

**Reframing Jurisdiction:
A New Scheme?**

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THE PROPOSED SCHEME

1. Whether or not it has jurisdiction under clause 2, the court has and may exercise provisional jurisdiction in respect of a claim from the time a claim form is issued, or (if earlier) an application is made in respect of the claim, until
- (1) the defendant accepts the jurisdiction of the court by acknowledging service or otherwise in writing, or
 - (2) if the defendant acknowledges service without accepting the jurisdiction of the court, the expiry of the time for the defendant to challenge the jurisdiction of the court, or
 - (3) if the defendant challenges the jurisdiction of the court, the court declares that it has jurisdiction under clause 5 or dismisses the claim under clause 6, or
 - (4) if the defendant has not acknowledged service, and the relevant time for doing so has expired, the claimant continues the proceedings having first obtained the court's permission under clause 12, if required under clause 11, or
 - (5) if the claimant does not serve the claim form, expiry of the period for serving the claim form,

as the case may be.

(‘Provisional jurisdiction’ includes the power to determine whether the court has or does not have jurisdiction under the following provisions, and any power which the court may have to grant interim remedies.)

2. Subject to clause 4, a court has jurisdiction in respect of a claim
- (1) if the defendant accepts the jurisdiction of the court, or
 - (2) if the defendant, having acknowledged service, does not challenge the jurisdiction of the court within the time limited for doing so, or
 - (3) if a statute provides that the court has jurisdiction, or
 - (4) if any of the grounds set out in List A applies to the claim, unless a statute provides that the court has no jurisdiction, or
 - (5) if (a) any of the grounds set out in List B applies to the claim, and (b) there is real and substantial connection between the claim and England, unless a statute provides that the court has no jurisdiction, or
 - (6) if, exceptionally, the right to a fair trial or the right of access to justice so requires, and the dispute has a sufficient connection to England.

3. The claim form shall contain a statement identifying any statutory provision or any ground from List A or List B, on which the claimant relies to establish the jurisdiction of the court.

4. If the court determines that it has no jurisdiction to determine the subject matter of the claim or if the law on state, sovereign, or diplomatic immunity, or the immunity of an international organisation, deprives the court of jurisdiction, the court shall declare that it has no jurisdiction and dismiss the claim.

5. Subject to clause 4, if the defendant challenges the jurisdiction of the court, and the court determines that it has jurisdiction in respect of a claim under clause 2, the court must declare that it has jurisdiction.

6. If, having determined the defendant's challenge to the jurisdiction of the court, the court does not make a declaration that it has jurisdiction in respect of a claim, the court may dismiss the claim, failing which the claimant may not continue the proceedings in respect of that claim, without the court's permission under clause 12, except that the claimant may make and the court may determine an application to amend the claim form or the particulars of claim.

7. A defendant may, within the time limited for challenging the jurisdiction of the court (or, with the permission of the court, at a later date), challenge the exercise of jurisdiction by the court without losing any right to challenge the court's jurisdiction.

8. If the defendant challenges the exercise of the court's jurisdiction

(1) the court may order that the proceedings be stayed if a statute requires or authorises this or, unless a statute otherwise provides, if it is in the interests of justice that the court not exercise its jurisdiction,

(2) unless a statute otherwise provides, the court may, on application of the claimant, lift the stay if there has been a material change of circumstances and that it is in the interests of justice that it exercise its jurisdiction, unless a statute otherwise provides, and

- (3) the court, in considering whether it is in the interests of justice to stay the proceedings or lift a stay of the proceedings, shall have regard in particular to the factors in List C.

9. A defendant who challenges the jurisdiction of the court or the exercise of jurisdiction by the court may at the same time (or, with the permission of the court, at a later date) challenge the validity of any procedural step (including service of the claim form), apply to strike out the claim, or apply for summary judgment without losing any right to challenge the jurisdiction or to challenge the exercise of jurisdiction.

10. If the defendant makes an application to challenge the jurisdiction or to challenge the exercise of jurisdiction, or both

- (1) the court shall give directions for the determination of the application, including where appropriate the filing by the claimant of a written response to that application,
- (2) the application shall be dealt with by a judge of the High Court without oral hearing unless the court considers an oral hearing to be necessary in the interests of justice,
- (3) if the applicant and the claimant request an oral hearing of the application, the court shall presume that an oral hearing is necessary in the interests of justice, unless the court is satisfied to the contrary,
- (4) no appeal shall lie against a decision to allow or to not allow an oral hearing of the application, and
- (5) a single appeal shall lie against an order made by the court on the application, but save in exceptional circumstances no further appeal shall lie.

11. If the defendant, who was not present in England when the claim form was served, has failed to acknowledge service and the relevant time for doing so has expired, the claimant may not continue the proceedings without first obtaining the court's permission under clause 12.

12. Upon the claimant making an application for permission to continue the proceedings, the court may give permission to continue only if it has jurisdiction under clause 2.

13. Any question of fact which arises in the application of clauses 1 to 12 shall be determined by the court in favour of the party who has the stronger case for argument, having regard to the evidence before it.

The burden of proof lies on the claimant, in respect of questions concerning the existence of jurisdiction, and on the defendant, in respect of questions concerning the exercise of jurisdiction.

List A

- (1)** A claim is made under an enactment which allows proceedings to be brought in England whether or not the defendant is present in England.
- (2)** The defendant was present in England when the claim form was served.
- (3)** The defendant is domiciled in England.
- (4)** A claim is made by a party to proceedings for a costs order against a person who is not a party to those proceedings.
- (5)** A claim is made to enforce any judgment or arbitral award in England.
- (6)** A contract contains a term to the effect that the court shall have jurisdiction to determine the claim.
- (7)** The defendant has, otherwise than by a contract term, consented to the exercise by the court of jurisdiction in respect of the claim.
- (8)** A claim is made in respect of a contract which was to be performed, wholly or substantially, in England.
- (9)** A claim is made for a declaration that the claimant is not liable under a contract which, if it were found to exist, would comply with the conditions set out in point (8).
- (10)** A claim is made in respect of a trust which is governed by English law or which provides that proceedings in respect of such a claim may be brought in England.
- (11)** A claim is made for a remedy which might be obtained in proceedings for the administration of the estate of a person who died domiciled in England or whose estate includes assets in England.
- (12)** The claim is a probate claim or a claim for the rectification of a will.
- (13)** A claim is made by the Commissioners for H.M. Revenue and Customs relating to duties or taxes against a defendant not domiciled in Scotland or Northern Ireland.
- (14)** The claim is in the nature of salvage and any part of the services took place within the jurisdiction; or to enforce a claim under section 153, 154, 175 or 176A of the Merchant Shipping Act 1995.

List B

(15) The claim relates wholly or mainly to property in England.

(16) A claim is made for an order that the defendant do or refrain from doing an act in England.

