Blast from the Past: *Forum Non Conveniens* Post-Brexit

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Introduction

The English courts frequently adjudicate disputes involving foreign entities and events. Although the English courts are well equipped to handle such disputes, in some instances a defendant will identify an alternative forum that is better suited to adjudicate the matter, in which case one option is for the defendant to bring a *forum non conveniens* ("inconvenient forum") application. Where successful, a *forum non conveniens* challenge will result in the English courts staying a claim filed in England so that it can be adjudicated elsewhere.

The *forum non conveniens* doctrine is having a resurgence in England following Brexit and, as a consequence, the abandonment of the Recast Brussels EU Regulation (under which *forum non conveniens* applications were not permitted). It is therefore important for anyone involved in cross-border litigation to understand the approach taken by the English courts when considering *forum non conveniens* applications. This involves the application of the decades old "*Spiliada* Test", which was first set out in *Spiliada Maritime Corporation v Cansulex Limited* [1987] 1 AC 460. Fortunately, the High Court's decision in *Al-Aggad v Al-Aggad* [2024] EWHC 673 provides an excellent summary of how the *Spiliada* Test operates, including invaluable guidance on how to apply it in the modern era. This decision also demonstrates that although there is greater scope to challenge English jurisdiction in the post-Brexit era, England remains a leading dispute resolution centre and the English courts will not divert a dispute elsewhere unless they are satisfied that justice will be done there.

Key Background Facts

The Claimant commenced legal proceedings against three of her siblings relating to a family-owned Saudi company. The Claimant brought two key claims:

- A claim for breach of a 2009 contract under which the Claimant had agreed to sell ownership of shares she owned in the company in exchange for cash. The Claimant alleged that she was never paid the cash due under this contract.

- A claim in unlawful means conspiracy. The Claimant alleged that the Defendants had unlawfully procured a judgment in Saudi Arabia in 2018 which prevented her from exercising rights under, or disposing of, the shares in the company that she had inherited from her father.

The Claimant was originally from Saudi Arabia but had moved to Canada in 2005 where she was granted asylum in 2011. The Claimant still, however, qualified as a Saudi national under Saudi law. The Defendants were all citizens and residents of Saudi Arabia, although they habitually spent time in England each year.

The case came within the purview of the English courts when the Claimant personally served the Third Defendant at Heathrow Airport while the Third Defendant was on holiday. Having secured the Third Defendant as the 'anchor defendant', the Claimant then served the First Defendant and Second Defendant in Saudi Arabia through CPR PD 6B paragraph 3.1(3), which allows English legal proceedings to be served on someone located outside of the jurisdiction if they are a "*necessary or proper party*" to proceedings that have been served on the anchor defendant.

The *Forum Non Conveniens* Application

The Defendants brought two related jurisdictional challenges:

- All three Defendants argued that the claims against them should be stayed on *forum non conveniens* grounds in favour of Saudi Arabia (the "Saudi Application").

- The First Defendant and Second Defendant (but not the Third Defendant) also argued that, in the event that the Court declined to stay the claims on *forum non conveniens* grounds in favour of Saudi Arabia, the claims should instead be stayed on *forum non convenies* grounds in favour of Jordan (the "**J**ordan Application").

Mrs Justice Cockerill reiterated that the legal test to be applied when considering a *forum non conveniens* argument is the test set out by Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (the "***Spiliada* Test**"). The *Spiliada* Test has two stages:

- Stage 1: The defendant must establish that there is another forum which is "*clearly or distinctly more appropriate than the English forum*". If the defendant fails to do so then its *forum non conveniens* application will fail.

- Stage 2: If the defendant satisfies Stage 1, then the onus switches to the claimant at Stage 2 to demonstrate that "*there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country*". If such special circumstances exist then the *forum non conveniens* application will fail.

The Saudi Application

Stage 1 of the *Spiliada* Test

Mrs Justice Cockerill concluded that Saudi Arabia, and not England, was clearly the natural forum for proceedings. The breach of contract claim was a claim under Saudi law, concerning a Saudi company. Likewise, the conspiracy claim was a claim under Saudi law concerning alleged misconduct by Saudi nationals that was said to have taken place in Saudi Arabia, and that had allegedly affected the Claimant's interests in Saudi assets. The majority of the witnesses and documents connected with the claims were also located in Saudi Arabia.

Mrs Justice Cockerill did acknowledge, however, that there were several factors pointing towards England as being an appropriate forum for the dispute. Although these factors did not dissuade Mrs Justice Cockerill from her conclusion that the Defendants had succeeded at Stage 1, she said that should would nonetheless take them into account at Stage 2. These factors included:

- The Defendants had ties to England (as evidenced by the fact that they regularly visit England).

- The Defendants owned property in England against which an English court judgment could be enforced.

- The Defendants were all fluent in English and therefore would not struggle to participate in legal proceedings conducted in English.

