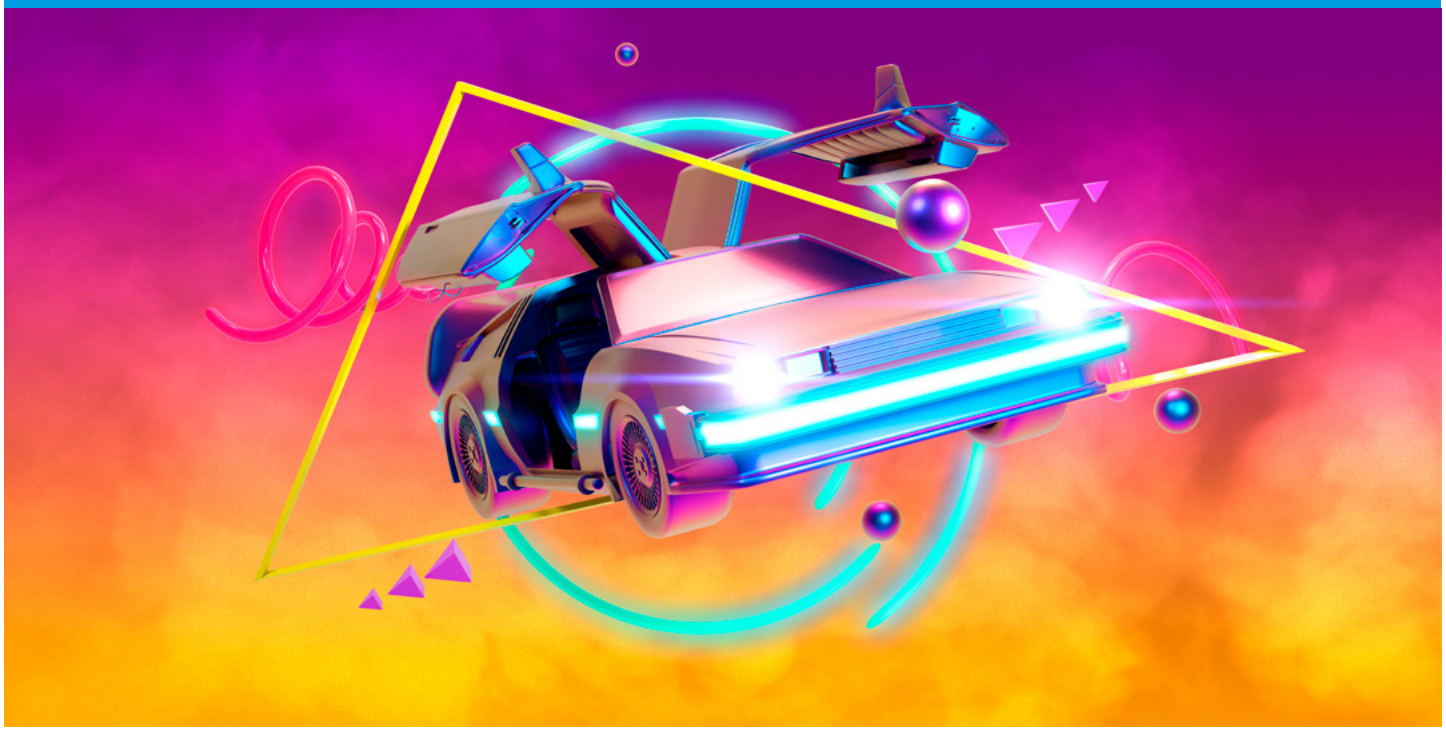
BACK TO THE FUTURE: THE RETURN TO PROMINENCE OF FORUM NON CONVENIENS



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Marty McFly travelled from 1985 to 1955 in Back to the Future; English law is currently embarking on a similar journey in relation to jurisdiction.

A change arising from Brexit has heralded a return to prominence of the doctrine of forum non conveniens, allowing the English Court once again to decline jurisdiction over defendants domiciled in England.

Pre-Brexit position: forum non conveniens challenges less likely to succeed where there was an English party

Before the end of the transition period on 31 December 2020, the English Court had been bound by Article 4(1) of Regulation (EU) 1215/2012 (the Recast Brussels Regulation). That required, subject to some exceptions, that persons domiciled in an EU member state, whatever their nationality, must be sued in the courts of that member state.

