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“Gateways” within the Civil Procedure Rules and the future of service-out jurisdiction in England

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For well over 150 years, the heads of jurisdiction currently listed within paragraph 3.1 of Practice Direction B, accompanying Part 6 of Civil Procedure Rules, have played a vital role in the English courts’ assertion of jurisdiction over foreign-based defendants. These jurisdictional “gateways” identify a broad range of factual situations within which courts may decide to entertain claims against defendants outside England. However, the existing general framework for deciding service-out applications is increasingly vulnerable to attack. In particular, the greater prominence of the *forum conveniens* doctrine, but also problems arising from the gateways’ operation, combine to cast doubt on their continued role (and relevance) in service-out cases. Against this backdrop, the article assesses the case for abandoning the gateway precondition. It is argued that rather than jettisoning the gateways, future revision of the law in this area should aim to minimise ambiguities concerning the gateways’ scope and also ensure that they include only instances which connote meaningful connection between the dispute and England.

Keywords: Private international law, jurisdiction, service-out jurisdiction, Civil Procedure Rules, jurisdictional gateways

A. Introduction

Under the national law in England, and subject to the relevant express or implied limitations,¹ courts can entertain international commercial claims against defendants outside the forum. The “service-out jurisdiction” has been a basis for adjudicatory competence in England since the mid-nineteenth century, when it was first introduced, following the enactment of the Common Law Procedure Act 1852. From 1883 until 1999, English courts exercised their power to summon foreign-based defendants under Order 11 of the Rules of the Supreme Court. Currently, the jurisdiction is codified within Part 6 of the Civil Procedure Rules (“CPR”). Pursuant to CPR, r 6.36, claimants can apply for proceedings to be served on defendants who are not in England at the time of service.

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¹ Eg, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1 (“Brussels Ia Regulation”) and the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 (“Lugano II Convention”).

Whereas English courts are expected to assert jurisdiction over a defendant who has submitted to the proceedings in England,² or has been present in the forum at the time of service,³ the assumption of service-out jurisdiction is discretionary.⁴ To persuade the court to summon the defendant in a service-out case, the claimant has to establish that the claim: (a) raises a “serious issue to be tried”; (b) falls within one of the heads of jurisdiction (widely referred to as jurisdictional “gateways”), presently listed within paragraph 3.1 of Practice Direction B, accompanying CPR Part 6 (hereinafter “CPR PD 6B para 3.1”); and, (c) is one where England is the proper forum for hearing it⁵ – ie, England must be *forum conveniens*.⁶ For present purposes, it is the second of these prerequisites which is of interest.

At their broadest, jurisdictional gateways identify a diverse range of factual situations that point to connection between the parties and/or the claim and England. Ever since the introduction of service-out jurisdiction, a party seeking to serve proceedings on a defendant outside England has been required to show that the dispute falls within one of the gateways. However, the continued significance of this requirement is increasingly open to debate. In particular, the logic of requiring a claimant to satisfy the English court that the action fits one of the gateways has been questioned on the basis that to obtain leave to summon the defendant, the claimant must anyway prove that England is *the* proper forum.⁷ Moreover, problems with the application of the sub-paragraphs within CPR PD 6B para 3.1 – principally, the ambiguity surrounding the scope of some of these provisions, but also the fact that some of them do not denote meaningful connection between the claim and England – are liable to strengthen further doubts about the gateways’ future relevance. For these reasons, the question whether the gateway precondition should survive (or be abandoned) in future service-out cases deserves closer attention.

This is the central question for consideration in this article. The substantive discussion is presented in three parts. Part B contains a brief outline of what jurisdictional gateways are, and the role they have played in deciding service-out applications. Then, Part C proceeds to explore the reasons why the gateway precondition is open to attack. As the analysis in this part attempts to demonstrate, one basis for doubting the need for maintaining the gateways stems from the view that they have now become redundant, owing to the *forum conveniens* doctrine’s greater prominence. The other ground for being sceptical about the merits of preserving the gateways derives from the problems which have arisen from their application. Finally, Part D evaluates whether the gateway precondition should be maintained. It is argued that, the gateways should continue to play a role in the English courts’ assumption of jurisdiction over defendants outside the forum. Instead of jettisoning the gateways, any revision to the law in this area should aim to minimise ambiguities regarding their scope and

² Lord Collins of Mapesbury, *et al*, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th edn, 2012) (hereinafter “*Dicey, Morris & Collins*”), Rule 32, [11–124]-[11–133].

³ *Ibid*, Rule 31, [11R–101]-[11–120].

⁴ *Ibid*, Rule 34, [11–141].

⁵ By virtue of CPR r 6.37(3).

⁶ See *Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran* [1994] 1 AC 438 and *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, [71], [81] and [88] (*per* Lord Collins of Mapesbury).

⁷ Especially, A Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) (hereinafter, “*Private International Law in English Courts*”), and A Briggs, *Civil Jurisdiction and Judgments* (Informa Law from Routledge, 6th edn, 2015) (hereinafter, “*Civil Jurisdiction and Judgments*”).

also ensure that only those instances which signify a meaningful connection between the dispute and England are included in the gateways.

B. CPR jurisdictional gateways and service-out jurisdiction in England

In historical terms, service out is a relatively new basis for assuming jurisdiction in England. It originated after the Common Law Procedure Act 1852 came into force. Prior to this milestone, courts had only assumed competence over defendants who had submitted to the English courts' jurisdiction, or those who had been served while present in England. Submission and presence, as the only grounds for hearing cross-border private disputes, provided English courts with an arguably limited jurisdiction. Therefore, courts were not able to entertain disputes connected with England – even, for instance, when the cause of action had occurred there – just because, by the time the writ was about to be served, the defendant had left the forum. It was largely in response to this shortcoming that through legislative intervention, the English courts' jurisdiction was expanded. This expansion took the form of affording English courts a discretionary power to summon defendants who were not present in the forum in certain situations where, for the most part, they or the dispute were connected with England. These situations have been listed in what are now commonly referred to as jurisdictional gateways.

The gateways have evolved over the years. In their current form, they are codified within CPR PD 6B para 3.1. It is not necessary here to outline all the sub-paragraphs within Paragraph 3.1.⁸ By way of illustration, it is instructive to point to some of the more prominent ones. In international contractual disputes, courts in England may summon foreign-based defendants where the contract: (i) was made in England;⁹ (ii) was made by or through an agent trading or residing in England;¹⁰ (iii) is governed by English law;¹¹ or, (iv) contains an English jurisdiction clause.¹² In these cases, leave to serve proceedings on a defendant outside England could also be obtained where the action is rooted in a breach of contract which is alleged to have taken place in England.¹³ In tort claims, to gain permission to sue the defendant who is not in England, the claimant has to show that England was where damage was sustained or will be sustained,¹⁴ or the event that has led (or will lead) to damage occurred in England.¹⁵

It does not necessarily follow that a claimant who meets the gateway precondition would be granted the right to sue the foreign-based defendant. The claimant must also overcome two other hurdles. The first is that the case raises a serious issue to be tried. This requirement is fulfilled if the claimant can provide evidence that the dispute involves

⁸ For a detailed account concerning each of the gateways, see, *Civil Jurisdiction and Judgments*, *ibid*, [4.63]-[4.85].

⁹ CPR PD 6B para 3.1(6)(a).

¹⁰ CPR PD 6B para 3.1(6)(b).

¹¹ CPR PD 6B para 3.1(6)(c).

¹² CPR PD 6B para 3.1(6)(d).

¹³ CPR PD 6B para 3.1(7).

¹⁴ CPR PD 6B para 3.1(9)(a).