- The English courts would be well placed to adjudicate the issues raised by the claims. Several of the contracts at issue were governed by English law and although the substantive proceedings were brought under Saudi law, in practice if the Claimant succeeds in establishing the facts alleged then the outcome will likely be no different than it would have been under English law. Mrs Justice Cockerill also made the general observation that England is a "*neutral*" and "*highly respected*" forum for dispute resolution.

- The Defendants had English lawyers acting for them and had first engaged these lawyers in relation to the dispute several years before the Claimant commenced proceedings in England.

Stage 2 of the *Spiliada* Test

At Stage 2 the burden switched to the Claimant to "prove, using cogent and objective evidence, that there are special circumstances which nonetheless justify the refusal of a stay." The Claimant argued that in this case the "Substantial Justice" principle had been triggered as if she were forced to bring her claims in the Saudi courts there would be a "real risk" that she would be unable to obtain substantial justice. This was because the Claimant is a refugee who is unable to physically return to Saudi Arabia, meaning that she would not be able to commence and participate in Saudi court proceedings.

The Defendants responded that this was not an issue because the Claimant could commence and participate in Saudi proceedings remotely. Unfortunately (for the Defendants) the expert evidence before the Court showed that this was not a viable solution. The Claimant would only be able to commence proceedings in the Saudi courts if she could prove her identity, and under Saudi law the only way in which a female Saudi national can prove her identity is by producing a "*Saudi National ID Card*". Although the Claimant had obtained asylum in Canada she still qualified as a Saudi national under Saudi law; and the Claimant did not have a Saudi National ID Card as these did not come into existence until after the Claimant had fled Saudia Arabia. The Defendants presented a variety of 'solutions' to this problem, but they all either also required the Claimant to prove her identity using a Saudi National ID Card (e.g. setting up a Saudi power of attorney so a local lawyer could conduct the proceedings on her behalf) or were patently absurd (e.g. the suggestion that the Claimant should have arranged for her (now deceased) father to commence Saudi proceedings on her behalf). The Defendants also failed to provide a satisfactory explanation for how — even if the Claimant could successfully commence proceedings in Saudi Arabia — she would be able to adequately pursue these claims, as she would be unable to physically attend a Saudi court to give evidence.

Mrs Justice Cockerill therefore concluded that there was a real risk that the Claimant would be unable to obtain justice in Saudi Arabia. This risk, along with the Defendants' ties to England identified in Stage 1, constituted special circumstances justifying the refusal of the Saudi Application.

The Jordan Application

As for the Jordan Application, the Third Defendant's failure to support this application meant that it was doomed from the outset. The First and Second Defendants were essentially proposing two sets of parallel proceedings should take place: one set of proceedings against the Third Defendant in England, and another set of proceedings against the First and Second Defendants in Jordan. As the issues in these parallel proceedings would overlap heavily, there would be a risk that the English and Jordanian courts issues irreconcilable judgments. Mrs Justice Cockerill was not prepared to entertain that risk, particularly as the First and Second Defendants had failed to identify any compelling reasons why Jordan was a more appropriate jurisdiction for the dispute than England (indeed, the First and Second Defendants had only turned to Jordan as an "*also ran*" forum after having failed to convince Mrs Justice Cockerill that the dispute should be heard in Saudi Arabia).

Commentary

There are several key points to take away from the *Al-Aggad* decision:

- The English courts will take a robust, yet balanced, approach to *forum non conveniens* applications. The English courts consider themselves adept at adjudicating foreign disputes and will not allow a *forum non conveniens* challenge to succeed if there are concerns about the proposed foreign forum's ability to do justice. However, that does not mean that a *forum non conveniens* is easily defeated. Mrs Justice Cockerill stressed that the English courts are mindful of the risk of offending international comity and are reluctant to tread on the toes of foreign courts. The reason the Claimant prevailed was because she provided a precise explanation for why she would face unique difficulties obtaining justice in Saudi Arabia — a broad argument to the effect that the Saudi courts are generally inferior to the English courts would not have succeeded.

- Where there are multiple defendants it is essential that they coordinate with each other if they wish to challenge English jurisdiction. The Third Defendant's failure to support the Jordan Application meant that it was doomed to fail.

- For a litigant who wishes to avoid being subjected to English court proceedings a *forum non conveniens* (or similar) jurisdiction challenge is an act of last resort. If a potential defendant is determined to avoid becoming subject to the jurisdiction of the English courts then there will often be proactive steps they can take in advance of the commencement of proceedings. In *Al-Aggad* the best way for the Defendants to have avoided the English courts would have been to avoid being personally served in the jurisdiction, and the Third Defendant therefore made a significant strategic error by allowing herself to be detected and served at Heathrow Airport. The Defendants' various ties to England (e.g. owning property in England) also undermined their ability to successfully bring a *forum non conveniens* application.

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