Introduction

When will the English court take jurisdiction over a dispute that has little or no connection with England? When will the English court accept jurisdiction over a dispute where it is accepted that England is not the natural forum? Historically the answer depended, in substantial part, on the personal presence of the defendant within the jurisdiction for sufficient time for service to be effected – which led to justifiable criticism that the results could be capricious. With the more recent development of notions of forum non conveniens, the answers to these questions might have been thought to be ‘never’ or, perhaps, ‘next to never’.

But the proliferation in recent years of litigation in the English courts concerning commercial disputes relating to foreign individuals and entities and, in particular, those hailing from the states of the former Soviet Union might suggest otherwise. On the face of it, these disputes have little or no connection with England. Often, the parties to them will not have provided for English law or jurisdiction in their contracts. So why are they in England? Is the system now as capricious as it ever was? What can we learn from their presence?

In this article, we focus upon applications for permission to serve a claim from outside the jurisdiction and, further, on applications to serve on a defendant who is not domiciled within one of the states of the European Union. This article does not deal with the situation where the parties have chosen a forum in the contract.
Applicable principles

The court’s permission is not required for service of a claim form or other documents out of the jurisdiction where the court has jurisdiction under the Judgments Regulation or Lugano Convention and the criteria under the Civil Procedure Rules (CPR), Rule 6.33 are met.

In all other cases, an application must be made to the high court for permission to serve a claim form on a party situated outside of the jurisdiction. On an application for permission to serve a claim form outside the jurisdiction, the relevant legal and evidential burdens fall primarily on the applicant. The applicant must meet these requirements strictly as summoning a foreign defendant to the English court is an exercise of sovereign power and represents an ‘exorbitant’ jurisdiction.\(^1\)

The applicant must satisfy the court that he or she has met each of three tests. The three tests are cumulative in the sense that the applicant must satisfy each test in order, such that the second test only becomes engaged if the first test is passed and the third test only if both the first and second tests have been passed. All three tests must be satisfied before permission to serve out may be granted. In particular:

- the applicant must establish first that each cause of action for which he or she seeks permission to serve out stands a ‘reasonable prospect of success’;
- the applicant must establish second that for any cause of action that survives the first test, there is a ‘good arguable case’ that it falls within one of the grounds or jurisdictional ‘gateways’ of CPR Part 6 PD 6B relied on; and
- the applicant must establish, third, that for any cause of action that survives the first and second tests, the court should decide affirmatively to exercise its discretion to grant permission to serve out. The court will not ordinarily exercise its discretion here unless the applicant satisfies it that England is the natural forum for the resolution of the dispute.

As to the first test, the applicant is required by CPR Rule 6.37(1)(b) to adduce evidence stating that they believe that their claim has a ‘reasonable prospect of success’, which is the same test as if the applicant were resisting an application for summary judgment\(^2\) and does not differ from the traditional test of ‘serious issue to be tried’.

For the second test, the standard required is that of a ‘good arguable case’. This requires the applicant to show that he or she has ‘much the better of the argument’ on the material available. It reflects that the court

\(^1\) See Dicey, Morris & Collins (15th edn, Sweet & Maxwell 2012) at paras 11–142.

must be satisfied – or as satisfied as it can be having regard to the limitations which an interlocutory process imposes – that the applicant has established that the court has jurisdiction to grant permission to serve out and that it should do so. But if the applicability of PD6B, paragraph 3.1 depends on a question of law or construction, there is no room for the application of the test of good arguable case: the court must decide the question on the application to set aside.

As to the limitations of the interlocutory process, it was once suggested that applications for permission to serve out should be heard in ‘hours not days’, but this is often today far from being the case, although the appellate courts have recently restated the importance of judges using their case management powers to keep applications within proportionate bounds. Recent cases have suggested the need for a defendant challenging jurisdiction on the basis that the claim has no real prospect of success to identify some ‘killer point’, which demonstrates that ‘the claimant’s case on the facts was unsustainable’, without which ‘the expending of so much time and energy on a full-scale evidential challenge is a fruitless exercise.’ Importantly, the approach is interlocutory and the matters are not being decided as if at trial.

