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

**Introduction**

Since 1986, the case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 has provided the definitive English law guideline on *forum non conveniens*. The fundamental principle in *Spiliada* is set out by Lord Goff as:

“*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*.”[[1]](#footnote-1)

The *Spiliada* decision marked the final step in a gradual evolution of the law over the previous years and a reconciliation between the Scottish and English positions on *forum non conveniens*. Shortly prior to the decision in *Spiliada*, the House of Lords considered the question of the effect of *lis alibi pendens* on the decision to grant a stay of proceedings in *The Abidin Daver* ([1984] AC 298). Lord Diplock summarised the development in Scottish and English jurisprudence to date and declared in his judgment that “*judicial chauvinism has been replaced by judicial comity*.” Lord Diplock’s recognition that the English and Scottish positions were now aligned was noted and approved in *Spiliada* at 475G.

However, as much as the *Spiliada* test may have sought to encourage greater judicial comity and flexibility, it is no longer fit for purpose as it does not safeguard against the real risk of judicial chauvinism that is present in its application, particularly in the field of international commercial law. The broad discretion offered to judges encourages the very behavior it sought to curtail.

Further, this essay argues that a restatement of both limbs of the *Spiliada* test is necessary as follows:

i) A greater emphasis on the primacy of the appropriate forum limb;

ii) A return to considering whether the claimant would lose some personal or juridical advantage if a claim were to be heard in another jurisdiction.

This essay will focus primarily on the *forum non conveniens* test as applicable to stays of jurisdiction but, given that the fundamental principle is also relevant to service out of the jurisdiction, may also refer to such cases for illustration.

**The rise of judicial chauvinism in commercial cases**

Although guidance is provided in *Spiliada* as to the relevant factors to consider under both limbs of the test, none of these are said to be binding and, broadly speaking, the courts have a broad discretion as to when a case is more closely connected with another forum and when the interests of justice require a stay to be granted. It is with this discretion that a risk of a rise in judicial chauvinism presents itself, particularly in the area of international commercial law.

It is uncontroversial to note that the complexity of commercial disputes have developed considerably since the *Spiliada*. Agreements are now regularly concluded between multiple parties in different jurisdictions and electronic communication and online platforms for the provision of services makes it difficult to establish where a contract has been concluded.

Another development in the years since *Spiliada* is the increase in the establishment of courts with specific jurisdiction to decide disputes of an international commercial nature. In some cases, courts are established in order to govern the disputes of a financial centre which has its own exclusive jurisdiction in commercial matters, such as the Dubai International Financial Centre (“DIFC”) Courts, the Abu Dhabi Global Markets (“ADGM”) Courts and the Astana International Financial Centre (“AIFC”) Court. The courts listed above operate within a common law framework, with procedural rules derived from the English Civil Procedure Rules and apply English law directly, subject to any conflicts with local legislation. Proceedings are conducted in English and the benches of these courts are comprised of eminent common law jurisdiction judges, including retired judges from the High Court of England and Wales.

Similarly, the Singapore High Court has established a division known as the Singapore International Commercial Court (“SICC”) which hears claims “international and commercial in nature”.[[2]](#footnote-2) The SICC is able to conduct proceedings in English and adopt non-Singaporean rules of evidence on application. As in the courts of the DIFC, ADGM and AIFC, the SICC’s bench is also staffed with international judges to sit alongside their Singaporean counterparts.

The reality that the establishment of these dispute resolution centres presents is that the Courts of England and Wales, particularly the Queen’s Bench Division of the High Court, face competition. It is clear from their marketing, investment and planning that has gone into the creation of these centres makes clear that they are eager to hear cases and to establish themselves as legitimate dispute resolution bodies. Against, this background, there is a real risk that the flexibility afforded by the *Spiliada* test may lead to judicial chauvinism in the form of a court prioritising its own competence to hear a case over the question of where the most natural or appropriate forum is.

Furthermore, the risk is even greater in cases of “service out” where the jurisdictional reach of certain dispute resolution centres can be very broad. For example, the Rules of the DIFC Courts 2018 (“RDC”) specify at RDC 9.53 that:

“*…permission to serve process outside the DIFC is not required, but it is the responsibility of the party serving process to ensure he complies with the rules regarding service of the place where he is seeking to effect service.*”

A similarly broad jurisdiction is afforded to a chamber such as the SICC whose remit includes international commercial disputes, covering disputes which may *prima facie* have a comparatively weak connection to Singapore.[[3]](#footnote-3)

The Singapore Court of Appeal noted these concerns in the case of *Rappo v Accent Delight International Ltd and another and another appeal* [2017] SGCA 27. The matter concerned claims by two companies domiciled in the BVI against individuals resident in Singapore and Monaco for breach of fiduciary duty, fraudulent misrepresentation and the tort of deceit. The defendants applied for a stay of proceedings commenced in Singapore on the basis that either Switzerland or Monaco was the more appropriate forum for their claim to be heard. The application for a stay was dismissed and on appeal, the defendants alleged, among other things, that the judge at first instance had erroneously taken into account the availability of a transfer to the SICC when considering whether Singapore was *forum non conveniens*. The Singapore Court of Appeal held that the first instance judge had applied the *Spiliada* test appropriately and clarified that:

“*an unprincipled jurisdictional grab resulting in the Singapore courts’ refusal to grant a stay in all cross-border commercial cases would be wrong*.”[[4]](#footnote-4) [original emphasis].