In Owusu v Jackson (Case C-281/02) [2005] ECR I-1383, the European Court of Justice (ECJ) considered the application of the forum non conveniens doctrine where the English Court had jurisdiction under the equivalent provision of the Recast Brussels Regulation's predecessor, Council Regulation (EC) No 44/2001 (the Brussels Regulation). The ECJ held that the jurisdiction conferred by Article 2 of the Brussels Regulation was mandatory even without any factors otherwise connecting the case to the member state. In practice, this meant that the English Court would have to accept jurisdiction over the English partyeven if the jurisdiction of another EU member state was not in issue.

The effect of this decision was to make it very difficult to challenge the English Court's jurisdiction over a party domiciled in England. As a result, claimants could sue English domiciled parties as "anchor defendants" over which the English Court could not refuse jurisdiction and then include in the claim other foreign defendants as "necessary or proper" parties pursuant to CPR PD 6B paragraph 3.1 (3)(b). This was commonly used to bring claims before the English Court with relatively limited connections to the jurisdiction.

Although the English Court was not guaranteed to refuse any stay application on forum non conveniens grounds brought by "necessary or proper" parties, it was far less likely to do so if claims against any English defendants were to proceed in England in any event.

Post-Brexit position: a holistic approach to forum non conveniens challenges

Following the end of the Brexit transition period, the Recast Brussels Regulation no longer applies in the UK. Nor is the English Court bound by Owusu v Jackson.

As a result, parties domiciled in England may once again challenge the English

Court's jurisdiction on the basis of forum non conveniens. While the presence of defendants in England is still highly relevant to the question of the appropriate forum, the English Court is no longer automatically obliged to accept jurisdiction over them.

Instead, the English Court will apply a more holistic approach to considering whether to grant a stay on forum non conveniens grounds based on the principles set out in the relevant cases, foremost of which is the House of Lords' decision in Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460. Spiliada confirmed that a stay of English proceedings will be granted if the English Court is satisfied that there is another available forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

The English Court's approach: Spiliada, but make it 21st century

There have been a number of decisions on forum non conveniens during 2021, with many more expected to follow.

One such case is VTB Commodities Trading DAC v JSC Antipinsky Refinery & Ors [2021] EWHC 1758 (Comm), which illustrates how Spiliada is now to be applied in the 21st century. Although this case did not involve any parties domiciled in England, it is illustrative of the approach that the English Court takes when applying the forum non conveniens doctrine. Cockerill J gave the following reasons for finding that Russia would be the most convenient forum:

1. **Russian law:** it was an "unappealing prospect" for the English Court to determine issues of Russian law that are "hotly contentious and indeed in the process of development". In addition, any appeal on an issue of Russian law would be "impeded by being a decision on facts and expert evidence" in which the Court of Appeal would be unlikely to interfere, whereas in Russia the full appeals process would be available.
2. **Irreconcilable judgments:** there was a risk of irreconcilable judgments, which issue needed to be taken "very seriously".
3. **Documents:** translated documents would not be "the ideal vehicle for" determining the defendants' state of mind, motives and actions.
4. **Witness evidence:** although the English court is "well used" to taking evidence through interpreters, there is "no doubt" that interpreted evidence is less easy to assess than evidence in a person's first language.

In view of the above factors, Cockerill J held that the burden of establishing that England was "clearly and distinctly" the most appropriate forum had not been discharged and that the English Court should not exercise its discretion to permit service out.

The future: more stays in favour of foreign proceedings

There is no reason in principle why the English Court should decline jurisdiction over defendants domiciled in England, while the courts of EU member states continue to be prevented from staying proceedings over their own residents. But absent a change in domestic law, or England's accession to the Lugano regime, the renewed prominence of forum non conveniens will remain.

This will inevitably mean an increase in stays in favour of foreign proceedings. It will be harder for claimants to establish English jurisdiction in cases with few links to the jurisdiction. Where significant factors point decisively in favour of another jurisdiction – such as in VTB v Antipinksy – such stays are especially likely to be granted.

Accordingly, practitioners should ensure in appropriate cases that they advise potential claimants of the increased risk of a stay on forum non conveniens grounds. It is, of course, important to identify that risk before issuing proceedings in England by conducting a comprehensive assessment of the connections of the potential claim to England and other jurisdictions. Otherwise, issuing in England may prove a mistake as costly as Marty McFly's when trapped in 1955.