***“Forum non conveniens*: Is *Spiliada* still fit for purpose or holed below the water-line?”**

Judicial application of the second limb of the test in *The Spiliada* [1987] AC 460 undermines the comity that forum non conveniens aims to strengthen, where courts are unwillingto articulate an objective basis or criteria on which the forum’s ability to do ‘substantial justice’ can be evaluated. Even where comity is not so undermined, the court sometimes struggles to remain objective between the parties. Much academic attention has been devoted to the fact that courts now hear arguments on alleged corruption in the foreign forum (Arzandeh*, “Should the Spiliada Test Be Revised?* (2014) 10 JPIL 89). Judges’ examinations of those courts’ abilities to deliver substantial justice was too extensive to respect judicial comity. Outside of these cases, judges tend to assume that the result reached by English procedural rules is the only one providing the claimant with ‘substantial justice’.This essay will focus on foreign forums where costs are not automatically awarded to the successful party, and forums which select different applicable laws to England. The latter is less afflicted by Anglo-centrism than the former, though uncertainties remain. Interestingly, one line of cases on judgment enforceability does not prioritise the English system – but it still favours the claimant in its application.

The Draft Withdrawal Agreement (14 November 2018) does not address the future of the jurisdictional regime between the UK and EU after the Brexit transition period. The Brussels Convention 1968 may apply by default— however, under article 68 of the Brussels I Regulation (‘BIR’), that Regulation ‘superseded’ the Brussels Convention as between member states. It is possible that, in the absence of agreement, some jurisdictional disputes where the foreign forum is an EU state will require *forum non conveniens.* It is even more likely that *Spiliada* will have application once more to the many cases excluded from its realm by C-281/02 *Owusu v Jackson* (Arzandeh*, Forum (Non) Conveniens in England, Past, Present and Future* (2018))*.* If *Spiliada* is to be fit for application to this broader range of disputes, clearer guidelines are required for the second limb’s application.

1. **Aims of Spiliada**

*Spiliada* articulated the familiar two-limb forum non-conveniens test: if a judge decided that the case should be heard in a more appropriate foreign forum, they could refuse to stay English proceedings if the claimant would be unable to obtain substantial justice abroad. It steered the exercise of the court’s discretion towards an approach objective as between the parties: an English juridical advantage to the claimant was not decisive in their favour, as any advantage to the claimant correspondingly disadvantages the defendant (*Spiliada* at 482); however, an advantage accruing equally to *both* sides could be decisive. Finally, Lord Goff’s approach preserved judicial comity over chauvinism, endorsing at 478 the application of comity in *Amin Rasheed Shipping Corporation v Kuwait Insurance* [1984] AC 50*.*

1. **Different Costs Regimes**

English judges adopt one of two approaches when tackling the argument that a stay should be refused because the foreign costs regime does not award costs to the winning party. One is to treat the ‘costs follow the event’ rule as an aspect of English litigation favouring both parties; the other is determining whether the claimant’s damages would be ‘necessarily and substantially diminished’ by costs that are irrecoverable abroad. The first approach is most problematic, using ‘legitimate advantage’ to disguise a preference for the English legal system; the second approach is also flawed, as it departs from the approach to ‘substantial justice’ in *Spiliada*.

Firstly, the view that England’s ‘costs follow the event’ rule advantages both parties disguises a natural inclination towards the familiar English procedure. In *The Vishva Ajay* [1989] 2 Lloyd's Rep 558, the claimant would bear a substantial part of litigation costs, even if they won in the foreign forum. According to the judge, costs following the event favoured ‘both parties’ – claimants should not be deprived of the fruits of their victory by having to pay a large sum in costs, and the defendant should not be pressured to settle for fear of paying a large sum in costs, even if the claim fails (at *560*). *The Al Battani* [1993] 2 Lloyd's Rep 219 (‘*The Al Battani’*)followed this approach; the costs argument was a more ‘important consideration’, since the action was only for $200,000, most of which would be lost to costs (*Al Battani,* *244*).