The Court of Appeal went on to state that:

“*We emphasise that the possibility of a transfer to the SICC should not be considered by plaintiffs as a free pass to elude all jurisdictional objections to the adjudication of a dispute in Singapore… a submission that the possibility of a transfer to the SICC weighs in favour of an exercise of jurisdiction by the Singapore courts must be grounded in specificity of argument and proof of evidence.*”

While this guidance may provide some comfort and certainty to parties litigating in Singapore, it does not detract from the fact that the flexibility accorded by the *Spiliada* test may lead to courts applying the test seeking to deploy a “jurisdictional grab” where they can.

This tendency is illustrated by two recent cases heard in the DIFC Courts in Dubai.

The case of *Al Khorafi and Others v (1) Bank Sarasin-Alpen (ME) Ltd (2) Bank Sarasin & Co. Ltd* [2011] DIFC CA 003 concerned claims for breach of contract, breaches of tortious duties of care and breaches of regulatory laws in connection with the alleged mis-selling of financial products. The claimants were domiciled in Kuwait, the first defendant in Dubai and the second defendant in Switzerland. The Court of Appeal was invited to consider an application to stay proceedings between the claimants and the second defendant in the DIFC on *forum non conveniens* principles and in particular, on the basis that all claims between the Second Defendant and the Claimants were governed by a jurisdiction clause in favour of Switzerland.

The Court of Appeal, having considered that the DIFC Courts’ jurisdiction was engaged, and accepted that the jurisdiction clause was binding and that the natural forum for the claims against the Second Defendant was Switzerland. Nonetheless, the Court found that in the interests of “justice, convenience and fairness”, the DIFC was the appropriate jurisdiction within which the claims against the Second Defendant should proceed.[[5]](#footnote-5) The judgment does not go into extensive reasoning as to why this decision was reached, save that the Court expressed concern that concurrent litigation in different jurisdictions should be avoided and that claims against the first defendant would proceed within the DIFC.

It is arguable that the reasoning of the Court of Appeal is highly unsatisfactory; the broad brush of “justice” was operated to override a clear agreement between the parties, as well as a recognition that Switzerland was in any event the most appropriate forum for the hearing of the trial. It is furthermore unclear why the court could not use any other of its case management powers to deal with issues of current litigation and avoid a duplication of proceedings.

In the case of *Tavira Securities Ltd v Re Point Ventures and others* [2017] CFI 026, the DIFC Court of First Instance dealt with two arguments from the Defendants – firstly that the DIFC Courts did not have jurisdiction over the contractual dispute because the Claimant, who was a licensed DIFC company at the time the claim was issued, was not so registered at the time of the events giving rise to the claim. Secondly, and in the alternative, the Defendant’s argued that the court should decline to exercise jurisdiction either on the grounds of abuse of process or *forum non conveniens*.

The argument regarding abuse of process was rejected relatively swiftly. As to jurisdiction, the Court held that the legislation which confers on the DIFC jurisdiction to hear “civil commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party” (Article 5(A)(1)(a) Law No. 12 of 2004 as amended (“the Judicial Authority Law”) was available in cases where the claimant was not a licensed establishment prior to the events giving rise to the claim. Having established that the Court’s jurisdiction was engaged, the Court considered the question of whether the English courts were the more appropriate forum. The arguments put forward by the Defendants on this ground included the fact that the contract was due to be performed in England, the contract was governed by English law and that the shares which were the subject of the contract were quoted on the London Stock Exchange.

In considering the Defendants’ arguments, the Court held that the Defendant had failed at the first limb of the *Spiliada* test, namely that they had not established that England was clearly or distinctly more appropriate than the DIFC Courts for the trial of the claim. The analysis of the court, however, does suggest that the DIFC Court of First Instance was executing the very “jurisdictional grab” which was warned against the case of *Rappo*:

“*That the alleged contract is highly likely to be governed by English law and England may well be the lex loci solutionis are weak factors in favour of the English High Court being clearly or distinctly more appropriate forum. The language of this Court is predominantly English and the Court is well familiar with English law. Nor is the fact that the shares which were the subject of the sell order were quoted on the LSE anything other than a weak connecting factor, this Court being well familiar with how the LSE operates and how equity bargains are settled in London.*”[[6]](#footnote-6)

The Court carried out an analysis other factors proposed by the Defendant but overall, it is highly suggestive that the Court was expressing a desire to assert its competence to deal with the claim rather than genuinely considering where the centre of gravity of the dispute was.