¹⁵ CPR PD 6B para 3.1(9)(b).

allegations that are not fanciful. The second obstacle that must be surmounted to obtain a service-out order is that England is *forum conveniens* – or the proper forum for the dispute. Lord Goff of Chieveley’s speech in the House of Lords’ landmark ruling in *Spiliada Maritime Corporation v Cansulex Ltd* sets out the test for ascertaining whether England is *forum conveniens*.¹⁶ Based on this test, in service-out cases, the onus is on the claimant to prove, on balance, that England is “the forum in which the case can suitably be tried for the interests of all the parties and the interests of justice”.¹⁷ To discharge this burden, the English court has to find that England is the dispute’s centre of gravity.¹⁸ To this end, claimants typically point to factors which highlight links between England and the claim. These factors include the dispute’s governing law, the location of evidence and witnesses and whether any parallel proceedings are pending elsewhere.¹⁹ Even where England is not the dispute’s centre of gravity, the court may yet hold that it is *forum conveniens* – and, thus, afford the service-out order – if it concludes that the claim cannot be entertained justly in the more closely connected forum elsewhere.²⁰

C. The future of CPR jurisdictional gateways doubted

Throughout much of the existence of the service-out jurisdiction, these have been the preconditions which claimants have had to fulfil to obtain leave to serve proceedings on defendants outside England. Nevertheless, as the discussion seeks to demonstrate, this approach has been increasingly susceptible to challenge. More specifically, there are reasons to be sceptical about the continued significance of the gateways in determining whether a service-out order should be granted. Two main considerations combine to create this scepticism. The first is that given the wider legal developments in private international law – particularly, the more prominent role played by the *forum conveniens* doctrine in service-out cases – the gateways have become superfluous. The second consideration that casts doubt on the logic in retaining the gateway precondition stems from the problems associated with the application of these provisions.

1. *The forum conveniens doctrine*

Doubts concerning the future of gateways, due to the greater prevalence of the *forum conveniens* doctrine, have been expressed exclusively in academic contributions. In this regard, the published works of Professor Briggs are especially significant. In these influential

¹⁶ [1987] AC 460.

¹⁷ *Ibid*, 476 (per Lord Goff of Chieveley).

¹⁸ *Dicey, Morris & Collins, supra* n 2, [11–143].

¹⁹ For a more detailed discussion of these factors and their operation in service-out cases, see *Civil Jurisdiction and Judgments, supra* n 7, [4.89]-[4.90].

²⁰ Eg, *Oppenheimer v Louis Rosenthal & Co AG* [1937] 1 All ER 23, *Roneleigh Ltd v MII Exports Inc* [1989] 1 WLR 619, *Altimo Holdings, supra* n 6. For associated academic commentary, see *Dicey, Morris & Collins, supra* n 2, Rule 34, [11–144].

publications, he has proposed to revise the law on service-out jurisdiction in England by abandoning the gateways altogether and, instead, basing the claimants' success in obtaining leave to summon a foreign-based defendant entirely on whether England is *forum conveniens*.

The earliest instance of Professor Briggs questioning the need for gateways can be found in the first edition of *The Conflict of Laws*, published in 2002.²¹ The following passage captures the essence of Professor Briggs's argument:

“At first sight it makes sense for the law to have categories of case into which the claims must fit before permission can be given, but at second sight this proves to be an illusion. Permission will not in any event be granted unless England is the proper place, or natural forum, to bring the claim. If this condition, which emerged as a specific and discrete requirement only recently, is satisfied, it is difficult to see exactly what value is added to the law by these more primitive, pigeonhole, criteria, or why there should not be an additional, open-ended, rule for any other case in which permission should be given ... The law needs to be rethought. The critical question is whether, had the central role of *forum conveniens* been appreciated from the outset, the law would have devised these pigeonholes as well, and insisted on compliance with their letter and their spirit before permission to sue in the natural forum was granted. A rational answer would be negative.”²²

In 2009, and as one of the editors of the fifth edition of *Civil Jurisdiction and Judgments*, he reiterated that service-out law should be rethought. In particular, he pointed to how the gateways have “suffered something of a reduction in apparent status”, by reaching “the end of the line” in Practice Direction B, supplementing CPR Part 6, given that, initially, they had been outlined in primary legislation, in Common Law Procedure Act 1852.²³ For Professor Briggs, these developments, together with what he called “the distinct acceptance of the principle of *forum non conveniens*” in *Spiliada*, and acknowledgment that the test underpinning it also applied to service-out cases,²⁴ led to one conclusion: in so far as gateways are concerned, “[t]here is nowhere left to go, except to abolish them altogether, and to rest the whole jurisdictional decision on whether England is the proper place to bring the proceedings.”²⁵

Professor Briggs has stepped up his challenge to the gateway precondition in his more recent publications.²⁶ In these contributions, in addition to relying on the reasoning presented in his earlier works, Professor Briggs has drawn on Lord Sumption's *obiter* pronouncements²⁷ in the 2013 UK Supreme Court decision in *Abela v Baadarani*.²⁸ In his

²¹ A Briggs, *The Conflict of Laws* (Oxford University Press, 1st edn, 2002).

²² *Ibid*, 100-101 (citations omitted). These remarks were republished, almost verbatim, in the second edition of the book: A Briggs, *The Conflict of Laws* (Oxford University Press, 2nd edn, 2008), 106.

²³ A Briggs and P Rees, *Civil Jurisdiction and Judgments* (Informa Law, 5th edn, 2009), [4.54] (citations omitted).

²⁴ *Spiliada*, *supra* n 16, 478-482. The test is known as the “more-appropriate-forum test”.

²⁵ Briggs & Rees, *supra* 23, [4.54] (citations omitted).

²⁶ See, eg, A Briggs, *The Conflict of Laws* (Oxford University Press, 3rd edn, 2013), 123-124, *Private International Law in English Courts*, *supra* n 7, [4.458]-[4.459], and *Civil Jurisdiction and Judgments*, *supra* n 7, [4.61].

²⁷ Be that as it may, they attracted much attention in the immediate aftermath of the judgment: eg, A Briggs, “Service Out in a Shrinking World” [2013] *Lloyd's Maritime and Commercial Law Quarterly* 415, A Dickinson, “Service Abroad – An Inconvenient Obstacle?” (2014) 130 *Law Quarterly Review* 197, and L Collins, “Sovereignty and Exorbitant Jurisdiction” (2014) 130 *Law Quarterly Review* 555.

short judgment, Lord Sumption questioned the widely-accepted assumptions under English law that service-out jurisdiction was “exorbitant” in nature and that courts should be slow in exercising this basis for adjudicatory competence.²⁹ His Lordship pointed to the numerous changes to the process of handling cross-border private disputes in England, opining that

“[t]he adoption in English law of the doctrine of forum non conveniens and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries. The basic principles on which the jurisdiction is exercisable by the English courts are similar to those underlying a number of international jurisdictional conventions The characterisation of the service of process abroad as an assertion of sovereignty may have been superficially plausible under the old form of writ (‘We command you ...’). But it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the defendant to decide whether and if so how to respond in his own interest. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like ‘exorbitant’. The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.”³⁰

Writing in the *Lloyd’s Maritime and Commercial Law Quarterly*, shortly after the ruling in *Abela*, Professor Briggs drew on this passage in bolstering his contentions that the gateways should cease to play a part in service-out applications, and that a claimant’s success in obtaining a service-out order should depend solely on whether England is the appropriate forum.³¹ Later, in the most recent edition of *Civil Jurisdiction and Judgments*, published in 2015, Professor Briggs once more relied on Lord Sumption’s judgment in *Abela* in proposing that advancing the proposition that the sole question for consideration in service-out cases should be “whether England was the proper place to bring the claim”.³²

2. Problems with the application of the gateways

In addition to the wider acceptance of the *forum conveniens* doctrine, problems relating to some of the sub-paragraphs within CPR PD 6B para 3.1 and their application could be seen

²⁸ [2013] UKSC 44; [2013] 1 WLR 2043.

