situation (b)). As a general rule in relation to (a): only rarely are English proceedings stayed unless, e.g., there two actions in rem against the same ship, as in ***The Abidin Daver***; and it is equally rare for a plaintiff to be restrained from continuing foreign proceedings unless the connection with a particular forum is tenuous.[2]

That the doctrine of *forum non conveniens* applied to *lis alibi pendens* cases was decided in ***The Abidin Daver*** (1984). Indeed, this was the case which introduced the doctrine of forum non conveniens in English law.

ABIDIN DAVER[3] : A Cuban ship collided with a Turkish owned ship, the Abidin Daver, in Turkish territorial waters. The Turkish owners commenced proceedings before the Turkish court in Instanbul. The Cuban owners then began an action in rem in the English Admiralty Court when a sister ship of the Abidin Daver docked in a Welsh port. The Turkish shipowners asked for a stay of this action.

HELD: (House of Lords) The stay was granted: the Turkish court was the natural and more appropriate forum. The principles which are applicable to determine whether the English action should or should not be stayed are indistinguishable from the Scottish doctrine of *forum non conveniens*.

With regard to the principles of *forum non conveniens* applying to *lis alibi pendens* cases, ***Lord Goff*** confirmed in the later case of ***De Dampiere v De Dampiere*** (1988) that *'the same principle is applicable whether or not there are other relevant proceedings already pending in the alternative forum'*. Accordingly, it is for the defendant to prove that the foreign forum is the appropriate or natural forum.[4]

Foreign Jurisdiction Clauses

A term common to many international commercial contracts provides for the exclusive determination by a foreign court of any dispute arising between the parties to the contract. Furthermore, that parties to the contract should abide by their terms of the contract is supported at common law.[5] However, in situations where the English court has jurisdiction over actions properly instituted in England and Wales, *there is an*

2 ***S.N.I.A. v. Lee Kui Jak*** (1987).

3 **The Abidin Daver [1984] 1 All ER 470.**

4 See: ***Du Pont v Agnew*** [1987] 2 Lloyd's Rep 585

5 ***R v. International Trustee for the Protection of Bondholders*** (1937).

inherent ***discretion*** *in the court* ***to disregard an express foreign jurisdiction clause***. The principles on which a decision whether or not to stay an action were formulated by ***Brandon J*** in ***The Eleftheria*** (1970) and repeated by him in ***The El Amria*** (1981). The principles have again been affirmed, most recently in ***The Nile Rhapsodv*** [1992] 2 Lloyd's Rep 399.

In ***The Eleftheria, Brandon J*** said:

"The principles established by the authorities can, I think, be summarised as follows:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:
- *(a) In what country the evidence on the issues of the fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.*
- *(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.*
- *(c) With what country either party is connected, and how closely.*
- *(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.*
- *(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:*
  1. *be deprived of security for their claim;*
  2. *be unable to enforce any judgement obtained;*
  3. *be faced with a time bar not applicable in England; or*
  4. *for political, racial, religious or other reasons be unlikely to get a fair trial."*

Whereas the ***Eleftheria*** criteria of appropriateness include those which are also considered under the doctrine of *forum non conveniens*, differences remain.

Forum Non Conveniens	**Foreign Jurisdiction Clause**
An action properly commenced in England should be allowed to continue.	Stay the proceedings if the contract provides for exclusive jurisdiction by foreign court.
Burden is on D to show that the appropriate or the natural forum is the foreign forum.	Burden of proof is on P to demonstrate that stay should not be granted.
	P cannot complain of procedures adopted by foreign court when that court has been specified in the jurisdiction clause.

Restraining Foreign Proceedings

Here the central issue is to determine whether the facts of the case in question are such that they would convince the courts to grant an injunction to restrain foreign proceedings on the basis of justice requiring that the plaintiff should be restrained

(I) Where There is a Choice of Forum.

Under this heading, the leading case is that of ***S.N.I.A. v. Lee Kui Jak*** (1987). This case was decided by the Privy Council and the decision is incompatible with an earlier House of Lords case. Nevertheless, it is a decision that has now been followed by subsequent decisions of the court of Appeal.