(17) A claim is made against another person in respect of whom the court has jurisdiction and the defendant is a proper party to that proceedings in respect of that claim.

(18) A claim is made against the defendant which falls within one or more of points (1), (4)-(12), (15)-(16) or (21)-(28), and a further claim is made against the same defendant which arises out of the same or closely connected facts.

(19) A claim is made for a contribution or an indemnity in respect of a liability enforceable by proceedings in England.

(20) A claim is made for an interim remedy which the court has power to grant.

(21) A claim is made in respect of a contract which (a) was made by the defendant or an agent of the defendant while present or resident in England, or (b) is governed by English law, or (c) was broken in England.

(22) A claim is made for a declaration that the claimant is not liable under a contract which, if it were found to exist, would comply with the conditions set out in point (21).

(23) A claim is made in tort in respect of which damage was sustained, or will be sustained, in England, or in respect of a wrongful act or omission committed, or likely to be committed, in England.

(24) A claim is made for a declaration that the claimant is not liable for a tort which, if the tort was found to exist, would comply with the conditions set out in point (23).

(25) A claim is made for breach of confidence or misuse of private information in respect of which detriment was suffered, or will be suffered, in England, or in respect of an act committed, or likely to be committed, in England.

(26) A claim is made for breach of fiduciary duty where the breach was committed or is likely to be committed in England, or the fiduciary duty is governed by English law.

(27) A claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim arises out of acts committed (whether by the

defendant or otherwise) in England, or arises out of events occurring in England, or relates to property in England.

(28) A claim is made in unjust enrichment where the defendant's alleged liability arises out of acts committed (whether by the defendant or otherwise) in England, or the enrichment is obtained in England, or the claim is governed by English law.

List C

- (1)** whether the parties made an agreement as to where or when proceedings would be brought and which applies to the proceedings before the court,
- (2)** whether the dispute has, in all the circumstances, a more real and substantial connection with the English court or the foreign court,
- (3)** whether a court overseas would have jurisdiction and could be expected to determine the dispute between the parties justly and fairly,
- (4)** whether proceedings brought in respect of the dispute before the foreign court are likely to give rise to a judgment which would, if necessary, be recognised in England,
- (5)** whether there are, or may be, related proceedings before the English court or the foreign court,
- (6)** whether the claimant would suffer unfair hardship if the English court were not to exercise its jurisdiction,
- (7)** whether the defendant would suffer unfair hardship if the English court were to exercise its jurisdiction,
- (8)** where the parties are resident.

NOTES ON CLAUSES

General synopsis

The overall structure of the law should reflect four guiding principles.

(1) The jurisdiction of the court should be based on rules of law which are clear and precise and capable of being stated in statutory form. There is no independently sensible justification for their being subtle, or clever, or sophisticated.

(2) The role of discretion in relation to the jurisdiction of the court should be confined to the exercise (not existence) of jurisdiction, and raised in a separate enquiry, the content of which may take account of *forum (non) conveniens*.

(3) The question whether the merits of claim are unanswerable, good, arguable, weak, or hopeless should be of no relevance to the jurisdiction of the court or to its exercise: such concerns should belong in a separate enquiry, most likely as an application for summary disposal.

(4) The rules governing jurisdiction should, so far as possible, be separate from the rules on service of process, the principal purpose of which should be to ensure that the defendant has sufficient notice of the case against it (see *Abela v Baadarani* [2013] UKSC 44, [53]).

The current state of the law strongly suggests that the last 50 years have seen us construct a complex structure which now seems over-engineered, and out of line with these guiding principles. If it could take 11 years and two journeys to the Supreme Court to decide (*FS Cairo (Nile Plaza) v Brownlie* [2021] UKSC 45) that Lady Brownlie may serve process on the entity she blames for her loss, then something has gone grievously wrong. The current rules, contained principally in CPR, Part 6 and the accompanying Practice Direction, are partly (though not wholly) to blame.

The costs, in terms of time, money and judicial resource, of deciding questions of jurisdiction may be harmful to London's reputation as a centre of international litigation. The fact that enormous costs may well be incurred without any resultant determination of the merits is, surely, shocking. At present there is no obvious limit; the weary reference to the 'many millions of pounds' spent on getting a jurisdiction dispute as far as the Court of Appeal (*Public Institution for Social Security v Banque Pictet* [2022] EWCA Civ 29, [12]) was just the latest in a long line of judicial lamentation. Exhortation to change behaviour has not worked, and there is no obvious reason to suppose that it will work without a change in the underlying framework of rules. It has, however, been acknowledged that it is not really fair to blame the litigating parties, who are playing to the whistle, for the problem which is perceived from the bench (*FS Cairo (Nile Plaza) v Brownlie* [2021] UKSC 45, [201]). If we want a different result, we must legislate for it.

The procedural framework

The decision to commence legal proceedings ought to be seen as momentous, and as requiring respect for the legitimate expectations of the targeted defendant from the outset. A claimant

should be required to consider, identify, and state in the claim form, the basis on which the English court is said to have jurisdiction over the defendant in respect of the claim. Given the significance for the defendant of the raising proceedings before the English court, the law should expect the claimant to pay proper attention to this, and require the claimant's belief as to jurisdiction to be fortified by a statement of truth.

If that is done, there will be no need for an application for permission to serve out of the jurisdiction, wasteful of costs and of the court's time. It is believed – hard evidence is not available – that the number of applications for permission to serve out which fail at the without notice stage is very low; and where there is initial failure the claimant may re-draft and re-apply. If this causes unease, one should recall that service of the documents required to commence proceedings, without the need for permission but with certification of the basis of jurisdiction, operated for decades in the context of the Brussels/Lugano scheme with no significant problem. So long as the claimant is required to comply with (separate) rules governing pleading and service, no more should be required at this stage. There will therefore be no need to apply for permission to serve out of the jurisdiction, and the formal distinction between service in and service out will dissipate almost entirely, subject to one procedural technicality (see clause 11 below). The resulting confusion of the jurisdictional and procedural roles of service will thereby be almost entirely eliminated. The rules within the CPR governing the mode of service would necessarily remain, but those concerning the necessity and conditions for obtaining permission to serve out could (happily) be removed.

An application by the defendant to challenge the jurisdiction of the court, whether relating to the existence of jurisdiction, or its exercise, should be dealt with without oral hearing unless the parties and the court agree that it is necessary that there be oral argument. For many, perhaps most cases, this approach will be perfectly satisfactory: focused attention on an application to be made in writing and determined by a judge will be a very good start and may well be a very good end. At present, the need for an oral hearing may be acute if the court is to be asked to find that the merits of a claim are too weak to allow the proceedings to continue. But it is neither necessary nor desirable that this element be incorporated into the definition of jurisdiction or the question of its exercise, for it has no rational connection with either. If examination of the merits of the claim is no longer bound up with the jurisdiction challenge, difficult issues of foreign law and how to account for it (a central feature of the litigation between Lady Brownlie and the hotel) will be largely sidestepped.