Further, the court will refuse to grant permission if the case is within the letter but outside the spirit of the Rules. Thus, if a claim can only be brought within the Rules on ‘narrow and highly technical grounds’, then permission will not be granted. The court will, in determining this matter, look at the substance of the matter and the true nature of the applicant’s claims rather than their form.

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3 Ibid paras 11–147 and Bols Distilleries v Superior Yacht Services [2006] UKPC 45; [2007] 1 WLR 12. See also ABCI v Banque Franco-Tunisienne [2003] EWCA Civ 205; [2003] 2 Lloyd’s Rep 146 at 167 (paragraph 66) where the Court of Appeal confirmed that the word ‘good’ was meant to add something to ‘arguable’.


6 See the criticisms made by the Supreme Court in VTB Capital plc v Nutritek Int Corp [2013] UKSC 5; 2 WLR 398 where the hearing at first instance occupied six days; see also the Court of Appeal in Alliance Bank JSC v Aquaanta Corp [2012] EWCA Civ 1588; [2013] 1 Lloyd’s Rep 175 where the first instance hearing took 11 days.


8 See Johnson v Taylor Bros [1920] AC 144 at 153 per Viscount Haldane; Rosler v Hilbery [1925] Ch 250 at 259–260 per Pollock MR; Beck v Value Capital (No 2) [1975] 1 WLR 6 at 15 and n 2 above at paras 11–142. Whether the applicant is required to demonstrate that the claim is within both the spirit and the letter of the rules as a prerequisite for the exercise of discretion or whether, the applicant having established that the claim is within the letter of the rules, the court should refuse to exercise its discretion to grant permission to serve out if the claim is not within the spirit of the rules (probably) does not matter but it is convenient to deal with this issue when analysing whether or not the claims fall within one of the gateways provided by the Rules.
It is also important to keep in mind that permission to serve out based on one cause of action pleaded in the claim form cannot be treated as permission based on some other cause of action. Accordingly, it is important when applying the first test and, in those cases where the first test is satisfied so that the court goes on to apply the second test, to identify and focus upon the cause or causes of action pleaded in the claim form and to consider whether each cause of action for which permission is sought satisfies the tests. This focus on the pleaded cause(s) of action is also important because a foreign party is entitled to know the precise grounds on which jurisdiction is asserted.

For the third test, the applicant must affirmatively discharge the burden of satisfying the court that it should exercise its discretion in their favour and show that there are good reasons why service on a foreign defendant should be permitted. The court is required to consider these issues and is only empowered to exercise such discretion if, and only if, the applicant has satisfied the first and second tests; that is, that their pleaded cause(s) of action stands a reasonable prospect of success and that one of the jurisdictional gateways provided by CPR Part 6 PD 6B is engaged.

The court’s discretion is ordinarily exercised within narrow bounds. There must be ‘good reason’ for permission to be granted to serve out, requiring the applicant ordinarily to establish that England is the ‘natural forum’ for the resolution of the dispute; namely the forum with which the action has the most real and substantial connection. The phrase ‘natural forum’ is used as shorthand for the criteria laid down in Spiliada Maritime Corp v Consulex Ltd, that the English court should be ‘clearly or distinctly more appropriate’ than any other forum. The effect is not merely that the burden of proof rests on the applicant to persuade the court that England is the appropriate forum for the trial of the action, but ordinarily that he or she has to show that this is ‘clearly so’.

In applying this standard the court must take into account the nature of the dispute, the legal and practical issues involved and such questions as local knowledge, availability of witnesses and their evidence and expense.

9 See n 1 above at paras 11–149.
12 This is the case even if the applicant is able to show a good arguable case as to the incorporation of a governing law and jurisdiction clause: n 2 above at para 11–192.
13 See n 1 above at paras 11–143.
14 [1987] AC 460 and see n 1 above at paras 12–005.
15 See n 5 above at 481 per Lord Goff of Chieveley.
16 See n 1 above at paras 11–143.
However, if the applicant satisfies the court that England is the natural forum then the court will ordinarily grant permission to serve out unless the defendant is able to show that there are circumstances by reason of which justice requires that this should be refused. Thus, the applicant bears the burden of demonstrating that England is the natural forum, but if this burden is discharged then the burden shifts to the defendant to identify reasons why permission to serve out should nevertheless not be granted.