S.N.I.A.[6] **:** Y had been killed in a helicopter crash in Brunei. The plaintiff's (Y's widow and the administrators of the estate of Y) had instituted actions in Brunei and Texas against S, the helicopter manufacturers, and M, the helicopter operators. Jurisdiction in the Texas proceedings was based on the fact that S did business in Texas - and that was sufficient to give the Texas courts jurisdiction. The dispute had nothing to do with Texas other than the 'business connection' and Texas having product liability laws favourable to the plaintiff's.

[6] **S.N.I.A. v Lee Kui Jak [1987] AC 871**

HELD: (Privy Council). An injunction was granted restraining the plaintiff's from pursuing the Texas proceedings. The natural forum for the trial of the plaintiff's action against S was Brunei. Trial in Texas would involve serious injustice to S amounting to oppression in that the company might be unable to claim a contribution from M in the Texas proceedings: they would then have to institute proceedings against K in Brunei to try and rectify this injustice. For the plaintiff's, however, they would not be deprived of any advantages by proceeding with the trial in Brunei: S had already given an undertaking that evidence already obtained in the Texas proceedings would be available in Brunei proceedings.

It would appear that at least three significant points emerge from the *Privy Council* decision, viz;

1. It is *incompatible* with the *earlier House of Lords* decisions in the **Casthano** and ***South Carolina*** cases.[7]
2. It is uncertain as to what is meant by *vexation or oppression;* and
3. This was a decision of a case in which there was a choice of forum and proceedings had been commenced in both of them. [8]

(II) Where There is no Choice of Forum.

There may be no choice of forum open to the plaintiff: he may be confined to bringing his case only before the foreign court perhaps because his claim is one which is known only to the foreign court and, consequently, would not be recognised in another forum:

LAKER[9] : Following the liquidation of Laker Airways in 1982, the British liquidator commenced proceedings in the United States of America under, inter-alia, the U.S. Anti-Trust laws, alleging that two British airlines (including British Airways) had conspired with other airlines and aircraft manufacturers to drive Sir Freddie Laker out of business. If the liquidator won the case he would be entitled to treble damages, i.e. the actual compensation trebled. Such an action could not have been brought in England, so the defendant airlines sought an injunction from the court restraining the liquidator from his action in the U.S. on the basis that it would be unjust to them and against public policy. This was refused at first instance but then granted by the Court of Appeal after the Secretary of State acted under the ***Protection of Trading Interests Act 1980*** preventing British Airways from producing documents or information to the U.S. courts. The Court of Appeal thought that this rendered a proper trial in the U.S. impossible. Nevertheless, this decision was appealed to the House of Lords.

HELD: The injunction was refused, i.e. the foreign proceedings would not be restrained. ***Lord Diplock***, speaking on behalf of a unanimous House of Lords, said that where a foreign court was the only forum which was of competent jurisdiction to determine the claim of a plaintiff who was amenable to the jurisdiction of the English courts, an English court would intervene to issue an injunction restraining the plaintiff from bringing his claim in the foreign court, ***but only if*** *it would infringe a legal or equitable right of the defendant not to be sued in the foreign court*, so that it would be an injustice if the defendant was not protected from the foreign claim. Since British Airways could not show that it would be unconscionable to allow Laker to proceed in the United States, the injunction was refused. The following case further extends the law :

SOUTH CAROLINA V ASSURANTIE[10] : The P's, an American insurance company, brought an action in England against the D's, a number of other insurance companies of different domiciles, under a contract of reinsurance. The D's had commenced proceedings in America for pre-trial discovery of documents relevant to the claim against persons resident there who were not parties to the English action. P sought an injunction restraining the D's from continuing with the American proceedings.

7 **N.B.:** The latest Court of Appeal cases have followed the ***S.N.I.A.*** decision; see, e.g. ***Du Pont v Agnew*** (1988)

8 Nevertheless, it has been decided that the same principles apply to cases in which no choice of forum applies, e.g. *lis alibi pendens* cases where the roles of the parties are reversed, i.e. P in England is the D in the foreign forum: ***Du Pont v Agnew*** (1988).