There should be one appeal against the decision made when the defendant challenges the jurisdiction or challenges the exercise of jurisdiction, but (generally, save in exceptional circumstances) no second appeal.

Terminology

Both the rules within the scheme, and these notes, presently refer to 'England', 'English court' and 'English law' as a shorthand for England and Wales, a court of England and Wales and the law of England and Wales. The fuller terms are geographically and constitutionally more accurate, but we will need the advice of those with greater experience of drafting legislation on how to produce a version which is both accurate and readable.

Likewise, advice on use or elegant avoidance of the third person singular pronoun from someone whose expertise in drafting is greater than our own would be helpful. At present, the rules within the scheme have been drafted in a way which avoids such references.

The law: jurisdiction

There should be a statutory statement defining when an English court has and when it does not have jurisdiction, with all possible routes to establishing or negating jurisdiction gathered in one place. At present, the law is contained in a number of fragments, and these are not all easy to assemble or understand. In particular, the idea of ‘submission’ to the jurisdiction of the court has become clouded: the basic idea may be sound, but ‘submission’ as a term of legal art is both formless and hazardous and a significant cause of confusion.

There should be as clear a separation as possible between the grounds on which the court has jurisdiction and the power of a court to not exercise the jurisdiction which the law gives it. At present these are intertwined (in particular, in cases in which the court’s permission to serve the claim form out of the jurisdiction is required) in a way which muddles the law.

The grounds of jurisdiction may be sub-divided into three groups.

First, then: certain grounds of jurisdiction are self-sufficient, in the sense that if they exist the court will have jurisdiction without any further condition needing to be met. These should include the presence of the defendant at the moment of service, for this has never been seriously questioned, as well as the (obvious) cases in which a statute provides for the jurisdiction of the court (for example, the statutory enactment of the 2005 Hague Convention on Choice of Court Agreements and the recently-inserted provisions of the Civil Jurisdiction and Judgments Act 1982 dealing with cases of consumer and employment contracts). Some of the current gateways to jurisdiction also appear suitable for stating as rules which are sufficient by themselves to justify the jurisdiction of the court without the need to go further, on the basis that by their nature they establish a connection between the claim and England which is both real and substantial.

Second: there should be other grounds of jurisdiction which are not self-sufficient but which should be available if there is (also) a demonstrated real and substantial claim between the claim and England. It is undeniable that this introduces an element of evaluation, but it is intended to be as narrow as it reasonably can be. It may fall short of the ideal, but it reflects the untidy reality.

The proposed jurisdiction rule for claims made in tort is an obvious example of such a rule.

As damage (in the sense of ‘actionable damage’ (*FS Cairo (Nile Plaza) v Brownlie* [2021] UKSC 45) extends to the indirect consequences of tortious conduct occurring and having its immediate impact elsewhere, the ground may be satisfied to the letter in circumstances which involve an artificial, transitory or slight connection to England. The additional requirement of a ‘real and substantial connection’ emphasises that a connection of this kind is insufficient to warrant an assertion by the English court of its adjudicatory jurisdiction with respect to the claim. This should be a question going to the *existence* of jurisdiction rather than a question as to its *exercise* (adopting, here, the view of Lord Leggatt in *Brownlie*, [196], to that of Lord Lloyd-Jones, [79]).

Third: the common law concern to secure access to justice would suggest that there should, under carefully defined circumstances, be a form of residual jurisdiction to secure the right to a fair trial or the right of access to justice if the dispute has a sufficient connection to England.

The defendant, in response to the claim form, may (i) state in an acknowledgement of service that he accepts the jurisdiction of the court, or (ii) challenge the jurisdiction of the court, or (iii) acknowledge service but fail to challenge the jurisdiction of the court within the prescribed time period, or (iv) fail to acknowledge service. In the case of (i) the court will have jurisdiction. In the event of (ii) the court will manage the procedure to investigate the question whether it has jurisdiction. In the event of (iii), the defendant's conduct should be taken to establish the court's jurisdiction. In the event of (iv) the claimant will be permitted to proceed with the claim if, but only if, he is able demonstrate that the court has jurisdiction in accordance with the rules stated above.

The law: no jurisdiction

The formulation of the rules set out above recognises that a statutory provision (such as s 9 of the Defamation Act 2013) may deprive the court of jurisdiction which it would otherwise have.

There remains, additionally, the possibility that the court may not have jurisdiction with respect to all or part of the subject-matter or that the claimant's ability to pursue the claim may be affected by the immunities of states and other persons enjoying protection in accordance with principles of public international law. The approach here recognises that the court may be responsible for raising such matters of its own motion even if the defendant does not do so.

The law: (non-)exercise of jurisdiction

It is not necessary for the claimant to establish at the outset that the court should *exercise* its jurisdiction. The defendant may nonetheless ask the court to not exercise the jurisdiction which he accepts that it has or which it declares that it has. An application of this specific kind should not revisit the question whether the court has jurisdiction (although this may have been raised by the defendant as a logically prior question). Instead, it should consider whether the interests of justice require that the court not exercise that jurisdiction. If successful, the application should result in a stay of the proceedings, itself capable of being lifted if the interests of justice so require.

An indicative list of factors to be taken into account by the court in assessing what the interests of justice require should be enacted to give structure to the analysis and predictability to the outcome.

There is every reason to encourage the defendant to make an application to challenge the jurisdiction and to challenge the exercise of jurisdiction at the same time. CPR 11 allows this, and it is entirely beneficial (as well as being unusually clear in the way it is set out). As the application for an order that the court not exercise its jurisdiction is separate from the issue whether jurisdiction exists, there is no risk of making an application by which a defendant shoots himself in the foot and somehow 'submits' to a jurisdiction he thought he was objecting to.

The law: strength of the claim on the merits

The question whether the court has jurisdiction, and the question whether the court should refrain from exercising its jurisdiction in the interests of justice, should be entirely separated from any assessment of the merits of the claim against the defendant.

The question whether the court has jurisdiction, and the question whether it should (not) exercise that jurisdiction, have no natural connection to the question whether the claim is sustainable on its merits. A defendant who considers the substantive claim raised to be without merit should be entitled to apply for its summary dismissal. It would be wrong to prevent such an application being made at the very beginning, but it should be treated as the ordinary strike out/summary judgment application which it really is and kept separate from the assessment of jurisdictional questions.

Evidence of foreign law may be called for if a challenge is to be made to the merits of the claim, for this is where it fits or belongs. It should not ordinarily be needed in connection with the rules proposed to establish the jurisdiction of the court, almost all of which are framed as ‘the claim is X’: foreign law is unlikely to be needed to ascertain whether a claim of one kind or another has been made (see clause 9 below). If there are a few cases in which it does appear to be needed (List A point (6) may be one), they can be dealt with by case management.