²⁹ In this respect, see, eg, Lord Diplock’s *dicta* in *The Siskina* [1979] AC 210, 254 and in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 65.

³⁰ *Supra* n 28, [53].

³¹ Briggs, *supra* n 27, 416-417. See, similarly, *Private International Law in English Courts*, *supra* n 7, [4.459].

³² *Civil Jurisdiction and Judgments*, *supra* n 7, [4.61].

as reinforcing the case for dropping the gateway precondition in service-out cases. In this regard, at least two shortcomings are worthy of consideration.

The first is that the precise scope of some of the gateways has proved to be somewhat unclear. For the most part, these ambiguities are caused due to the wording of the provisions which, in turn, have made it difficult to know whether a claim fits the gateway in question. Illustrative, in this respect, are sub-paragraphs 6(a) and 9(a). As stated in Part B, under gateway 6(a), in a cross-border contractual dispute, a claimant can seek to initiate proceedings against a defendant outside England if the contract was made in England. The English law of contract is consulted in determining whether the relevant agreement was made in England. Under the principles in this area, in a contract in which the offeree accepts the offer through post, the contract is made in England, provided that the letter of acceptance is posted in England.³³ Where the offeree deploys an instantaneous means of communication to accept the offer – such as telephone, email, or fax – then the contract is made in England, so long as the acceptance is received there.³⁴

Nevertheless, in a recent decision, in *Brownlie v Four Seasons Holdings Inc*, the law underpinning the operation of gateway 6(a) has been criticised for having an “artificial nature”.³⁵ This criticism is mostly due to how the provision has been worded. The following passage in Lord Sumption’s judgment in *Brownlie* highlights why the gateway, and the principles based on which its ambit has been defined, are deemed to be problematic:

“[The rules for determining when a contract is formed under English law] were adopted for reasons of pragmatic convenience, and provide a perfectly serviceable test for determining whether a contract has been concluded at all. However, their deployment for the purpose of determining when or where a contract was made is not at all satisfactory. It depends on assumptions about the point at which an offer is accepted or deemed to be accepted, which are particularly arbitrary when the mode of communication used is instantaneous (or practically so). It also gives rise to serious practical difficulties. The analysis of an informal conversation in terms of invitation to treat, offer and acceptance will often be impossible without a recording or a total recall of the sequence of exchanges and the exact words used at each stage, in order to establish points which are unlikely to have been of any importance to either party at the time. This may be unavoidable under the current wording of gateway 6(a). But the whole question could profitably be re-examined by the Rules Committee.”³⁶

Put differently, in his Lordship’s view, the wording and the current approach to the operation of gateway 6(a) are problematic because they have the potential of making it especially onerous, in practical terms, to identify the place where the contract is made. It is not difficult to see that in today’s world, with the increased (and still increasing) frequency in the parties’ reliance on modern technology in conducting contractual negotiations while not being present in the same jurisdiction, there is an even greater risk of practical complications arising in ascertaining whether a case falls within gateway 6(a).

³³ *Adams v Lindsell* (1818) 1 B & Ald 681.

³⁴ *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327, *Brinkibon v Stahag Stahlund Stahlwarenhandels GmbH* [1983] 2 AC 34.

³⁵ [2017] UKSC 80; [2018] 1 WLR 192, [16] (*per* Lord Sumption).

³⁶ *Ibid.* See, similarly, Lady Hale in *Brownlie*, *ibid*, [34].

By the same token, the courts' approach to the application of gateway 9(a) points to uncertainties affecting this provision. This sub-paragraph provides English courts with the power to summon defendants outside the forum in cross-border tort cases where damage was sustained, or will be sustained, in England. For the best part of two decades after its introduction in 1987, courts had almost consistently interpreted the gateway as encompassing only direct damage ensuing from the defendants' acts or omissions.³⁷ But from the mid-2000s onwards, English courts afforded a much wider meaning to damage under gateway 9(a). Based on this new interpretation, which was applied in a series of decisions,³⁸ *indirect (as well as direct)* damages sustained by the victim (or their family members) in England was said to fall within the scope of sub-paragraph 9(a). One of the most recent statements on the scope of the provision came in the Supreme Court's ruling in the *Brownlie* case. There, in a three-to-two majority decision,³⁹ the wider interpretation of damage was endorsed. Nevertheless, the ruling may not have entirely removed the doubts surrounding gateway 9(a). After all, the Justices of the Supreme Court were at pains to emphasise that their verdict on this matter was *obiter* in nature. As such, it is not inconceivable for questions relating to the scope of sub-paragraph 9(a) within CPR PD 6B para 3.1 to continue to resurface in future litigations.

The second shortcoming with the application of the gateways is that, on their own, some of these provisions signify weak points of connection between England and the dispute. The most obvious illustrations for this observation are gateways 3, 6(a) and 6(b). Gateway 3 provides a basis for a claimant's action against a defendant outside England in cases involving multiple defendants. Accordingly, a claimant (C) who has commenced (or is about to commence) proceedings in England against a defendant (D1), can apply to summon the (other) foreign-based defendant (D2), as long as C can show that D2 is a necessary or proper party to the claim against D1. This gateway is said to be "extraordinarily wide", as it enables the court to assert jurisdiction over D2, notwithstanding that D2 might have no (or scarcely any) connection with England.⁴⁰ In the same way, in international contractual disputes, the fact that the parties made the contract in England – as set out under gateway 6(a) – or that the contract was made by or through an agent trading or residing within the jurisdiction – as provided under gateway 6(b) – do not, by themselves, point to sufficiently strong links between the dispute and England.⁴¹ Indeed, as Lord Diplock remarked in *Amin Rasheed Corporation v Kuwait Insurance Co*, it is "often a mere matter of chance" where a contract is

³⁷ Eg, *Metall und Rohstoff v Donaldson Lufkin & Jenrette* [1990] 1 QB 391; *Bastone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd* [1996] CLC 1902; *Beecham Group plc v Norton Healthcare Ltd* [1997] FSR 81; *ABC I v BFT* [2003] EWCA Civ 205; [2003] 2 Lloyd's Rep 146; *Newsat Holdings Ltd v Zani* [2006] EWHC 342 (Comm); [2006] 1 Lloyd's Rep 707.

³⁸ Eg, *Booth v Phillips* [2004] EWHC 1437 (Comm); [2004] 1 WLR 3292; *Cooley v Ramsey* [2008] EWHC 129 (QB); [2008] ILPr 27; *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB); *Stylianou v Toyoshima* [2013] EWHC 2188 (QB); and *Pike v Indian Hotels Co Ltd* [2013] EWHC 4096 (QB).

³⁹ Baroness Hale of Richmond PSC, Lord Wilson, and Lord Clarke of Stone-cum-Ebony for the majority; Lord Sumption and Lord Hughes dissenting.

⁴⁰ P Rogerson, *Collier's Conflict of Laws* (Cambridge University Press, 4th edn, 2013), 150. For an illustration, see *Altimo Holdings, supra* n 6.

⁴¹ For an example of how tenuous the connection signified under gateway 6(a) could be, see *Cherney v Deripaska* [2008] EWHC 1530 (Comm); [2009] 1 All ER (Comm) 333. Affirmed by the Court of Appeal [2009] EWCA Civ 849; [2009] 2 CLC 408.

made.⁴² The lack of meaningful connection between the forum and the claim, as exemplified by these gateways, is liable to make stronger the case against maintaining them as a precondition for issuing service-out orders.