This approach improperly categorizes differences between costs regimes as beneficial to *both* parties. This assumption made by the judge in *The Vishva Ajay* and *The Al-Battani* does not describe the views of all commercial litigants. Either party may legitimately prefer to litigate in a country where they are certain to pay only their own litigation costs. One party may have relatively low legal costs, but knows that their opponent has spent much more on the dispute – the ‘advantage’ does not accrue equally to both sides in view of how the case is actually conducted. Further, the English costs system does not free the parties from costs pressures which influence the conduct of their case – parties feel pressure to continue litigating if they cannot agree to settle costs, even over small sums, for fear of being forced to pay their opponent’s substantial legal expenses if they lose or abandon their claims or defences. The explanation that the unsuccessful party ‘has no grounds for complaint’ if ordered to pay the successful party’s costs’ (*The Vishva Ajay,* 560) does not meet this objection – it restates the normative stance taken by the English procedural system. This approach is far from the procedural advantage accruing to both sides in *Spiliada*; the expertise was evenly distributed on both sides, and the ‘advantage’ concerned parties’ preparations, so was not an implicit critique of the foreign legal system. It remains unclear whether *The Vishva Ajay’s* approach is supported by the Court of Appeal in *Roneleigh Ltd v MII Exports (CA)* [1988] 1 WLR 619(‘*Roneleigh*’). The first instance judge stated that the English costs position was an advantage on both sides; Butler-Sloss LJ and Nourse LJ upheld the exercise of his discretion and do not specifically dispute his characterisation of the issue.

Secondly, the more prevalent approach is in *Roneleigh.* According to Nourse LJ, a judge could conclude that substantial justice would not be done via a foreign forum’s proceedings, if the claimant’s success in monetary terms would be *necessarily and substantially diminished* by the costs they would have to pay there. Butler-Sloss LJ was more conservative, stating that the costs factor could not be determinative if other factors clearly favoured a hearing in the foreign jurisdiction. This is distinguished from costs in *Connelly v RTZ* [1998] AC 854and *Lubbe v Cape* [2000] 1 WLR 1545, where the claimant *could not* bring their claim abroad due to the lack of legal aid and contingency fee agreements. In *Roneleigh*, the claimant could bring their claim in the foreign forum, but paid a percentage of their damages award to their lawyer instead of recovering their costs from the defendant.

However, it is difficult to distinguish the fact that costs would absorb a substantial portion of the claimant’s potential damages, from the fact that a foreign jurisdiction may simply award *substantially lower* damages. The latter was specifically rejected in *Spiliada*, as a mere advantage accruing to the claimant – it did not mean that ‘substantial justice’ could not be done in the foreign jurisdiction. This can be mitigated by setting a higher threshold for substantial injustice – for instance, costs absorbing the entire damages award. However, even this approach may not pay sufficient attention to comity – jurisdictions where all parties bear their own costs do so to discourage expensive and drawn-out litigation over relatively small sums and leave more court time for other cases; the English view that ‘substantial justice’ is not done by such a system undermines this policy choice. This issue is particularly relevant as the prospect of *Spiliada’s* application to more EU jurisdictions looms post-Brexit: many EU states impose capson the amount recoverable from the losing party, which may or may not leave a ‘substantial’ portion of the award depending upon the damages awarded, and the costs incurred (e.g.: recoverable legal fees are capped under the Federal Attorney Remuneration Fees Act in Germany).

1. **Conflict of Laws Regimes**

English judges have found that a foreign forum does not do substantial justice where the claimant’s case would fail there, because that forum’s conflicts rules apply a different governing law to English conflicts rules. This undermines the idea of taking an objective stance as between the parties, and undermines judicial comity by prioritizing English procedural rules. English conflicts rules are not generally described as superior to other systems; however, the English-determined ‘governing law’ is sometimes used as a benchmark against which the foreign forum’s applicable law is measured. Recent cases appear to be moving towards only taking this factor into account as a justifiable exception where the foreign forum would disregard parties’ choice of law or ‘internationally applicable legal principles’.