The defendant does not have to show that another jurisdiction is the appropriate forum for the resolution of the dispute since the burden rests on the applicant to show that England is the appropriate forum and that the discretion should be exercised in their favour. If another forum is as suitable as England, then permission will not be given unless there are special circumstances by reason of which justice requires that permission should nevertheless be granted. This, again, is consistent with the comity shown with the courts of other jurisdictions and the caution with which the court approaches the exercise of its own jurisdiction over those domiciled overseas. So far, so conventional.

England not natural forum

But what of the case where the applicant concedes, or it is plain, that the natural forum is other than England, but seeks to have their case heard in England on the basis that they should not be compelled to litigate in the natural forum?

The answer is now plain: the natural forum may be ousted in favour of England if the court determines that England is the ‘appropriate’ forum in which the dispute should be tried. It might have been thought that if England is not the natural forum for the resolution of the dispute then nor could it be the appropriate forum. Put another way, if the applicant could not show that England was the natural forum then that was the end of the matter.

This is not so. The court is entitled to and will embark in appropriate cases upon an enquiry as to the availability (to the applicant) and relative merits of the natural forum before deciding whether or not to accept or decline jurisdiction. This leads to what might at first be viewed as the odd result of the court taking jurisdiction over disputes for which the natural forum is other than England. Whether or not this might be viewed as the English court over-reaching itself in jurisdictional terms is, perhaps, for others (and in particular those in the natural fora concerned) to judge.

18 See Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] AC 50 at 65 per Lord Diplock.
What follows are some recent cases where the court has accepted jurisdiction over a dispute notwithstanding that the natural forum for the resolution of that dispute is somewhere other than England and attempt to identify from these cases some principles that might be applied in future.

Cherney v Deripaska (No2)

This is perhaps the most well-known of the recent line of cases in this area. The case settled before trial. The that which follows represents the position as it was at the time of the jurisdictional dispute. It should be noted that we are here dealing with the second jurisprudential battle between the parties, the first (as to domicile) being resolved in Mr Deripaska’s favour and establishing (for the greater good of English jurisprudence in this area) that service either on one’s butler or one’s bodyguard is not good personal service.  

Mr Cherney, resident in Israel, claimed to be entitled to a declaration that Mr Deripaska, resident in Russia, holds 20 per cent of the shares of a Russian company, Russky Alyuminiy (‘Rusal’), and 20 per cent of a 66 per cent shareholding in another company, United Company Rusal, on trust for him. Mr Cherney also sought an order for the sale of the shares allegedly held on trust, an inquiry and account of any income or benefits received from the shares by the defendant and damages.

The claim arose out of two alleged contracts written in the Russian language that Mr Cherney asserted were concluded in a hotel room in London in March 2001. Save for the alleged location of the agreement and allegations (rejected by the judge) that the parties expressly orally agreed that their alleged contracts should be governed by English law and further that the parties also expressly orally agreed that any disputes between them should be resolved in England, the dispute had no connection with England.

Unsurprisingly, the court found that Russia (and not England) was the natural forum for the resolution of the dispute. Nevertheless, it also found that Mr Cherney had discharged the relevant burdens that he faced by showing that his claims: (i) had a real prospect of success; and (ii) engaged one of the relevant jurisdictional gateways (contract made in England).  

The issue thus remained as to why the court should take jurisdiction if the natural forum was Russia, a major industrialised nation, an ally of the UK, a permanent member of the United Nations Security

20 Cherney v Deripaska (No 1) [2007] EWHC 965 (Comm).
21 [2008] EWHC 1530 (Comm); [2009] 1 All ER (Comm) 333 per Christopher Clarke J.
22 And in doing so applied the ‘Canada Trust gloss’ requiring the party seeking to found jurisdiction to have much the better or at least the better of the argument on this point.