Against the backdrop of the *forum conveniens* doctrine's prominence in determining service-out applications, the existence of the abovementioned weaknesses in the operation of the gateways can further reinforce the argument for reframing this area of law. To this end, it might be thought that removing the gateway precondition, and making the decision to issue proceedings on foreign-based defendants contingent on England being the proper forum is the way forward.⁴³ The next part of the discussion assesses the viability of adopting this approach to service-out jurisdiction in England.

D. Should CPR jurisdictional gateways be abolished?

For reasons that follow, it is contended that it would be unappealing to revise the law in this area by abandoning the gateway precondition and resting the decision to serve the claim form on foreign-based defendants exclusively on England being *forum conveniens*. Instead, any future refinement of the law in this area should aim to minimise ambiguities surrounding the scope of jurisdictional provisions within CPR PD 6B para 3.1, and also ensure that they only include factual scenarios which connote real connection between the dispute and England.

1. Analysing the case for abolishing the gateways

To begin with, the arguments for dropping the gateways and basing the decision to serve proceedings outside England solely on the (in)appropriateness of England as a forum for hearing the dispute are not as convincing as they might seem at first blush. Consider, first of all, the claim that the House of Lords' fulsome approval of the *forum conveniens* precondition in *Spiliada* has made it unnecessary to establish that the case fits one of the gateways. This contention would only be persuasive if it were supported by evidence that, in the context of *service-out cases*, the *Spiliada* decision represented a sufficiently dramatic break with the past that made the gateways redundant. Such evidence would, in turn, have to demonstrate that, prior to *Spiliada* in 1986, English courts were not reliant on a discretionary principle akin to the *forum conveniens* doctrine in exercising service-out jurisdiction. However, as even a brief survey of case law in England in the past nine decades reveals, there are ample instances of service-out cases, decided long before *Spiliada*, in which, in addition to showing that their claims fell within one of the gateways, the plaintiffs shouldered the burden of proving that England was *forum conveniens*.

⁴² *Supra* n 29, 62 (his Lordship made this observation in the course of identifying the proper law of contract). See, also, *Fleming v Marshall* [2011] NSWCA 86, [66] (*per* Spiegelman CJ).

⁴³ Professor Briggs is supportive of this approach.

A helpful example here is the Court of Appeal ruling in *Rosler v Hilbery*.⁴⁴ In this 1925 case, the plaintiffs applied for the writ to be served on the Belgium-based defendant, arguing, *inter alia*, that he was “a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction”.⁴⁵ In stating the court’s decision, Pollock MR emphasised the discretionary nature of service-out jurisdiction, observing that “in deciding whether or not it will exercise its discretion the Court pays attention to a great number of matters, in particular it would pay attention to what is the *forum conveniens*”.⁴⁶ On the facts, the Master of the Rolls concluded that Belgium was “where the substance of the matters which will determine the question in issue between the parties took place and ought to be determined, and it is Belgian law which will decide the rights of the parties.”⁴⁷ Thus, the court declined the plaintiffs’ service-out application.⁴⁸

Rosler v Hilbery is only one of several pre-*Spiliada* cases in which *forum conveniens* was influential in the courts’ decision making regarding service-out applications.⁴⁹ In all these cases, the gateways and *forum conveniens* have co-existed as complementary preconditions for initiating proceedings against defendants outside England. As noted by Edmund Davies LJ in *HRH Maharanee Seethadevi Gaekwar of Baroda v Wildenstein* in 1972, a well-known case concerned with discretionary stays of as-of-right proceedings, *forum conveniens* was a factor of “decisive importance” in service-out cases.⁵⁰ Indeed, the English courts’ routine reliance on *forum conveniens* considerations in asserting jurisdiction over foreign-based defendants prompted calls in the mid- to late 1960s within the academic community,⁵¹ for the courts to rely on the same principle in granting stays of proceedings brought in England during the defendant’s presence.⁵² Consequently, while the ruling in *Spiliada* was of significance – in finally recognising the *forum non conveniens* doctrine as the basis for granting stays of proceedings initiated during the defendant’s presence in England – it is difficult to accept it as having caused a substantial-enough change to service-out law in England as to dispense with the need for the gateways. Accordingly, it is contended that it is unpersuasive to deem the *Spiliada* ruling as providing a basis for jettisoning the gateways, and, instead, resting the English courts’ service-out jurisdiction merely on England being the proper forum.

⁴⁴ [1925] Ch 250.

⁴⁵ At the time of the litigation, this gateway was set out under Order 11, r 1(g). The equivalent provision can now be found in CPR PD 6B para 3.1(3).

⁴⁶ *Rosler*, *supra* n 44, 259.

⁴⁷ *Ibid*, 261.

⁴⁸ Warrington and Sargant LJJ agreed with Pollock MR but gave short judgments of their own.

⁴⁹ Eg, *In re Schintz* [1926] Ch 710, *Kroch v Rossell & Cie* [1937] 1 All ER 725, *Ocean Steamship Company Ltd v Queensland State Wheat Board* [1941] 1 KB 402, and *Vitkovice Horni A Hutni Tezirstvo v Korner* [1951] AC 869.

⁵⁰ [1972] 2 QB 283, 294. See L Collins, “Some Aspects of Service Out of Jurisdiction in English Law” (1972) 21 *International & Comparative Law Quarterly* 656, 659-663.

⁵¹ Chiefly, BD Inglis, “Forum Conveniens – Basis of Jurisdiction in the Commonwealth” (1964) 13 *American Journal of Comparative Law* 583 and BD Inglis, “Jurisdiction, The Doctrine of *Forum Conveniens*, and Choice of Law in Conflict of Laws” (1965) 81 *Law Quarterly Review* 380, and JD McClean, “Jurisdiction and Judicial Discretion” (1969) 18 *International & Comparative Law Quarterly* 931.

⁵² For a fuller discussion of these calls for reforming the law on discretionary staying of proceedings in as-of-right cases by adopting the *forum conveniens* doctrine, see A Arzandeh, *Forum (Non) Conveniens in England: Past, Present, and Future* (Hart Publishing, 2019), 46-50.

What is more, the claim that Lord Sumption's *obiter* remarks in *Abela* heralded a new dawn in the English courts' approach to service-out cases whereby the focus is exclusively on the (in)appropriateness of the English forum has been significantly undermined following his Lordship's pronouncements in *Brownlie*. In *Abela*, Lord Sumption had opined that the recognition in England of the *forum non conveniens* doctrine, together with other developments, had meant that "[i]t should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'."⁵³ This remark was understood as meaning that, to obtain leave to sue defendants outside England, "the traditional principle, that a claim needed to fall within the letter and spirit of the [jurisdictional gateways was] no longer reliable".⁵⁴ However, in his powerful dissenting judgment in *Brownlie*, Lord Sumption dismissed this reading of his observations in *Abela*. His Lordship noted, in *Brownlie*, that it is "contrary to principle and is not warranted by anything that was said in *Abela*" to suggest that *forum conveniens* could become the sole prerequisite for serving proceedings outside England.⁵⁵ His Lordship proceeded to state that:

"The jurisdictional gateways and the discretion as to *forum conveniens* serve completely different purposes. The gateways identify relevant connections with England, which define the maximum extent of the jurisdiction which the English court is permitted to exercise. Their ambit is a question of law. The discretion as to *forum conveniens* authorises the court to decline a jurisdiction which it possesses as a matter of law, because the dispute, although sufficiently connected with England to permit the exercise of jurisdiction, could be more appropriately resolved elsewhere. The main determining factor in the exercise of the discretion on *forum conveniens* grounds is not the relationship between the cause of action and England but the practicalities of litigation. The purpose of the discretion is to limit the exercise of the court's jurisdiction, not to enlarge it and certainly not to displace the criteria in the gateways. English law has never in the past and does not now accept jurisdiction simply on the basis that the English courts are a convenient or appropriate forum if the subject matter has no relevant jurisdictional connection with England. In *Abela v Baadarani*, I protested against the importation of an artificial presumption against service out as being inherently 'exorbitant', into what ought to be a neutral question of construction or discretion. I had not proposed to substitute an alternative, and equally objectionable, presumption in favour of the widest possible interpretation of the gateways simply because jurisdiction thus conferred by law could be declined as a matter of discretion."⁵⁶

Lord Sumption's forthright and precise elucidation, in *Brownlie*, of his *obiter* statement in *Abela* is sure to assuage concerns that his Lordship had favoured a liberalisation of service-out jurisdiction in England.⁵⁷ More important, the passage in Lord Sumption's speech in *Brownlie* makes it virtually impossible to insist that his Lordship's judgment in *Abela*

⁵³ *Abela*, *supra* n 28, [53].

⁵⁴ Briggs, *supra* n 27, 416.

⁵⁵ *Brownlie*, *supra* n 35, [31].

⁵⁶ *Ibid.*

⁵⁷ See, especially, Dickinson, *supra* n 27.

supports the proposition that whether England is *forum conveniens* should be the sole basis in summoning foreign-based defendants.⁵⁸

2. Additional reasons for maintaining the gateway precondition

Independent of the misgivings with the rationales for reforming service-out law in England by relying entirely on the *forum conveniens* doctrine, and abandoning the gateway precondition, there are at least two additional reasons which militate against this course of action. The first is that a broadly similar approach, which until relatively recently provided the basis at common law for Canadian courts' assertion of jurisdiction over out-of-province defendants,⁵⁹ known as "assumed jurisdiction", proved to be problematic. It is argued that these problems would arise in England, too, were its courts to reformulate their service-out law by focusing their decision making entirely on whether England is *forum conveniens*. Before advancing the reasons for this contention, it is helpful to outline briefly the law in Canada concerning assumed jurisdiction.⁶⁰

When compared with English courts, there is a difference in how their Canadian counterparts exercise jurisdiction at common law over defendants that are not present in the forum. In Canada, the plaintiff would have to persuade the court that it has jurisdiction over the matter (the so-called "jurisdiction *simpliciter*" enquiry). If unsuccessful, the plaintiff's application would fail. Otherwise, the defendant can challenge the exercise of jurisdiction by arguing that the Canadian court should relinquish jurisdiction in favour of a clearly more appropriate forum elsewhere based on the *forum non conveniens* doctrine.⁶¹

To establish jurisdiction *simpliciter*, the plaintiff would have to show that there is a "real and substantial connection" between the forum and the dispute. This basis for summoning out-of-province defendants was introduced by the Supreme Court of Canada in 1990 in *Morguard Investments Ltd v De Savoye*.⁶² However, the ruling stopped short of defining real and substantial connection. It was, in fact, over a decade later, in *Muscutt v Courcelles*,⁶³ where the Ontario Court of Appeal elaborated on the meaning of this verbal

⁵⁸ Be that as it may, Professor Briggs appears unperturbed by Lord Sumption's statement in *Brownlie*, and remains resolute in challenging the continued role of the gateway precondition. In a recent casenote concerning the decision in *KAEFER Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, he stated: "Let it be said again: if permission may not be granted unless England is the proper place to bring the claim, that should serve as the main focus of the court's enquiry. If the claimant has to do still more, it should not be much. The door of the court, of the natural forum, for heaven's sake, should not remain locked unless he can also deliver the moon on a plate.": A Briggs, "Service Out: *Communis Error Frangit Ius*" [2019] *Lloyd's Maritime and Commercial Law Quarterly* 195, 198.

⁵⁹ In this article, references to out-of-province defendants relate to both situations in which the defendants are present in another Canadian province or, indeed, overseas.

⁶⁰ For a more detailed assessment of this head of jurisdiction in Canada, see SGA Pitel and NS Rafferty, *Conflict of Laws*, (Irwin Law, 2nd edn, 2016), 71-103.

⁶¹ This means of asserting jurisdiction over out-of-province defendants at common law was restated in a recent decision of the Supreme Court of Canada in *Haaretz.com v Goldhar* 2018 SCC 28; [2018] 2 SCR 3.

⁶² [1990] 3 SCR 1077.

⁶³ (2002) 60 OR (3d) 20 (CA).

formulation. The court in *Muscutt* identified the following considerations as indicators for determining whether the claim has a real and substantial connection with the forum:⁶⁴

- the connection between the forum and the plaintiff's claim;
- the connection between the forum and the defendant;
- unfairness to the defendant in assuming jurisdiction;
- unfairness to the plaintiff in not assuming jurisdiction;
- the involvement of other parties to the suit;
- the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- whether the case is interprovincial or international in nature; and
- comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

As can be seen from this (non-exhaustive) list, only the first two were about connection between the parties and the forum. The other considerations – such as fairness to the litigants, existence of other parties in the dispute, and comity – were much wider in scope. It was not difficult to see that the *Muscutt* factors for the determination of jurisdiction *simpliciter* overlapped with the considerations underpinning the operation of the *forum (non) conveniens* doctrine. Although the Ontario Court of Appeal reiterated that the jurisdiction *simpliciter* and *forum non conveniens* enquiries were distinct,⁶⁵ in practice, the decision to summon an out-of-province defendant all but entirely turned on whether the relevant Canadian province was *forum conveniens*.⁶⁶ Indeed, this state of affairs prompted observations that, following the *Muscutt* ruling, “the distinction between the power to take jurisdiction and the discretion whether to exercise it has become very hard to discern”.⁶⁷ Similarly, Professor Monestier remarked that “*Muscutt* has essentially transformed the question of whether a court *can* hear a case (jurisdiction *simpliciter*) into the question of whether a court *should* hear a case (*forum non conveniens*).”⁶⁸ If English courts were to assert jurisdiction over defendants outside the forum dependant solely on the (in)appropriateness of the English forum, then, effectively, this aspect of English law would resemble the post-*Muscutt* approach to assumed jurisdiction at common law in Canada. Accordingly, to form a reasoned view on whether this would be a prudent course of action, it is necessary to examine the operation of assumed jurisdiction in Canada after *Muscutt*.

As the assessment of the law in this area highlights, far from being regarded as a success, the application of the *Muscutt* factors in assumed-jurisdiction cases attracted much

⁶⁴ *Ibid*, [75]-[110] (*per* Sharpe JA).

⁶⁵ *Ibid*, [40]-[44] (*per* Sharpe JA).

⁶⁶ For at least two illustrations, see *Samson v Hooks Industrial Inc* (2003) 42 CPC (5th) 299 and *Wood v Sharp* [2006] OJ No 1925.

⁶⁷ J Blom and E Edinger, “The Chimera of the Real and Substantial Connection Test” (2005) 38 *University of British Columbia Law Review* 373, 394.