Individual clauses

Clause 1

It is notorious that the word ‘jurisdiction’ has many meanings, and that its use may bewilder the inexpert. At present one may say that a court has jurisdiction to authorise service to be effected out of the jurisdiction and that once service has been made the court will have jurisdiction over the defendant. This is not helpful. In these rules, and unless the context otherwise compels, ‘jurisdiction’ will mean authority to hear and determine the matter set out in the claim form. There must be a way to describe the position or power of the court to act prior to the point at which its adjudicatory jurisdiction is established: it seems sensible to describe that as provisional jurisdiction.

Provisional jurisdiction to act will ordinarily arise when the claim form is issued. A small adjustment to the wording has been made to cater (for example) for the case in which interlocutory relief such as a freezing injunction is applied for prior to the issue of the claim form.

Provisional jurisdiction will last until *either* it merges in the adjudicatory jurisdiction of the court (see clause 2(1), (2), (3) if the challenge to the jurisdiction is dismissed, and (4)) *or* until the foundation for the court to have adjudicatory jurisdiction is removed (clause 2(3) if the challenge to the jurisdiction is successful, and (5)).

Clause 2

Clause 2 sets out the law which defines the jurisdiction of the court. Its six sub-clauses reflect, and are inspired by, but do not exactly reproduce current law. It is to be read subject to Clause 4, which deals with ‘subject matter jurisdiction’ and international immunities. The six sub-clauses are as follows.

Clause 2(1) applies if the defendant accepts the jurisdiction of the court in writing. It is not necessary to elaborate this; accepting the jurisdiction of the court is preferable to submission as a definitional element, as submission is encumbered with complexity and contradiction which is not helpful. The most obvious, and most usual, way of accepting the jurisdiction of the court will be to say so on the form by which service is acknowledged. Clause 2(1) is not so limited, but (to promote certainty) requires that the statement of acceptance be in writing.

Clause 2(2) applies if no challenge is made to the jurisdiction of the court after the invitation to do so has been made in the documents served by or on behalf of the claimant, to which the defendant has formally responded by acknowledging service. If there is no challenge in these circumstances, it may be argued that the defendant has accepted the jurisdiction of the court, but it seemed preferable to avoid arguments about whether acceptance may be found in or inferred from inaction. So long as the documents served by the claimant are clear and accessible, and the defendant has acknowledged service without challenging jurisdiction, this is sufficient to establish the jurisdiction of the court.

Clause 2(3) applies if a statute provides that the court has jurisdiction. Sometimes a statute does this directly, such as where the 2005 Hague Convention on Choice of Court Agreements, now inserted in the Civil Jurisdiction and Judgments Act 1982; likewise, the provisions of sections 15B to 15E of the same Act. If Parliament has explicitly declared that the court has jurisdiction, that is the end of the matter. On other occasions it may be more difficult to discern Parliament’s intentions: the question whether or in which circumstances Parliament gave the court jurisdiction to make an order under s 423 Insolvency Act 1986 with respect to persons or conduct outside the United Kingdom was a good example of the difficulty which may arise. However, if a statute gives the court jurisdiction to rule upon a particular claim against a person with the characteristics of the defendant, there is no more to say on the matter.

Clause 2(4) applies if any one or more of the grounds in List A (numbered points (1) to (14)) applies to the claim. These grounds are considered to describe circumstances in which a court may legitimately claim jurisdiction without the need to ask about the strength of the connection between the dispute and the English court as the points of contact themselves enshrine a real and substantial connection.

Clause 2(5) applies if any one or more of the grounds in List B (numbered points (15) to (27)) applies to the claim. However, if the claimant relies on any point in List B, the court will not have jurisdiction unless the claimant also establishes a real and substantial connection between the claim and the English court. This is because the points in List B may, depending on the circumstances of the case, reveal a strong connection, or only a weak connection, between the claim and the court.

Many of the grounds in List A and List B have been carried across from those which currently appear in Practice Direction 6B; we have also made a few additions, of which point (26), for breach of fiduciary duty, is the most significant.

Clause 2(6) may apply if the claimant cannot satisfy any of the other sub-clauses. Its use will be very rare, but the claim is still connected to England, and the common law right of access to justice will be defeated if the claimant is not allowed to sue in England, a court should have a route to establishing its jurisdiction. In other systems of law this may be thought of as the law providing a forum of necessity, but it is preferable to state an English rule in English terms.

Under the proposed new structure, it will not be necessary for a claimant to seek permission to serve the claim form on a defendant who is not in England. Nonetheless, if the defendant were to challenge jurisdiction, or if the claimant were required to seek the court's permission to continue the claim, the onus would be on the claimant to satisfy the court that one or more of the grounds applies and that, within List B, a real and substantial connection exists. For example, in relation to clause 2(5), the claimant must satisfy the court that one or more of the grounds in List B 'applies' and that there exists a real and substantial connection between the claim and the dispute. Clause 13 addresses the approach to be taken in resolving questions of disputed fact.

Clause 3

Clause 3 requires the claimant to state, in the claim form (verified by a statement of truth) the jurisdictional rule or rules on which reliance is placed. It is considered that the institution of legal proceedings is an act of such significance that a claimant should be required to focus on this at the outset. As there will no equivalent of the current application for permission to serve the defendant at an address overseas, there will be no other vehicle for the claimant to convey information about this aspect of his claim.

It is not unusual to see a pleading as to the jurisdiction of the court in proceedings before a foreign court: the United States is typical. After a while it can seem odd that, while an English claim form will set out what the claimant is complaining about, it is silent about why or how the law allows him to summon this defendant before the court. It is considered that the substance of clause 3 is a reform that is long overdue. It provides the information necessary for the defendant to consider, and to seek advice, whether to challenge the court's jurisdiction.

Clause 4

Clause 4 makes the obvious point that if other legislation, or a rule of the common law, means that the court has no authority to adjudicate, that is the end of the matter and the claim must be dismissed. In some contexts this has been, and may still be, referred to as subject matter jurisdiction, but this draft seeks to identify the contents of the bottle rather than just reading the label on it.

To the extent that the common law still denies the court authority to adjudicate a claim which is based on title to foreign land, or which would require it to determine the validity of a foreign patent, the other rules set out here will not operate: if the issue which the court has to determine is not justiciable according to law, there can be no question of the court having jurisdiction to determine it.