On the face of it, this was unpromising territory for the court to find that the natural forum (Russia) should be displaced. Nevertheless, the court accepted jurisdiction on the basis that, on the evidence before it, there was a significant risk that justice would not be done in Russia rendering England the appropriate forum for the resolution of the dispute. The court held as follows:23

‘I do however regard there as being a significant risk of improper government interference if Mr Cherney were to bring the present claims in Russia, where they would be very high profile proceedings indeed, such that substantial justice may not be done to him if he is required to proceed there. I am not satisfied that, if he is so required, justice will be done.’

Strong stuff indeed. As an aside, the assertions as to the fairness of proceedings in Russia were: (i) raised relatively late in the day by Mr Cherney; and (ii) apparently contradicted his position in US proceedings (where he had argued successfully that the proceedings should be stayed in favour of Russia – the natural forum).

Mr Deripaska’s appeal to the Court of Appeal was dismissed. The appeal failed essentially because the Court of Appeal, having upheld the judge’s approach to the applicable tests, was reluctant to interfere with his findings on the facts:24

‘I should make clear... the judge is not conducting a trial. It is not a situation in which he has to be satisfied on the balance of probabilities that facts have been established. He is in many instances seeking to assess risks of what might occur in the future. In so doing he must have evidence that the risk exists, but is not and cannot be a requirement that he should find on the balance of probabilities that the risks will eventuate... He has only statements and experts’ reports on which he is not going to hear cross-examination. He is able, of course, to take a view as to the cogency of that evidence at that stage. But then he has to make an evaluation taking account of all factors as to whether the claimant (despite Russia being the “natural forum”) has discharged the burden of showing that England is “clearly the proper forum”. That involves assessing whether Mr Cherney has shown on cogent evidence that there is a real risk that he will not get a fair trial there.’

In dismissing the appeal, the Court of Appeal emphasised that the position

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23 At [248].
24 At para 29 per Waller LJ. See also para 40 per Waller LJ, para 59 per Moore-Bick LJ and para 60 per Sir John Chadwick.
reached as regards Russia as a forum was specific to that case. Nevertheless, the case provides a checklist that other litigants might seek to use in future if seeking to displace Russia in favour of England.

The position following Cherney

As if to underscore that the decision in Cherney was specific to the parties in that case, and not some general indictment of the Russian legal system, the next case to consider is Yugraneft v Abramovich. In that case, Christopher Clarke J distinguished his own decision in Cherney and held that, on different facts, a fair trial was possible for those litigants in Russia.

More recently, in Erste Group Bank AG (London) v JSC (VMZ Red October), Flaux J emphasised that Cherney was an ‘extreme’ case, noting that Mr Cherney was seen as something of an enemy of the Russian state and had good reasons for not returning to Russia because he might be a political target. In contrast, the present case was in a ‘completely different category’ with Flaux J concluding that ‘this is not an instance of cogent evidence of a real risk of injustice, it is once again a perception that courts are the subject of improper influence without any concrete evidence to that effect.’

A similar result was reached, albeit this time in relation to the Ukraine, in Pacific International Sports Club Ltd v Soccer Marketing Ltd. There the suggestion was that a fair trial would not be available in the Ukraine because of corruption and inadequacies in the Ukrainian legal system. Blackburne J concluded that the dispute should be tried in its natural forum – the Ukraine – and the Court of Appeal dismissed an appeal over this decision. The same result in relation to Ukraine was reached in Ferrexpo AG v Gilson Investment.

In Mengiste v Endowment Fund for the Rehabilitation of Tigray, Peter Smith J decided that the evidence that the applicants would not obtain a fair trial in Ethiopia was not sufficiently cogent such as to oust the natural forum – Ethiopia – in favour of England, noting that ‘it would be arrogant in the extreme in my view for this court to pronounce adversely on the Ethiopian systems of justice on the basis of material before me.’

What these five cases have in common is that the party seeking to found

25 See para 44 per Waller L.J.
27 [2013] EWHC 2926 (Comm).
28 At para 199.
29 [2009] EWHC 1839 (Ch); [2010] EWCA Civ 753.
31 [2013] EWHC 599 (Ch).
32 At para 256.
jurisdiction in England was able to point only to generalised concerns relating to the integrity and reliability of the three legal systems involved (Russia, Ukraine and Ethiopia) and were unable to identify (at least not to the requisite standard) any risk or risks of injustice that were specific to the parties or the particular litigation. This is to be contrasted with the position in Cherney. Mr Cherney was able to succeed where others were not because he was able to show that he would not, or might not, receive justice in Russia and that if there was no trial in Russia – as there was unlikely to be if the court did not accept jurisdiction – then there would be no trial at all.