⁶⁸ MJ Monestier, “A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2007) 33 *Queen’s Law Journal* 179, 183 (emphasis in the original). It should be highlighted that not all commentators considered *Muscutt* and its approach to jurisdiction *simpliciter* to be essentially the same as the *forum non conveniens* analysis: eg, SGA Pitel, “Reformulating a Real and Substantial Connection” (2010) 60 *University of New Brunswick Law Journal* 177.

criticism. These criticisms were rooted in the practical problems with employing what was essentially *forum (non) conveniens* considerations in conducting jurisdiction *simpliciter* analysis. For the most part, these problems included unpredictability and lack of clarity in the application of the *Muscutt* factors when founding jurisdiction over out-of-province defendants. In this context, Professor Monestier observed that “an independent consideration of each of [*Muscutt*] factors as they relate to individual litigants before the court creates uncertainty and unpredictability, thereby undermining the order that jurisdictional determination should seek to foster.”⁶⁹ She proceeded to remark that “the very structure of the *Muscutt* test lends itself to inconsistent judicial determinations of whether a court has jurisdiction over a defendant, thereby impairing the ability of parties to make informed litigation decisions.”⁷⁰ In the same vein, other scholars have remarked that the breadth of the *Muscutt* factors resulted in the emergence of “real differences among the provinces” when it came to deciding whether to assert jurisdiction over the defendant outside their territory.⁷¹ In short, the experience in Canada of having an approach to assumed jurisdiction post-*Muscutt* that, to all intents and purposes, hinged on the appropriateness of the Canadian forum for hearing the dispute was problematic.

It was largely in response to these shortcomings that in *Club Resorts Ltd v Van Berda*,⁷² a tort dispute, the Supreme Court of Canada introduced a new means for asserting jurisdiction over out-of-province defendants at common law. This new method, it is argued, bears the hallmarks of the existing framework for the exercise of service-out jurisdiction in England. According to LeBel J, who delivered the court’s only reasoned judgment,⁷³

“to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction [over an out-of-province defendant] has the burden of identifying a presumptive factor that links the subject matter of the litigation to the forum.”⁷⁴

In other words, to overcome the jurisdiction *simpliciter* hurdle, the plaintiff would have to show that the action falls within one of the “presumptive connecting factors” identified by the court. In relation to tort claims, LeBel J identified the following connecting factors:

- “(a) the defendant is domiciled or resident in the province;
- (b) the defendant carries on business in the province;

⁶⁹ *Ibid*, 187.

⁷⁰ *Ibid*, 188. Similar views can be found elsewhere: Blom & Edinger, *supra* n 67.

⁷¹ V Black, J Blom, and J Walker, “Current Jurisdictional and Recognition Issues in the Conflict of Laws” [2011] 50 *Canadian Business Law Journal* 499, 509, citing, on the one hand, *Penny v Bouch* (2009) 310, DLR (4th) 433; 2009 NSCA 80 (in fn 45, decided in Nova Scotia) as an example of a province that had a liberal approach to assumed jurisdiction, and *Fewer v Ellis*, 2010 NLTD 35; 295 Nfld & PEIR 32 (in fn 46, decided in Newfoundland and Labrador) as an example of province that had adopted a more restrictive approach to applying the *Muscutt* factors, on the other.

⁷² 2012 SCC 17. For a considered review of the case, see V Black, “Simplifying Court Jurisdiction in Canada” (2012) 8 *Journal of Private International Law* 411.

⁷³ McLachlin CJ, Deschamps, Fish, Abella, Rothstein, and Cromwell JJ concurring.

⁷⁴ *Supra* n 72, [100].

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.”⁷⁵

LeBel J emphasised that this list of presumptive factors was non-exhaustive. Courts could expand it by enlisting new ones, not just in tort claims, but also in other types of dispute, that mark “a relationship with the forum that is similar in nature”.⁷⁶ Once the plaintiff has shown that one of the connecting factors has been engaged, the burden would shift on to the defendant to rebut it. For this purpose, the defendant “must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them”.⁷⁷ If the defendant is unsuccessful at rebutting the presumption of connection with the forum, then, *prima facie*, the court will have jurisdiction to entertain the claim, unless the defendant can convince it that Canada is *forum non conveniens*.⁷⁸

While not without its drawbacks,⁷⁹ the decision in *Club Resorts* to rely on presumptive connecting factors in determining jurisdiction *simpliciter* has made assumed jurisdiction at common law clearer than it was under the *Muscutt* test. Additionally, it has created greater harmony between the overall approaches to assumed jurisdiction at common law, on the one hand, and under the Court Jurisdiction and Proceedings Transfer Act 1994 (“CJPTA”), on the other.⁸⁰ CJPTA was introduced by the Uniform Law Conference of Canada.⁸¹ British Columbia,⁸² Nova Scotia,⁸³ and Saskatchewan⁸⁴ have enacted CJPTA, meaning that principles concerning assumed jurisdiction in these provinces are codified under the Act.⁸⁵ CJPTA, s.3(e) provides that “[a] court has territorial competence in a proceeding that is brought against a person only if ... there is a real and substantial connection between [that forum] and the facts on which the proceeding against that person is based.” CJPTA, s.10 contains a list of factors which help courts to determine whether the litigation has a real and substantial connection with the forum for the purposes of the Act. For the most part, this list outlines situations which connect the claim to the forum. If the claim in question fits one of these connecting factors, then a (rebuttable) presumption is created that the matter has a real

⁷⁵ *Ibid*, [90].

⁷⁶ *Ibid*, [91].

⁷⁷ *Ibid*, [95].

⁷⁸ *Ibid*, [102]-[103].

⁷⁹ For critiques of the decision, see, eg, Black, *supra* n 72, TJ Monestier, “(Still) A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2013) 36 *Fordham International Law Journal* 396, and V Black and SGA Pitel, “Assumed Jurisdiction in Canada: Identifying and Interpreting Presumptive Connecting Factors” (2018) 14 *Journal of Private International Law* 193.

⁸⁰ For a more detailed assessment of the various components of CJPTA, see V Black, SGA Pitel and M Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell 2012). For accounts comparing the approaches under the Act and at common law, see, eg, SGA Pitel, “Six of One, Half a Dozen of the Other? Jurisdiction in Common Law Canada” (2018) 55 *Osgoode Hall Law Journal* 63.

⁸¹ Uniform Law Conference of Canada, Proceedings of the Seventy-Sixth Annual Meeting, Appendix C: Court Jurisdiction and Proceedings Transfer Act.

⁸² Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28.

⁸³ Court Jurisdiction and Proceedings Transfer Act, SNS 2003 (2d Sess), c 2.

⁸⁴ Court Jurisdiction and Proceedings Transfer Act, SS 1997, c C-41.1.

⁸⁵ The Act has been enacted in Yukon Territory, but not yet in force: Court Jurisdiction and Proceedings Transfer Act, SY 2000, c 7.

and substantial connection with the relevant province, thus affording its court jurisdiction. For instance, in contract disputes, the forum where “the contractual obligations, to a substantial extent, were to be performed”,⁸⁶ or whose law has been expressly chosen to govern the agreement is presumed to have a real and substantial connection with the dispute.⁸⁷ In tort claims, the court in the relevant province is presumed to have jurisdiction *simpliciter* if the cause of action arose in that forum.⁸⁸

It is argued that the foregoing examination of the developments over the past three decades of assumed jurisdiction in Canada provides a strong case for maintaining the existing framework for service out in England. The analysis has attempted to demonstrate that the approach at common law in Canada, following the articulation of the *Muscutt* factors – which premised the decision to summon defendants outside the forum on factors mostly mirroring those underpinning the *forum conveniens* doctrine’s operation – would make the law’s application uncertain and confusing. It is entirely conceivable that similar problems would arise under English law, were service-out applications to be decided merely on the (in)appropriateness of England as the venue for entertaining the claim. After all, broad (and non-exhaustive) factors are consulted in deciding whether England is *forum conveniens*. In this respect, the relevant considerations “depend on the circumstances of the individual case: many may be listed, but the weight of any of them depends on the context in which it arises.”⁸⁹ At present, the *forum conveniens* doctrine’s application has received much criticism. In particular, it has been argued that it can be unpredictable, wasteful, inefficient and liable to exhibit chauvinistic judicial tendencies.⁹⁰ It is contended that these problems are destined to become even more acute, if *forum conveniens* is to be employed as the only prerequisite in service-out cases.⁹¹ Furthermore, the response in Canada to the problems arising after *Muscutt*, through the introduction of the presumptive connecting factors at common law in *Club Resorts* (alongside those which had, prior to that ruling, been outlined under CJPTA) signify the importance of having a clear list of situations within which the court is able, *ceteris paribus*, to exercise jurisdiction over defendants not present in the forum. This development, in turn, has much to offer the case for preserving the existing approach to service-out jurisdiction in England. While not alike in their functions,⁹² the common law and statutory presumptive connecting factors under Canadian law, on the one

⁸⁶ CJPTA, s.10(e)(i).