The same is true when rules of public law relating to state, sovereign, and diplomatic immunity, or more generally to the activities of a foreign sovereign state, deny the jurisdiction of the court. To a large extent these rules are set out in treaty, convention, and statute which does not need to be copied here. More complicated issues arise when it contended by a defendant that rules relating to what may loosely described as foreign acts of state prevent the court adjudicating the matter which the claimant wishes to bring before it. The substance of the law is still being settled at the highest level (see, most recently, *Maduro Board of the Central Bank of Venezuela v Guaido Board of the Central Bank of Venezuela* [2021] UKSC 57). It is sufficient to say that if rules of or inspired by public international law, or rules of English constitutional law, mean that the court has no jurisdiction to adjudicate with respect to the parties or the subject matter of claim, nothing in these draft proposals is intended to contradict those rules.

Legislation may appear to deny the court authority to adjudicate in particular circumstances. Two examples might be the Arbitration Act 1996, when a defendant invokes section 9 to require the matter to be removed from the court and referred to an arbitral tribunal, and the provisions of the 2005 Hague Convention on Choice of Court Agreements, when a defendant points to a Hague-compliant agreement for the courts of another Hague state. But by long tradition these are circumstances in which the court is directed not to exercise its jurisdiction, rather than cases in which it has none. It is therefore dealt with under Clause 8.

Clause 5

Clause 5 makes a simple point. If the defendant challenges the jurisdiction of the court (the procedure for which will be set out elsewhere), but the court finds the challenge to be unsuccessful, it will be required to declare that it has jurisdiction; it will not be sufficient that it simply dismiss the application. If the defendant challenges the jurisdiction of the court and the challenge is sustained the court will declare that it has no jurisdiction (and may grant further relief: see clause 6 below). It ought to follow that, if the challenge is dismissed, the court should be required to declare, in the claimant's favour, that it does have jurisdiction.

Clause 6

Clause 6 deals with the case in which the court, having ruled on the defendant's challenge to the jurisdiction, does not declare that it has jurisdiction. It may decide to dismiss the proceedings, and if it does so at any point in time they are at an end. There may, however, be circumstances in which the claimant persuades the court that the action should not immediately be dismissed, for example because the claimant wishes to amend the claim in one or more respects so as to strengthen its claim to establish jurisdiction, or because there is a likelihood that the circumstances may change so as to improve the claimant's position. In such a case, clause 6 allows any application to amend but otherwise provides that the claimant may proceed only with the court's permission under clause 12.

Clause 7

Clause 7 replicates the current understanding of CPR 11. A defendant may challenge the jurisdiction; a defendant may challenge the exercise of jurisdiction (on which, see clause 8, below); and a defendant may do both, at the same time without there being any risk that in making the latter challenge he has given the game away on the former. CPR 11 (and the decision of the Privy Council in *Texan Management v Pacific Electric Wire* [2009] UKPC 46) mostly removed the traps and pitfalls which sometimes seemed to mean that a defendant who thought he was objecting to the jurisdiction was in fact admitting to it. It should now be easier for everyone to see what is going on. Clause 7 needs no further elaboration.

Clause 8

Clause 8 deals with the defendant's objection to the exercise of jurisdiction which may be made (see clause 7, above) in parallel with his challenge to the jurisdiction. However, if the defendant realises that there is no sensible basis for challenging the jurisdiction, but still wishes to show the court reasons why it should not exercise its jurisdiction, he may do this.

The relief applied for will be, as now, for a stay of proceedings. The language of the clause suggests that, subject to the terms of any relevant statute, the test to be applied is whether the interests of justice favour the non-exercise of the court's jurisdiction: this is derived from the summary speech of Lord Templeman in *Spiliada v Cansulex* [1987] AC 436. It may well be that a court, called upon to evaluate this issue, may prefer to apply the more elaborate statement of the principle of *forum non conveniens* which may be traced back to the speech of Lord Goff in the same case, and which has been much commented on and elaborated since.

It is considered, however, that the simpler formulation is suited to a reformed system. The fuller version of *forum (non) conveniens* has also had to do service, as in *Spiliada* itself, to deal with an application for permission to serve process on a defendant overseas: there will no such application to be made under this new system. The 'version of *forum non conveniens*' required to be used under this reformed scheme will be concerned solely with whether the English court should exercise the jurisdiction which it has under the provisions of clause 2. Moreover, if the foreign court to which the defendant points is more closely connected to the dispute but is one with respect to which there exist well-founded doubts as to whether the interests of justice will be served in the case, it may not be wholly easy to apply the two-stage, *forum non conveniens*, analysis to determine the defendant's application. If the court is simply directed to ask whether, given that it has jurisdiction over the defendant in respect of the claim set out in the claim form, it is in the interests of justice that it not exercise that jurisdiction, it is more likely to focus on assess the critical issues. Any assessment as to the foreign court's availability and ability to adjudicate in a just and fair fashion (see point (3) in List C, discussed below) will arise in the evaluation of a question which focuses more obviously on the exercise of its own jurisdiction. The may be a little closer to the approach of the High Court of Australia, asking a question which is narrower than the current doctrine of *forum (non) conveniens* seems to allow.

The legal burden of persuading the court that the interests of justice favour the non-exercise of jurisdiction lies on the defendant, although the court may consider that the evidential burden with respect to particular matters lies elsewhere. (With respect to disputed questions of fact, see the comment to clause 13 below).

If there is a material change of circumstances following a stay, the claimant should be able (as presently) to apply to lift the stay on the ground that the interests of justice now favour the exercise of jurisdiction. In this case, the legal burden rests with the claimant.

Relief in the form of a stay of proceedings may be on such conditions as the court may determine. This calls for no further comment.

List C contains a non-exhaustive list of factors to which the court may look in assessing whether the interests of justice favour the exercise or non-exercise of its jurisdiction. Most speak for themselves, but the first point in the list is designed to accommodate the non-exercise of the court's jurisdiction when there is an arbitration agreement which binds the claimant to pursue his claim against the defendant before an arbitral tribunal (or other forum, such as mediation), and when there is a choice of court agreement which binds the claimant to pursue his claim against the defendant before a foreign court. The wording of clause 8 nonetheless recognises that the exercise of the power to stay proceedings in such circumstances may be regulated by a statute (Arbitration Act 1996, s.9; Hague Convention, Arts. 5(2) and 6), which will displace the framework described here.

Clause 9

Clause 9 makes two important points. The first is that if the defendant raises objection to the service of the documents upon him – for example, that the contents of the claim form did not comply with the rules, or that service was not effected in accordance with English law so far as it deals with service of these documents on him, or that service was contrary to a relevant service convention or violated foreign law – he may do that as well as challenging the jurisdiction or its exercise or both. Objections to service as such will now be separate and distinct from challenges to the jurisdiction, but they should be raised at the outset.

The second is that if the defendant is of opinion that the claim against him is bound to fail and should be put out of its meritless misery as quickly as possible, he may apply to have the claim struck out summarily; and he may make that application at the same time as he challenges the jurisdiction or its exercise.