The same inclination to prefer one’s own jurisdiction may increasingly present itself to the Courts of England and Wales in the future when deciding cases on the appropriate forum. As things currently stand, the terms of the United Kingdom’s withdrawal from the EU provide that the Brussels I (Recast) Regulation (Regulation (EU) 1215/2012) will only continue to apply in relation to proceedings instituted before the end of the transition period or actions which are related to such proceedings within the meaning of the Regulation’s *lis alibi pendens* provisions.[[7]](#footnote-7) In anticipation of the end of the Brexit transition period, courts in European countries are preparing themselves to be able to provide dispute commercial dispute resolution services to parties that may otherwise choose to litigate in London. Earlier this year, the Paris Court of Appeal International Chamber (“CICAP”) became operational. The Chamber has jurisdiction over “transnational commercial disputes” and has adopted a flexible procedure whereby evidence may be heard in English and the bench, comprised of English-speaking judges familiar with principles of common law, will have the power to hear disputes governed by English law. It is hard to see the CICAP as anything but a competitor to the Queen’s Bench Division of the High Court and with the broad scope of discretion afforded by the *Spiliada* test, one may be wary that the English courts may also embark on a practice of judicial chauvinism.

**The proposed restatement of the *Spiliada* test**

As can be seen above, the potential for judicial chauvinism in applying the *Spiliada* test can emerge at either stage of the test – through a prioritization of a court’s own competence or through the guise of seeking to do “justice”. Both limbs of the test stand to be modified to control the basis on which courts decide the appropriate forum without becoming overly prescriptive.

In relation to the first limb, it is suggested that clear, judicial guidance is necessary as to factors which are indicative of a connection with a particular forum, such as the place of performance of a contract or the place where damage in relation to a tort took place.

A modification of the first limb in this respect would bring the test for the granting of a stay of proceedings in line with that for service out of the jurisdiction, as it would be reflective of (but perhaps not as prescriptive as) the factors listed in CPR PD 6B paragraph 3.1.

Above all else, however, any restatement of *Spiliada* must make clear that the key consideration under the first limb is whether another forum is clearly more appropriate, rather than a reflection of whether the court deciding the matter would itself be competent to deal with a trial.

As to the second limb, this essay favours a return to the approach in *Macshannon v Rockware Glass Ltd* [1978] AC 795 and consider whether a claimant would lose some personal or juridical advantage if the matter were to be heard in another forum, as opposed to a focus on whether “substantial justice” could be achieved in the other jurisdiction.

This restatement is crucial firstly in order to curtail the practice of parties advancing numerous arguments and producing excessive submissions in order to appeal to the court’s sense of justice. This tendancy was condemned by Lord Neuberger in *VTB Capital v Nutritek* [2013] UKSC 5, who further emphasized that the consideration of the appropriate forum for a claim was a procedural one.[[8]](#footnote-8)

Secondly, such a restatement would act as an effective “backstop” in balancing the availability of another forum with the Claimant’s procedural right to commence proceedings in the jurisdiction within which the stay application has been made. In its current formulation, there is a tendancy for primacy to be given to the “interests of justice” which overrides the finding that an appropriate forum has been established. Regard for the personal or juridical advantage that would be lost to the claimant retains the focus on the second limb acting as a safeguard to the main consideration of the appropriate forum.

Finally, the test would assist with the elimination of forum shopping by claimants in courts where jurisdictional gateways are broad and, in reality, a claimant would not be disadvantaged by a stay of proceedings.

**Conclusion**

The *Spiliada* test represented a balanced drawing-together of previous authorities on *forum non conveniens* which reflected a spirit of judicial comity rather than judicial chauvinism. However, if judicial comity is to be encouraged, the test must incorporate safeguards against the instances of judicial chauvinism which can and do arise in its application. A focus on the primacy of the appropriate forum and on the procedural disadvantages to a claimant that service out might present will restrict the instances of judicial chauvinism which the English law seeks to curtail.

**Sahana Jayakumar**

1. *The Spiliada,* at 476C. [↑](#footnote-ref-1)
2. Singapore International Commercial Court Procedural Guide, January 2017, rule 2.1. [↑](#footnote-ref-2)
3. See also the Paris Court of Appeal International Chamber (CICAP) discussed below, whose jurisdiction covers “transnational commercial disputes”. [↑](#footnote-ref-3)
4. *Rappo v Accent Delight International Ltd and another and another appeal* [2017] SGCA 27, para. 123. [↑](#footnote-ref-4)
5. *Al Khorafi*, para. 119. [↑](#footnote-ref-5)
6. *Tavira Securities,* para. 53. [↑](#footnote-ref-6)
7. Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 14 November 2018, Article 67. [↑](#footnote-ref-7)
8. *VTB Capital*, para. 81. [↑](#footnote-ref-8)