Conference Notes: Forum (Non) Conveniens in England – Past, Present and Future

A research seminar delivered by Dr Ardavan Arzandeh, Senior Lecturer in Law, University of Bristol Law School (12 April 2019, SMU School of Law)

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Dr Arzandeh discussed his recently published book, *Forum (Non) Conveniens in England: Past, Present, and Future* (Hart Publishing, 2019) during a research seminar of the same name.

During his research, he had found that no single source had devoted its entire focus to the examination of *forum (non) conveniens* in England. Furthermore, he felt that there were significant misconceptions about the doctrine's historical development, leading to incorrect and one-dimensional characterisations of the case law. Finally, he considered that there was a dearth of debate among academics on the doctrine's future after the case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). Instead, *Spiliada* seemed to be accepted as the final word on the doctrine of *forum (non) conveniens*. As such, his book had four key objectives:

1. Refining our understanding of the origins and development of the principles underpinning the doctrine;
2. Critically assessing contemporary application, thereby enabling richer understanding;
3. Examining the future direction of the law after *Spiliada*; and
4. Being an authoritative first stop for anyone with an interest in the doctrine.

Notable Points

Notwithstanding observations to the contrary, such as Professor Briggs' commentary in *Civil Jurisdiction and Judgments* (Routledge, 6th Ed, 2015), Dr Arzandeh asserted that *forum (non) conveniens* remains doctrinally the same as when it was articulated in *Spiliada* in 1986. *Spiliada* held, essentially, that when the doctrine is invoked in interjurisdictional cases, the onus is on the defendant to show that a more closely connected jurisdiction exists elsewhere, such that it would be more appropriate to adjudicate the case in that other jurisdiction (the first limb). The burden then shifts to the plaintiff to demonstrate that other jurisdiction would *not* be an appropriate forum (the second limb).

Rather than being altered, the doctrine's applicability has become limited in cases such as *Owusu v Jackson* [2005] ECR I-1383 due to the influence of European Union Law in England.

The doctrine also remains relevant, having been a key source of inspiration for the development of equivalent principles in stay applications across commonwealth systems.

As for future developments, Dr Arzandeh accepted that the *Spiliada* test manages to balance the competing rights of claimants and defendants who disagree over the appropriate forum for their dispute. Furthermore, the test seems to be consonant with modern socio-economic developments, whereby litigants from other countries seek a neutral forum like England to litigate their disputes.

However, the doctrine has significant problems. Firstly, it is unpredictable in its application. Seemingly similar cases have given rise to diametrically opposed outcomes. Secondly, the application of the doctrine in its present form has resulted in protracted and wasteful litigation. Dr Arzandeh observed from major contemporary cases that these problems likely exist because the second limb of the *Spiliada* test (see above) affords too much discretion to the courts.

His solution was to have a second stage modelled on the test under Article 6 of the European Convention on Human Rights ("ECHR") for the right to a fair trial in expulsion cases. Under Article 6, if there is a "flagrant denial of justice" in the receiving state, then the English courts would be barred from expelling the person. He argued that this test should be similarly applied as the second limb in *non conveniens* cases because it is a stringent one which targets any situation that would result in the right guaranteed by Article 6 being frustrated. This mitigates the issue of courts having too much discretion.

Q&A

When asked whether the reformed *Spiliada* test would still support the bringing of disputes to neutral and advanced legal hubs, Dr Arzandeh stated that his aim was to have cases sent to the forum in which they belonged. Therefore, the number of cases which were decided in "third-party" legal hubs would be reduced. Still, the modified doctrine would still allow litigants to include a jurisdiction clause in their agreements, thus retaining their discretion to agree on litigating in neutral forums. Ultimately, there should be a very high threshold to cross before an English court can assert that a foreign case should nevertheless remain in England.

Regarding a question on the universality of the proposed test (given that not everyone has the same conception of human rights and justice), Dr Arzandeh replied that the modified test is based on the ECHR conception of human rights. Therefore, even if a country is not an ECHR

signatory, it could examine how the European courts have approached Article 6 cases and apply the test based on the elucidated principles.

As for a question about the modified doctrine's application in cases where home countries did not want to hear the case, Dr Arzandeh responded that this problem was dealt with under the first limb of the test in any case. If a claimant is not able to seek recovery in a particular jurisdiction, then that jurisdiction would not be considered an available forum under the first limb.

Finally, Dr Azandeh was asked whether stay applications generally turn on the first or second limb of the *Spiliada* test. If the first limb normally determines the outcome of an application, then changing the second limb would not affect most cases. He replied that he did not know the answer but chose to draw attention to the second limb because it was pivotal in many high-profile English cases post-*Spiliada*. Furthermore, the first limb adequately identifies various factors which demonstrate the "centre of gravity" of any given case, but the second limb is too nebulous and requires some refining as to precisely what justice or injustice means.