It will have been seen that the jurisdiction of the court no longer depends on the claimant being able to demonstrate a serious issue on the merits, or a claim that deserves to be tried. As the law presently stands, a defendant served while overseas with the permission of the court may object to the jurisdiction of the court by contending that the claim against him is very weak or hopeless on its merits. There is no doubt that this is the law. But there are several serious objections to it, the most obvious of which is that it is hard to explain how the jurisdiction of an English court depends or should depend on the strength of the merits of the claim. It is also liable to create unnecessary and undesirable cost, complexity and confusion with respect to the determination of a challenge to jurisdiction on this basis (see e.g. *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3).

The solution proposed is to allow the defendant, whose assessment of the merits of the claim is as just described, to seek to have the court deal in summary form with the meritless claim by making a separate application exactly as would be made if there were no objection to the jurisdiction: usually, an application for defendant's summary judgment. Clause 9 allows this

to be done alongside a challenge to the jurisdiction and a challenge to the exercise of jurisdiction, or both: each application will be freestanding and will not jeopardise or prejudice the other.

The advantages of separation are clear. It will also mean that the need or opportunity for a party – and it can be very hard to work out, from current jurisprudence, which party it should be – to refer to, or plead, or establish the content of foreign law will be much diminished. Lady Brownlie’s case threw this complexity into sharp relief. However, in dealing with the jurisdiction of the court, properly so called, there will be little or no room for reference to foreign law. If, by contrast, the defendant seeks to have the court examine the merits in summary proceedings, in order to show that the claim against him is bound to fail, the admission of evidence, and examination, of foreign law may well be appropriate. If the two questions are kept apart, it will then be easier for the court to manage the procedure, and to give appropriate permissions and directions.

To return to the point made above, that the jurisdiction of the court will not require attention to foreign law, one may return to clause 2 and the six bases for jurisdiction given there. Of these, clause 2(1), 2(2), 2(3) and 2(6) depend entirely upon English law. Clauses 2(4) and 2(5) are different; but examination of the 28 numbered points in List A and List B suggests that very few will require reference to be made to foreign law. Most specify that a claim is made of a particular kind, or arises in particular circumstances. For example, a claim may be made in respect of a tort if the facts and matters pleaded are in the nature of a tort, whether or not a tortious wrong will be established at trial; a claim may be made in respect of contract to be performed in England, whether or not a contractual obligation will be made out at trial.

It is possible that point (6) of List A, with its requirement that ‘a contract contains a term to the effect that...’ could be read as requiring proof of a contract underwritten or vouched for by the law that would govern it if it were valid. It is not clear that this analysis would be required in the context of the 2005 Hague Convention, and is arguable that it could be avoided outside it. Even so, if this is the basis on which the jurisdiction of the court is to be established, it may not be possible, or reputable, to ignore the impact of the *lex contractus*. All in all, it is a matter of detail and can be addressed through sensible case management (see clause 10); the larger point is that it should generally be possible to determine the jurisdiction of an English court without needing to get tangled up by pleading and proof of foreign law. To adapt from the observation of John Collier, it will no longer be necessary to determine whether there was a tort in order to decide whether there is jurisdiction to determine whether there was a tort. When one remembers that rules of the conflict of laws may be required to determine whether there was a tort in the first place, Mr Collier’s acute observation becomes more pointed still.

This separation, or at least distancing, of questions of jurisdiction and choice of law is consistent with the approach taken by the European Court in the context of the Brussels I regime, without any obvious adverse effects.

Clause 10

This marks a sharp change from current procedures. The starting point is that the defendant’s challenge to the jurisdiction, and to the exercise of jurisdiction, will be a paper application, not requiring an oral hearing. This may not be immediately welcomed by those who consider that

oral advocacy is an essential part of the procedure for persuading the court that it does or does not have jurisdiction, should or should not exercise jurisdiction, and so forth. But it is hard to see how else to respond to the concern that current procedures have allowed costs to spin out of control and delay to reach alarming proportions. A focused application on paper, dealt with by an experienced applications judge who will deliver a reasoned judgment, should be proportionate, and therefore sufficient, in most cases.

It will not be true in all. In high-value commercial disputes, the issues may be complex and the judge may well benefit from oral advocacy. For example, in cases in which the parties have concluded a complex financial relationship comprising several contracts containing (apparently) conflicting choice of court or arbitration clauses, detailed analysis of the claim and the documents may be required, in circumstances in which oral argument is the only sensible way to illuminate what is going on. So if the court (and it is best placed to make the final decision) considers that a hearing is necessary one should take place; if the parties agree that a hearing is necessary there should be a (rebuttable) presumption that one will take place; but the entire process from the issue of the defendant's application will be managed and directed by the court.

Clause 10 is concerned only with applications to challenge jurisdiction or its exercise. It is not proposed that an application to strike out the claim as hopeless, or for summary judgment in the defendant's favour, will be one for which an oral hearing of the application will be presumed to be sufficient. As noted above (see clause 9), jurisdiction and the merits are to be kept apart.

So far as appeals are concerned, a single appeal from judge to Court of Appeal should be presumed to be sufficient. If the decision of the Court of Appeal is a foregone conclusion, a leap-frog application may lie, but questions of jurisdiction should not normally find their way to the Supreme Court. An exception may be made (it has not been incorporated in the draft of the rules) for cases of significant public importance or in which a definitive ruling on the interpretation of statutory words may be required, but otherwise the application of the law to individual sets of fact (such as whether there is a real and substantial connection to England, or whether the case is one in which the interests of justice point one way or another) merits the possibility of one appeal, but not two.

Clauses 11 and 12

Clauses 11 and 12 direct the court in the context of a claim for which the defendant has been served but has failed to make any response, and also provide for the situation, described in clause 6, in which the court does not declare that it has jurisdiction but is persuaded that it should not immediately dismiss the claim. It is not appropriate to equate such a case either to one in which the defendant has accepted the jurisdiction of the court, or to treat it as one in which the defendant acknowledged service but did not challenge the jurisdiction. As the original issue and service of the claim form will not have been undertaken under any form of judicial scrutiny, the claimant should be required to seek the permission of the court to continue to apply for default or summary judgment, as the case may be, and that application should involve an examination by the court whether it has jurisdiction under clause 2.

This requirement does not apply in a case in which the defendant was in England when the claim form was served on him). Here, the fact of service, which the claimant will be required to certify in order to proceed, itself provides a sufficient basis for the court's jurisdiction (see List A, point (2)). This qualification means that an application for permission to continue will not need to be made in cases with no foreign connection. Although it is, of course, possible that the court may have no jurisdiction with respect to a defendant who was served while in England, and defendants in that position may need to take further steps in order to set aside a judgment entered without jurisdiction, this seems a sensible limitation in the interests of procedural efficiency.