⁸⁷ CJPTA, s.10(e)(ii).

⁸⁸ CJPTA, s.10(g).

⁸⁹ *Civil Jurisdiction and Judgments*, *supra* n 7, [4.23]. In this paragraph, Professor Briggs discusses the factors concerning the operation of the first limb of the *forum non conveniens* doctrine in stay-of-proceedings cases brought in England as of right. However, the same observation applies in the relation to the application of the *forum conveniens* doctrine in service-out cases.

⁹⁰ DW Robertson, “*Forum Non Conveniens* in America and England: ‘A Rather Fantastic Fiction’” (1987) 103 *Law Quarterly Review* 398, AG Slater, “Forum Non Conveniens: A View from the Shop Floor” (1988) 104 *Law Quarterly Review* 554, J Hill, “Jurisdiction in Civil and Commercial Matters: Is There a Third Way?” [2001] *Current Legal Problems* 439, 449-450, and A Arzandeh, “Should the *Spiliada* Test Be Revised?” (2014) 10 *Journal of Private International Law* 89, 96–97 (which focuses mainly on the shortcomings with the doctrine’s second limb).

⁹¹ See also A Dickinson, “Faulty Powers: One-Star Service in the English Courts” [2018] *Lloyd’s Maritime and Commercial Law Quarterly* 189, 195.

⁹² See W Day, “Reputation in the Conflict of Laws” [2019] *Lloyd’s Maritime and Commercial Law Quarterly* 1, 5.

hand, and England's CPR jurisdictional gateways, on the other, are similar. Taking all these considerations into account, it ought not to be difficult to see why the gateway precondition should remain material in the exercise of service-out jurisdiction in England.

The second (and final) independent reason which militates against jettisoning the gateway precondition in any future reframing of the law in England is that it would lead to an excessive expansion of the courts' service-out jurisdiction. This development is liable to render the law unduly claimant-friendly. At a basic level, it would remove an obstacle which claimants have had to surmount for well over 150 years in order to obtain permission to sue defendants outside England. But, more important, dropping the gateways, and relying on *forum conveniens* alone, would enable claimants to initiate proceedings in England with potentially weaker connection with the forum than is allowed under the current service-out regime.

As outlined earlier, to initiate proceedings against a defendant outside England, a claimant must convince the court that the dispute falls within at least one of the gateways, before proceeding to satisfy it that England is the proper forum. The gateways identify different factual circumstances that mark points of connection between the parties and/or the claim and England. Objectively speaking, some gateways connote strong gravitational pull towards England. For example, in actions against foreign-based defendants concerning property in England, gateway 11 requires for the whole subject matter of the claim to relate to property located in England. In tort claims, according to gateway 9(b), England must be where the alleged wrongful act was committed. At the same time, as highlighted in Part C, some of the other gateways indicate a much less robust connection between the claim and the forum. In this regard, in contract claims against defendants outside England, the fact that the agreement was made in England, or was made by or through an agent trading or residing in England, are deemed to represent sufficient connection with England to engage gateways 6(a) and 6(b), respectively.⁹³ Overall, though, as a package of connecting points, it is argued that the sub-paragraphs within CPR PD 6B Para 3.1 characterise instances where at least some minimal linkage exists between the relevant cause of action and England.

As stated in Part C, for Professor Briggs, the fact that the claimant bears the burden of proving that England is *forum conveniens* has supplanted the requirement that the dispute should also fit within at least one of the gateways. For this perception of the redundancy of the gateways to work, it must be the case that, in a given instance, the finding that England is the appropriate forum means that the dispute necessarily has enough connection with the forum to make it apt for the court to summon the defendant.

However, in practice, different factual scenarios can be envisaged where the application of the *Spiliada* test could lead to the conclusion that England is *forum conveniens*, notwithstanding that the dispute is not meaningfully connected to the forum to warrant service on the defendant. In other words, if reliance were to be placed on *forum conveniens* as the exclusive ground for issuing service-out orders, it would make defendants susceptible to facing litigation in England concerning matters that have considerably weaker links with the forum than characterised by any of the existing gateways. This type of situation is more likely to arise where the finding that England is the proper forum is exclusively due to the operation

⁹³ The same point can also be made in relation to gateway 3.

of the second limb of the *Spiliada* test.⁹⁴ The following hypothetical example demonstrates how dropping the gateways and, instead, focusing the decision making on the application of the *forum conveniens* doctrine could unduly broaden the reach of the English courts' adjudicatory competence in service-out cases:

While in Arcadia, A and B, two Utopian businessmen, entered a contract. Under the contract, B agreed to sell his shares in X, a large Utopian corporation, to A. Not long after the completion of the purchase, A alleged that B had misrepresented the financial health of X, in the hope of securing a higher price for the shares from A. A proceeded to obtain permission to sue B in England for damages for misrepresentation. Despite overwhelming connection between the dispute and Utopia, A has adduced evidence to show that following a major row with an influential Utopian government minister, he has fallen out of favour with the Utopian regime. Because of this development, A claims that not only the Utopian courts will not dispose of his claim against B justly, but he is also likely to face (trumped-up) allegations of financial wrongdoing against him in Utopia. A has limited connection with England: he has some assets in the forum; the law firm representing him has its head office in London; and, A's children attend a boarding school near London. B has no presence or connection with England.

Here, it is obvious that regardless of whether England is *forum conveniens*, A's service-out application would fail under existing law because it does not fit any of the jurisdictional gateways. However, under a system of rules in which the English courts' decision to summon defendants outside the forum were to be entirely based on England being the proper forum, the court could well reach a different conclusion. On these facts, even though Utopia is the more closely connected forum, under the *Spiliada* test, if A can advance "cogent evidence" that the Utopian court would not be able, justly, to entertain its claim against B,⁹⁵ then the English court could nevertheless rule that England is *forum conveniens*.⁹⁶ Thus, A's service-out application would be successful, notwithstanding that, in this instance, the dispute has a weaker connection with England than the gateways presently denote.

This is only one example of the type of disputes that can arise where abandoning the gateways and, making the success of the service-out application conditional on England being the proper forum would lead to a disproportionate expansion of the English courts' jurisdiction. It is also possible to foresee applications for service outside England being successful where claimants allege that they would face severe delays if they sued the

⁹⁴ To a much lesser extent, the English court could also rule that it is *forum conveniens*, notwithstanding the lack of a genuine link between it and the case, on the basis of the so-called "*Cambridgeshire* factor". The type of case in which the *Cambridgeshire* factor could be influential in the court's decision as to whether it is *forum conveniens* could arise where the English court "has acquired a special expertise in the resolution of a particularly complex species of dispute", in an earlier hearing, which would make it the appropriate forum for entertaining the case immediately before it. For more discussion concerning the *Cambridgeshire* factor, see *Dicey, Morris & Collins*, *supra* n 2, [12–035] and *Civil Jurisdiction and Judgments*, *supra* n 7, [4.90].