Firstly, some cases express a clear preference for English conflicts rules. According to Staughton LJ in *Irish Shipping Ltd. v Commercial Union Assurance Co. Plc. and Another* [1991] 2 QB 206 at 229, it was wrong to view our system of *domestic* law as better than another; however, English judges could view their own conflicts rules as more appropriate, since conflicts rules ‘should be, but are not, the same internationally’. This reasoning is flawed – the fact that conflicts rules should be universal does not mean that the *English* approach should be so adopted. Furthermore, it takes sides between the parties – claimants do not have a ‘right’ to win their case in the natural forum (Briggs and Rees*, Civil Jurisdiction and Judgments* (2015)). Fortunately, this view does not seem to have been explicitly taken up in subsequent jurisprudence, and there has been a move away from this approach in recent cases (*Navig8 Pte Ltd v. Al-Riyadh Co for Vegetable Oil Industry* [2013] EWHC 328 at [27] - [28]). However, it still has potential to hold some sway – *Irish Shipping* was decided in the Court of Appeal, and Staughton LJ held that the difference between English and Belgian conflicts rules was ‘likely to be predominant’ in that case. Further, some cases still adopt the *Irish Shipping* approach implicitly – in *Dornoch v Mauritius Union Assurance Company Ltd [2006] 1 Lloyds Rep IR 127 (‘Dornoch’)*, the claimants showed a good arguable case that the relevant contract would be governed by English law (applying Article 4 Rome Convention (‘RC’), since the parties reached a stalemate on article 3 (at [41])). However, the foreign forum (Mauritius) would apply its own choice of law rules, which lead to Mauritian law. This law would not apply certain defences to enforceability available under English law. Similarly, for the tort claim, English conflicts rules pointed to English law, which gave damages under the Misrepresentation Act – there was a risk that such a remedy would be absent under Mauritius law (Fentiman, *International Commercial Litigation* (2015) at 13.85; *Dornoch* at [53] At [51], the judge notes the danger of the ‘wrong proper law’ being applied to the issues. Yet there is no good arguable case for any choice of governing law, nor was the RC an internationally applicable instrument outside Europe.

Secondly, prioritizing the English conflicts rule is understandable if the foreign jurisdiction would override a governing law expressly or impliedly chosen by contracting parties (*Novus Aviation Ltd v Onur Air Tasimacilik AS* [2009] 1 Lloyds Law Rep 576 at [78]; *Stonebridge Underwriting v Ontario Municipal* [2010] EWHC 2279). This is in principle more justifiable than the approach to costs, as giving effect to party autonomy and to validly-entered contracts is not generally offensive to comity (*Coast Lines Ltd. v. Hudig & Veder N.V* [1972] 2 Q.B. 34 at 49G) – it is principle generally accepted by trading nations. However, it must be applied cautiously, and restricted to cases in which the foreign court would disregard the parties’ choice of law, not where the foreign court would simply come to a different conclusion about which law the parties in fact chose as a matter of contractual interpretation; this would treat the English forum’s reading of the contract as universal. Further issues arise if the natural forum would not give effect to the choice of law to protect a contracting class – even the RIR does not give full effect to the law expressly chosen by parties to consumer and employment contracts, as such a choice cannot deprive the consumer (Article 6(2)) or the employee (Article 8(2)) of protections that cannot be derogated from by agreement under the law indicated by Articles 6(1) and 8(2), respectively. This principle also runs into difficulties when several different causes of action can be brought in respect of the same dispute. A foreign court might legitimately take a different view about: whether a tort is sufficiently closely connected to a contract to be governed by the same law; which law should govern concurrent duties in contract and tort; and whether the claimant can choose to frame the issue as a contract or a tort to obtain his ‘choice’ of governing law. Whilst giving effect to chosen governing law is supportable in theory, in practice its operation should be restricted to a narrow range of cases.