Clause 13

The evidential standard, in resolving disputed questions of jurisdictional fact, is presently formulated in terms as to whether a party has a 'good arguable case' with respect to matters on which carries the burden of proof. The precise meaning of this term has proved hard to pin down (see *Kaefer Aislamientos SA De CV v AMS Drilling Mexico SA De CV* [2019] EWCA Civ 10). In view of the difficulty to which this question has given rise, it seems prudent to insert a provision which seeks to clarify the position. Clause 13 serves this purpose.

On the one hand, the interlocutory nature of the proceedings means that there are limitations in the evidence that the court can and will receive: this will predominantly be in written form with no opportunity for the cross-examination of witnesses. On the other hand, there is a risk of injustice if a particular question of fact is determined in a party's favour even though the balance of evidence presented to the court favours the case of its opponent. In these circumstances, a relative standard appears justified.

As presently drafted, the first part of clause 13 seeks to give statutory expression to the test of whether the party bearing the burden of proof has "the better of the argument" on the available evidence, which is consistent with the relative element of the standard currently applied (*Kaefer*, [73]-[75]). It seems more straightforward to express this in terms of the relative strength of each party's case.

Clause 13 also makes clear where the burden of proof lies. It is suggested that this will rarely be determinative. However, a claimant who is unable to persuade the court that facts exist which support the claim to jurisdiction (or a defendant who is unable to persuade the court that facts exist which justify a refusal to exercise jurisdiction) will fall short on this basis.

A claimant who fails to discharge the legal burden placed on it under clause 2 may, with the court's permission under clause 6, seek to introduce fresh evidence, allowing for a re-assessment of any disputed question of fact. Similarly, a defendant who fails to discharge the legal burden placed on it under clause 8 may, with the court's permission under clause 7, make a further application challenging the court's jurisdiction, relying on fresh evidence.

The Lists

It has been explained above that there are grounds of jurisdiction (List A) which should be available without separate consideration of whether there is a real and substantial connection

to England, and grounds of jurisdiction (List B) which should be available to a claimant who can also show that there is a real and substantial connection, but otherwise not available.

If this characterisation and division is acceptable in principle, there will, no doubt, be suitable opportunities to consider both how the two lists should be formulated *ab initio* and whether the initial allocation is in need of adjustment from time to time (see, recently, Sir David Foxton [2022] LMCLQ 70). For example, should it turn out to be better to subdivide an existing ground, such as the one concerning property within the jurisdiction, to into a List A and a List B ground, or to move a ground from one List to the other, it is anticipated that this could be achieved by an adjustment to the original scheme or by a suitable amending instrument. Indeed, this proposed structure should be seen as paving the way for this kind of focused analysis in the light of experience.

List A

List A sets out the circumstances in which an English court will have jurisdiction without the need to ask whether or to show that the dispute has a real and substantial connection to England: that question will be irrelevant to the existence of jurisdiction in this case, and irrelevant to an application challenging the jurisdiction of the court. These 14 points describe cases in which such an additional requirement would be redundant or inappropriate.

As to the detail of the individual points, the following comments are offered.

(1) replicates existing law (gateway (21)(a)). It does not seek to explain when an enactment has this effect. Clause 2 provides separately (in clause 2(3)) for the case in which a statute, such as the Civil Jurisdiction and Judgments Act 1982, provides that the court has jurisdiction.

(2) replicates existing law. It would be traumatic to alter a jurisdictional rule which appears to be common to the common law world.

(3) makes little, if any, change to existing law (gateway (1)). A definition of domicile will be needed: that found in the 1982 Act is perfectly sufficient and can be carried across for this purpose.

(4) replicates existing law (gateway (18)) save that it will not be needed to show that England is the proper place for the claim. If the proceedings have been before an English court, the connection to England is obvious.

(5) replicates existing law (gateway (10)) save that it will not be needed to show that England is the proper place for the claim. If the proposed enforcement is to take place in England, the connection to England is obvious.

(6) replicates existing law (CPR, rule 6.33(2B)(b)). Cases involving an ‘exclusive choice of court agreement’ within the 2005 Hague Convention designating an English court would be addressed by clause 2(3). It may require the court to determine that there (actually, rather than allegedly) is a contract between the parties, and on this issue the court must be prepared to apply foreign law if it is the *lex contractus*.

(7) is rational, and probably reflects existing law. The idea of consent to, or consensus as to, the jurisdiction of a court has advantages over the more complicated and ambivalent

‘submission’, and the idea of implied consent to the jurisdiction of a court has been used by courts at the highest level. There is no need to suppose that consent or consensus can be shown only by a term in a contract to which the defendant is party.

(8) builds upon existing law (gateway (7)) save that it will not be needed to show that England is the proper place for the claim. If the contract was to be performed in England, that should be sufficient. A similar rule in the Brussels/Lugano scheme was never seriously questioned, even if the parties may sometimes make it difficult to locate the place of contractual performance. It would certainly be possible, and may be for the best, to apply such a rule by focusing on the claim made rather than on a technical analysis of how the *lex contractus* would define the contract and its performance obligations.

(9) builds upon existing law, and is to be read alongside point (8) to which it is the logical corollary.

Points (10) to (14) replicate existing law (gateways (12), (13), (14), (17) and (19)), save that it will not be needed to show that England is the proper place for the claim. Each of these points established a sufficiently strong connection to England.

As to (10), it is considered that the application of English law to a trust provides a stronger connection to England, and the English legal system, than the application of English law to a contract (see List B, point (21)), as trusts potentially have wider proprietary and public interest implications. If that distinction were to be rejected, the first part of point (10) should be moved to List B, rather than bringing the governing law of a contract within List A.

(12) is not restricted to wills governed by English law, or made by English testators, &c. It might be thought to belong on List B, but the proposal here would be that it keep company with point (11), and that concerns be dealt with under the procedure for challenging the exercise of jurisdiction.

List B

List B sets out the circumstances in which an English court will have jurisdiction if, and only if, the claim also has a real and substantial connection to England and if no statute supervenes to remove the jurisdiction of the English court. These points describe circumstances in which there may, depending on the circumstances giving rise to the claim, be a very close connection to England, or no more than a weak or remote connection to England. For these, there is no way to avoid the need for a supplementary requirement, modelled in familiar terms but designed to do a single, jurisdiction-determining, task. A real and substantial connection between the dispute and England will need to be asserted by the claimant when identifying the basis for the court’s jurisdiction; its absence may be asserted by the defendant as part of an application challenging the jurisdiction of the court.

As to the detail of the individual points, the following comments are offered.

(15) reflects existing law (gateway (11)), though for pragmatic reasons it does not seek to address the meaning of property (a question which is becoming complex) or the manner (if intangible) in which its location is to be determined.

(16) reflects existing law (gateway (2)) and slightly simplifies it.