This is not to say that an applicant will not succeed in founding jurisdiction in England if they are only able to point to more general as opposed to party-specific or case-specific risks about the natural forum. If the applicant can demonstrate that the natural forum is effectively not available to them then they may well be able to found jurisdiction in England.

What an applicant must show here was considered recently by the privy council in AK Investment CJSC v Kyrgyz Tel. This was an appeal from the Isle of Man. The case concerned an attempt to serve proceedings out of the jurisdiction in Kyrgyzstan. The defendants to those claims sought to set aside service on the basis that the natural forum was Kyrgyzstan. The parties agreed that the natural forum was Kyrgyzstan and so the issue on the appeal was whether the natural forum should (as had been found below on appeal) be displaced in favour of proceedings in the Isle of Man. The appeal was dismissed by the privy council.

The essential questions that the privy council had to consider were: (i) the standard of proof that a party has to satisfy who asserts that justice will not be done in the foreign (natural) forum; and (ii) whether the court may rule that justice will not be obtained in a particular foreign legal system in general.

As to the first issue – burden of proof – the privy council found that, depending on the circumstances as a whole, the burden might be discharged by showing that there was a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption in the foreign system. The better the evidence, the more this would weigh in the exercise of the discretion as to whether to permit service out.

As to the second issue, the privy council was of the view that while considerations of comity will make the court slow to make any findings adverse to a foreign system in the absence of cogent evidence, there was no principle of law that prevented the court from considering such evidence.

34 This is consistent with The Abidin Davar [1984] AC 398.
or the issue as to whether justice would be done (or was likely to be done) in the foreign system. In this regard, generalised, anecdotal material will not suffice. What is required is sufficiently cogent and persuasive evidence of the risk of injustice.

Conclusion

It seems that the following principles can be derived from the Rules and the case law.

First, it is plain that the three-stage test for obtaining permission to serve out remains the starting point. An applicant must satisfy each of these in turn. Thus they must show: (i) a reasonable prospect of success on each cause of action for which they seek permission; (ii) that for each cause of action that satisfies the first test, that there is a ‘good arguable case’ in the sense of them having (much) the better of the argument35 that the cause of action passes one of the jurisdictional gateways provided by CPR Part 6 PD6B; and (iii) that England is clearly the appropriate forum for the trial of the claims.

Secondly, most controversy is likely to arise at the third stage. As to this, seven factors are relevant:

- The test is in material respects the same for service out as it is when the court is considering a stay of proceedings on forum grounds.
- The ‘appropriate’ forum is that forum where the case may most suitably be tried. Care is required here in terminology: the test is the ‘appropriate’ forum, which will ordinarily also be the ‘natural’ forum, but the two are not necessarily the same. The position here is complicated by the eliding of ‘natural’ with ‘appropriate’ in some of the forum cases.
- In considering the appropriate forum, the starting point is to identify the natural forum (ie, that with which the case has the most real and substantial connection).
- In considering the appropriateness of forum, any procedural advantages offered by the English system (eg, as regards limitation periods or the power to award interest) will be ignored.
- If another forum is apparently as or more suitable than England then ordinarily the court will not take jurisdiction unless there are circumstances by reason of which justice requires that the court take jurisdiction.
- The burden of establishing a matter upon which a party relies in seeking to persuade the court to exercise its discretion in their favour will rest on that party.
- Where the matter relied on in support of the court exercising its

35 The Canada Trust gloss.
jurisdiction is an allegation that justice will not be done in the foreign jurisdiction then that matter must be supported by cogent evidence.