9 **British Airways Board v Laker Airways Ltd. [1984] 3 All ER 39**

10 **South Carolina Insurance Co. v Assurantie [1986] 1 AC 24**

HELD: (Unanimous decision of the House of Lords). No injunction would be granted. An injunction could be granted if: (a) a party to an action had invaded or threatened to invade a legal or equitable right of another; ***or*** (b) *where one party had behaved or threatened to behave in a manner which was unconscionable*. On the facts of the case, no injunction was necessary.[11]

The Airbus case involved litigation in India in respect of an air crash in India resulting in, *inter alia*, the deaths of British citizens resident in England and litigation in Texas in respect of three American passengers who died in the same crash. Airbus obtained an injunction in India restraining the appellants (Patel and others) from proceeding against Airbus in any court other than in Bangalore. In the English courts, Airbus sought to restrain the English claimants from continuing with the actions they had commenced Airbus in Texas on the grounds that they were vexatious and oppressive. In the *Court of Appeal*, ***Hobhouse LJ*** said that there was no precedent covering the case, all previous cases having been concerned with the interrelation of English proceedings and proceedings in a foreign court. However, he identified issues relating to the natural forum and the disadvantages both to Airbus in having the case continue in Texas and to the claimants in not having the case continue there and concluded that the conduct of the claimants was clearly oppressive and caused significant injustice to Airbus.

In the ***House of Lords***, however, ***Lord Goff,*** on behalf of a unanimous House, noted that:
" *... Airbus is relying simply on the English court's power of itself, without direct reliance on the Indian court's decision, to grant an injunction in this case where, unusually, the English jurisdiction has no interest in, or connection with, the matter in question. ... [As such] interference, even indirect interference, by the courts of one jurisdiction with the exercise of the jurisdiction of a foreign court cannot in my opinion be justified by the fact that a third jurisdiction is affected but is powerless to intervene.* **The basic principle is that only the courts of an interested jurisdiction can act in the matter***; and if they are powerless to do so, that will not of itself be enough to justify the courts of another jurisdiction to act in their place*."

Courts will not necessarily restrain proceedings brought in breach of agreement.
Whereas the English court will readily restrain proceedings commenced abroad by a party in breach of an agreement to submit to the jurisdiction of the English court[12], it is far more reluctant to do so when the purpose of the proceedings is to obtain security for the plaintiff's claim.[13]

The Lisboa : Cargo owners had arrested D's ship in Italy for towage fees. D's had sought restraint of further proceedings in Italy and release of their ship.

HELD: Injunction restraining proceedings was refused since the arrest of the ship was made to obtain security. The breach of jurisdiction (England) clause was not oppressive (per ***Dunn LJ***).

References

Clarkson & Hill, *Jaffey on the Conflict of Laws*, 2/e. London: Butterworths, 1997, pp114-142
O'Brien, *Smith's Conflict of Laws*, 2/e. London: Cavendish, 1999, Ch.12.

WORKSHOP QUESTION

John, resident in England, entered into a contract with Vic, manufacturer resident in Davania, to act as Vic's sole agent in England for the distribution of his products. The contract provided that all disputes arising between the parties should be settled by the Davanian courts only.

A dispute arose between the parties over whether John was properly performing his obligations under the contract. Vic purported to terminate the contract. John, wishing to sue Vic for breach of contract, had a writ served on Vic while he was in England for two days to attend a business meeting. John had been advised by a Davanian lawyer that an action in the Davanian court will take five years to come to trial (it would be heard within a year in England), that the Davanian court would apply Davanian law which is very unfavourable to John and that, as a Roman Catholic, John is unlikely to receive a fair trial in Davania. Vic has started an action against John in Davania for breach of contract.

John wishes the trial of both actions to take place in England. Vic wishes it to take place in Davinia.

Advise John.

11 See also the decision of the *Court of Appeal* in: ***Airbus Industrie GIE v. Patel***, (1996) *The Times*, August 12th; and its subsequent ***reversal*** by the ***House of Lords*** expressed in the judgments published on 2nd April 1998: [1999] AC 119.

12 ***Tracomin SA v Sudan Oil Seeds* (No.2)** (1983),

13 **The Lisboa [1980] 2 Lloyd's Rep 546 (CA)**