(17) reflects existing law (gateway (3)) and simplifies it. Considerable case-law has accumulated around the existing rule, not all of it consistent. The principle is clear, though: if proceedings are or will be before an English court on the basis of these re-stated jurisdictional rules, and if the proposed defendant belongs in those proceedings as a defendant or third party, as the case may be, the court should have jurisdiction. In such a case the need to show a real and substantial connection to England may be easily met, and it may even be thought to follow that this case should be on List A.

(18) reflects existing law (gateway (4A)), which although somewhat controversial at the time of its introduction has not been adversely commented on in terms which justify its removal as part of this exercise.

(19) reflects existing law (gateway (4)), and may be thought to overlap with (17), which is not a problem. But it will also cover claims for a contribution under the 1978 Act. Given that the principal liability has to be one enforceable, rather than enforced, in England, it is appropriate that there be a further requirement that the contribution claim have a real and substantial connection to England, for some will and others will not.

(20) reflects existing law (gateway (5)).

(21) broadly reflects existing law (gateway (6)). It departs from it in that it does not ask where the contract was made or concluded (which has proved to be an unreliable basis for a jurisdictional rule: *FS Cairo (Nile Plaza) v Brownlie* [2021] UKSC 45, [213]) but where the defendant was when it was made, however it was made, which seems preferable, if still not compelling. All three sub-points reflect the fact that they may in terms apply when the dispute has a close connection to England as well as in one for which this would be far from true. That distinguishes them from point (8) on List A, though the comments made there about the role of the *lex contractus* apply here in equal measure.

(22) reflects existing law (gateway (8)) and is to be read alongside point (21) to which it is the logical corollary.

(23) reflects existing law (gateway (9)) without seeking to make substantial changes to it. Its presence in List B reflects the fact that these points of contact to England may apply when the dispute has a close connection to England as well as in one in which this is far from true. The task of defining damage, or of explaining where it occurs, which is still an important one even after Lady Brownlie's case, has not been attempted here for fear that it would be a distraction.

(24) is new, but is the logical corollary to point (23) and reflects the sound policy already adopted in relation to contract claims.

(25) reflects existing law (gateway (21)). It does not seek to specify how the location of detriment is to be ascertained, for fear that this would be a distraction.

(26) is new, but is drafted to reflect the structure of those rules to which it is analogous. It has been drafted to be simple, but a more complex rule could be devised if that were preferred. The current absence of a rule for breach of fiduciary duty appears to be accident rather than design.

(27) and (28) reflect existing law (gateways (15) and (16)) while refraining from addressing the issues which will arise when their individual definitional elements come to be scrutinised.

It will be seen that a number of these points are framed on the footing that a place can be identified for, say, the occurrence of loss or damage, the place of enrichment, the location of property, the place or performance, and so forth. These issues have generated case-law of undue complexity which would be better avoided. It would be possible, and may be sensible, to develop and spell out some basic guidelines by which to identify, for this purpose only, the relevant locations. In List A this would be necessary for point (8); in List B for points (15), (21), (23), (25), (26), (27), and (28).

List C

The fact that the English court has jurisdiction does not necessarily mean that it is appropriate that the court exercise it; the fact that the court has jurisdiction on the basis of rules which assume or require it to be proved that there is a real and substantial connection between the dispute and the English court does not necessarily mean that it is appropriate to exercise it. There may be, for example, a *lis pendens* before another court in circumstances in which this makes it (manifestly) inappropriate that the English court adjudicate the claims now set out in the claim form.

A defendant should be entitled to ask the court to not exercise its jurisdiction unless the jurisdiction rule invoked by the claimant – for example, that the English court has jurisdiction on the basis of the 2005 Hague Convention on Choice of Court Agreements – precludes this (see Hague Convention, Art. 5(2)).

The overarching principle should be, as was said in *Spiliada v Cansulex*, that the interests of justice favour the non-exercise of jurisdiction, but it is convenient to set out, in a non-exhaustive list, a number of pointers which the court may find helpful in assessing the interests of justice. They mostly reflect current elements in the existing law of *forum non conveniens*, but the following brief comments are offered.

(1) reflects the fact that the existence of a valid and binding arbitration agreement, and a valid and binding choice of court agreement, is a powerful indicator of whether the court should exercise jurisdiction. Much will turn on the interpretation of the agreement. The duty laid on the court by the Arbitration Act 1996 and by the 2005 Hague Convention does not need to be repeated here; where the matter is one of common law, it has been established that the court should be strongly, but not inflexibly, disposed to give effect to the choice of court agreement.

(2) reflects existing law. It does not contradict the jurisdictional rule that in some circumstances jurisdiction will depend on the existence of a real and substantial connection to the English court. If there is a stronger connection to a foreign court, this should be a significant element in the assessment of the requirements of justice.

(3), which concerns the availability of a foreign court and its ability to determine the dispute between the parties justly and fairly, incorporates important features of the existing law. Neither the common law nor the European Convention on Human Rights would suggest that the interests of justice are served by refraining from exercising jurisdiction in favour of trial in a foreign court where that foreign court does not appear to be likely to do or deliver justice according to the law. Although the courts may need to consider, in an individual case, where the evidential burden appropriately lies, it seems sensible to expect the defendant to identify a

court overseas which has jurisdiction (*Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] UKSC 37, [96]-[97]) at the same time as recognising that comity ordinarily demands that the burden of bringing forward cogent evidence of a risk of injustice in that foreign forum should rest upon the claimant (*AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7). This latter element establishes a close connection between factor (3) and factor (6).

(4) probably reflects English law. A claimant who has established the jurisdiction of the court should be entitled to object to an application for a stay of proceedings if a judgment obtained by him from a foreign court would not, if necessary, be enforceable in England. It should not be a trump card, but (and it will depend on the circumstances of the case, and in particular an assessment of the likelihood that enforcement in England will be necessary) the interests of justice may not be best served by depriving a claimant of the opportunity to obtain a judgment which he may enforce in England.

(5) reflects existing law: the ‘broad picture of litigation’, before the English court and the relevant foreign court, may be compared and contrasted. An existing *lis pendens* will usually be a highly significant factor in the assessment of the interests of justice.

(6) and (7) reflect existing law, although the point has never quite been put this way. However, where one of the parties, say a consumer claimant (excluding one who has the statutory right to sue in England), or individual victim of a tort, can only really sue in England, it may well be unduly harsh to stay the proceedings in favour of another court. Equally, as defendants have a legitimate interest in putting their side of the story, a defendant in a weaker position should be entitled to say that it is unduly harsh to require him to defend in England: sauce for the goose is sauce for the gander. Inconvenience or hardship should not be enough: the consequences for the claimant or the defendant of being required to defend proceedings in a disadvantageous forum must be such as to affect the judgment whether the interests of justice require a trial in England or elsewhere.

(8) reflects existing law, but unless one of the parties is in practice only able to claim or defend in its home court, it makes a pretty minor contribution to it.

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