Thirdly, other cases which find that application of a different conflicts rule leads to substantial injustice are explicable on the basis that the foreign forum would disregard an internationally applicable legal rule. In *Banco Atlantico SA v The British Bank of the Middle East* [1990] 2 Lloyd's Rep 504 *(‘Banco Atlantico’),* the clearly more appropriate forum (the Sharjah Court) had no established conflict of laws doctrine, and the rule that Spanish law (selected by English conflicts rules) would apply was accepted in the world of international commerce and contained in the Geneva Convention on Bills of Exchange 1932 (*Banco Atlantico* at508); Bell, *Forum Shopping and Venue in Transnational Litigation* (2003) at [4.57]). However, it is not clear that the court actually decided the case on this ground. At 509, Bingham LJ states that the claimant had a claimunder what *England* would consider the proper law, and requiring them to litigate in a jurisdiction where it faced summary rejection of those claims was unjust (at 509); the ‘law of other trading nations’ is only mentioned ‘if relevant’, and is not mentioned at all when the appeal judge explains why the first instance reasoning was erroneous. Furthermore, it was unclear whether the foreign forum’s courts would give the same answer to the issue applying local law (*Banco Atlantico*, 508). The *Banco Atlantico* did not consider how widespread the acceptance of the relevant convention was, or lay down criteria to do so. Without guidance, judges reach radically different conclusions about ‘acceptance’– the Hong Kong Court of Appeal in *The Adhiguna Meranti* [1988] 1 Lloyds Rep 384 considered the Brussels Convention 1957 to reflect generally accepted international public policy (*Bell* at 4.58) but the English court in*The Herceg Novi* [1998] 2 Lloyds Rep 454 found that it had nowhere near universal acceptance (at 458). Although the *Spiliada* is ultimately a discretion, this part ought to be consistent – whether a legal rule is ‘internationally accepted’ does not depend on the parties’ circumstances.

1. **Enforceable Judgments**

In *International Credit and Investment Co (Overseas) Ltd v. Adham* [1999] ILPr 302 (‘*Adham*’), sending the claimant to a foreign forum where he does not have the benefit of a judgment enforceable under the Brussels Convention deprived him of a legitimate juridical advantage, militating against a stay, as the judgment would be less enforceable against the defendant’s assets in Member States. This was endorsed in *Sharab v Al-Saud* [2009] 2 Lloyd’s Rep 160 at [63]. This approach is not objective between the parties -- whether the defendant valued having a recognizable negative declaration enforced in the EU was not considered. At the same time, this is an interesting counterbalance to the Anglo-centric view of procedures, because it bases its ‘advantage’ on England’s membership of an international judgment recognition system. At the time, this was not in doubt, and this factor was not expected to count against English jurisdiction – the *Sharab* refers to the ‘status and enforceability’ of an English judgment *around the world*. However, when English judgments cease to be part of the BIR system post-Brexit, English judges may hear the argument that it is their own courts which will deprive the claimant of a juridical advantage and/or substantial justice. Though this argument falls outside the two-limb *Spiliada* framework, the court’s discretion to act ‘in the interests of justice’ is broad enough to encompass it.

1. **Conclusion**

The *Spiliada* test’sapplicationis flawed where judges are unwilling to articulate why substantial justice cannot be done abroad. However, the approach taken in some areas is moving in the right direction. The treatment of costs differences between England and the foreign forum misuses the concept of a ‘legitimate juridical advantage’ to hide a tendency to consider English costs rules as the only ones capable of substantial justice; even where ‘substantial justice’ is directly considered, objective principles are not articulated. This is not reflected in the treatment of differences in the law applicable in England and the foreign forum. Courts articulated someobjective principles to determine whether substantial justice would be done, though they have not done so clearly or conclusively. Furthermore, some recent cases treat the answer given by English conflicts rules as decisive, even where express choice of law is irrelevant. However, the English courts’ treatment of judgment enforceability is a small countervailing current – though it is claimant-centric, the *Adham* unintentionally de-centres English views of procedural justice in favour of courts within a judgment-recognition system. If the *Spiliada* principle is to step into the limelight as the post-Brexit guiding principle of English jurisdictional disputes, two refinements to its application are required: further clarity on the characteristics of ‘substantial justice’, and greater judicial objectivity between the parties.

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