Thirdly, there is a direct link between the comity that will be shown to foreign systems and the cogency of the evidence required before the court will allow the natural forum (or even perhaps as an appropriate forum) to be displaced in favour of England on the ground of the risk of injustice in the foreign system. What that evidence should look like is far from clear but the following guidance might assist:

- Generalised allegations of political, governmental or judicial impropriety in other jurisdictions are unlikely to suffice.
- Similarly, press and political comment will not suffice unless supported by cogent and independent evidence.36
- Academic commentary may assist but a degree of caution is required in approaching this too.
- The court will be careful to distinguish ‘public perception of manipulation of the court system based upon some high profile cases in the past’ from ‘the reality on the ground today.’37
- While expert evidence may be available from independent sources, it will not always be available and is certainly not necessary for an application to succeed. That said, credible expert evidence from demonstrably independent experts is likely to be very important and helpful (and certainly appears to have carried the day in Cherney).
- If the applicant can produce evidence particular to their position, or that of the defendant, which gives rise to the risk of injustice, then he or she is more likely to be able to persuade the court (as was Mr Cherney) to take jurisdiction.
- The best evidence is that absent the court taking jurisdiction there is unlikely to be any trial (in the natural forum) at all.

Interestingly, it would appear that in none of the cases where the procedures of a foreign state have sought to be impugned has the foreign state itself adduced (or been invited to adduce) evidence or make submissions as to the position. That in itself may cause some unease. Thus, for example, in Cherney pretty strident criticisms were made (albeit specific to Mr Cherney’s position) of the Russian political and judicial system without the court hearing from the Russian state. That said, requiring a foreign state to effectively intervene in a private law matter in England where its procedures are called into question may well represent a more exorbitant jurisdiction by the English court than the grant of permission to serve out.

Fourthly, and beyond what might be derived as a matter of principle

36 See Dornoch Ltd v Mauritius Union Assurance Co Ltd [2005] EWHC 1887 (Comm); [2006] Lloyd’s Rep IR 127 at para 97 per Aikens J.
or guidance from the recent cases, there remains the issue—and some might say—unease, arising from the willingness of the court to accept (or claim) jurisdiction over disputes and litigants which have little or no connection with England. If foreign parties wish to have the advantages of litigating in England then they can provide for English jurisdiction (and law) in their bargains. Should the court be willing to ‘fill the gaps’ left primarily by commercial entities when concluding their arrangements and structuring their affairs? In particular, should the court be prepared to take jurisdiction over matters with little or no connection with England on the ground of potential risks of injustice posed by a trial in the natural forum? What about the interests of other court users who can found jurisdiction in England as of right? Is the long arm of the jurisdiction of the English court in danger of over-reaching itself? These concerns are not hypothetical but have generated comment in national newspapers: ‘How did the English judiciary sink so low?’ 38 Perhaps being alive to these concerns, it is of note that in the recent decision of \textit{VTB Capital plc} 39 the UK Supreme Court dismissed an appeal from a refusal to grant permission to serve out of the jurisdiction in a claim where the claims were found to be governed by English law (relating to torts of fraudulent misrepresentation) on the basis that the ‘fundamental focus’ of the dispute was on Russia, such that the claimant could not discharge the burden of establishing that England was clearly the appropriate forum for trial. 40

These issues are perhaps best judged by others and, in particular, by those who offer the perspective of practising in other jurisdictions. But they are issues that must be kept in mind (as the court has) when considering these cases. It may be desirable for foreign parties to continue to choose to resolve their disputes in England. But where the parties have not made such a choice, and England is not the natural forum for resolving their disputes, the English courts must remain cautious about exercising its jurisdiction over them. 41 The position can, perhaps, be considered by asking how people in England would feel if a court in, say, Texas or Moscow, were to find that a fair trial of issues in England involving a major British company and alleged IRA involvement was impossible as a basis so as to establish jurisdiction for itself.

38 ‘How did the English Judiciary sink so low?’ \textit{The Observer}, 23 September 2012.
39 See n 6 above. See also the similar outcome reached in \textit{Alliance Bank JSC} (also n 6 above).
40 Note that in this case the parties agreed that they would each receive a fair trial in Russia.
41 Whether or not allowing foreign parties to ‘export’ their disputes to England helps or hinders the resolution of the problems with their domestic systems is, perhaps, a moot point.