⁹⁵ *The Abidin Daver* [1984] 1 AC 398, 411 (Lord Diplock).

⁹⁶ This finding would be in line with the rulings in cases like *Altimo Holdings, Cherney, Roneleigh*, and *Oppenheimer* whereby the considerations under the justice limb of the *forum conveniens* doctrine prompted courts to grant orders summoning foreign-based defendants, notwithstanding the lack of connection between the disputes and England.

defendants in the more closely connected forum,⁹⁷ or that the court and legal system in the more closely connected forum would be ill-prepared to hear the dispute due to lack of proper resources or experience.⁹⁸ As a result, it is argued that a more defensible route to take would be to maintain the gateway precondition in the overall approach to deciding service-out applications. Otherwise, there would be a real risk that defendants are summoned to appear in litigations with even more tenuous connection with England than is allowed under the present service-out regime.

3. *The way forward*

In light of all these considerations, it is argued that abandoning the gateways and simply examining whether England is the proper forum for hearing the dispute, would provide an unappealing means of restructuring service-out law. Such an approach is, in fact, liable to compound the problems in this area, rather than mitigating them. Therefore, the gateway precondition should remain in place as an obstacle which claimants must overcome to obtain permission to serve proceedings outside England.

Nevertheless, as touched on in Part C, service-out jurisdiction in England is not without its shortcomings. Some of these problems have arisen because of confusion surrounding the meaning and scope of the gateways. Others have emerged because not all the subparagraphs of CPR PD 6B para 3.1 point to meaningful connection between the dispute and England. On their own, these weaknesses do not call for a complete abolition of the gateways. Instead, what is required is a more proportionate response that directly tackles these shortcomings.

To this end, in the first place, the wording of the gateways should be reviewed and, where appropriate, redrafted so that their contours become more predictable. The language employed for the gateways must be sufficiently unambiguous and prescriptive, making it reasonably clear from the outset whether a particular claim fits the provision. Recasting the law in this manner will ultimately lead to greater overall certainty in its operation. What is more, any future revision of the gateways should seek to include only those circumstances within the jurisdictional grounds that connote meaningful connection between the dispute and England. After all, the reason for having the gateway requirement in service-out cases has been to ensure that there is a factual nexus between the claim and the forum, before it is decided whether England is the proper forum for hearing the case.

To achieve these objectives, a prudent course of action would be to rewrite those existing CPR gateways that were singled out in Part C as being especially open to criticism.

⁹⁷ Comparable to the position in, eg, *The Vishva Ajay* [1989] 2 Lloyd's Rep 558 (a stay-of-proceedings case), where the delay in the more closely connected forum elsewhere (India) was seen as being so excessive as to prompt the English court to rule that the dispute would not be justly disposed of in that forum.

⁹⁸ Similar to the decisions in *Connelly v RTZ Corp Plc (No 2)* [1998] AC 854 and *Lubbe v Cape Plc* [2000] 1 WLR 1545 (both staying-of-proceedings cases), in which, notwithstanding the overwhelming proximity between the disputes and Namibia (in *Connelly*) and South Africa (in *Lubbe*), the lack of legal-aid provisions (and sufficient experience in handling large-scale class-action litigation) in those forums prompted the courts in England to sustain the proceedings before them.

They were gateway 3 (the so-called “necessary-or-proper party gateway”), 6(a) (where contract was made in England), 6(b) (where a contract is made in England by an agent trading or residing in the forum), and 9(a) (where England was the place damage occurred, or will occur).

Starting with gateway 3, it would be wrong to jettison it altogether, because, in practical terms, the provision serves an important function. It enables a claimant (C), who has claims against multiple defendants (D1 and D2), to consolidate the issues and litigate them in the same court, thereby avoiding additional expense, and pre-empting the risk of conflicting rulings. A possible (and arguably the most obvious) replacement for gateway 3 is Brussels Ia Regulation, Art.8(1). Art.8(1) provides that

“A person domiciled in a Member State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”.

Broadly, Art.8(1) aims to reduce the risk of fragmentation of claims against multiple parties which arise from the same factual circumstances. This provision could be adapted for the purpose of gateway 3, so that permission to serve proceedings on D2 outside England can be granted, if C can show that the claim against D2 is so closely connected to the one against D1 that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. In this context, D1 does not necessarily have to be domiciled in England. All that is necessary (as is presently the case) is that the court has jurisdiction over D1 by means other than subparagraph 3 of CPR PD 6B para 3.1.

Notwithstanding their apparent similarities, it is somewhat unrealistic to expect for gateway 3 to be restyled along the lines of Art.8(1). It is well known that, in relation to Art.8(1), what constitutes close connection between multiple claims is narrowly conceived.⁹⁹ This restrictive approach to interpreting Art.8(1) is accepted within the Brussels regime because Art.8(1) signifies a derogation from the fundamental principle that, pursuant to Art.4, jurisdiction should be based on the defendant’s domicile. This hierarchical approach to jurisdiction rules – with one principal rule and others derogating therefrom – is not mirrored under the English national jurisdiction rules. Consequently, it is more difficult to rationalise replacing the necessary-or-proper party gateway with a provision that requires the sort of strong connection between C’s actions against D1 and D2 that is required for jurisdiction to be asserted under Art.8(1).

Perhaps a less obvious (but, arguably, more pragmatic) means of revising gateway 3 is to require for there to be the type of nexus between C’s claims against D1 and D2 that would meet the definition of “related actions” under Brussels Ia Regulation, Art.30. Art.30 is not a jurisdiction-affording provision. Instead, it provides the courts of an EU Member State discretion to decline jurisdiction where related actions are pending before the courts of another EU Member State. Under Art.30(3) related actions are those that “are so closely

⁹⁹ Eg, Case C-98/06 *Freeport Plc v Arnoldsson* [2007] ECR I-8319 and Case C-145/10 *Painer v Standard Verlags GmbH* EU:C:2011:798.

connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

Ostensibly, similar phraseology has been deployed to define related actions under Art.30 and Art.8(1). Nevertheless, the judicial pronouncements on the interpretation of Art.30 suggest that what amounts to related actions under this provision has a much wider scope than is the case under Art.8(1). For example, in *The Tatry*, the Court of Justice held that (what is now) Art.30 should be widely construed “and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive”.¹⁰⁰ Building on the ruling in *The Tatry*, in *Sarrio v Kuwait Investment Authority*, a House of Lords ruling, Lord Saville observed that

“there should be a broad commonsense approach to the question whether the actions in question are related, bearing in mind the objective of [(what is now) Art.30], applying the simple wide test set out in [Art.30] and refraining from an over-sophisticated analysis of the matter.”¹⁰¹

It is argued that the broader conception of related actions under Art.30 can provide the basis for modifying the current necessary-or-proper party gateway. It is, therefore, proposed that under the new gateway 3, C may serve a claim form outside England on D2 if C is able to establish that the claim against D2 is related to C’s action against D1, as defined for the purpose of Art.30. Case law on the scope of Art.30 should be consulted to help determine whether C’s action against D2 is related to the action against D1, thus enabling C to rely on the gateway to serve proceedings on D2.

While it has been relatively more challenging to identify a potential means of replacing gateway 3, it is easier to envisage how gateways 6(a), 6(b) and 9(a) could be remodelled. Regarding gateway 6(a), a sensible alternative is to restyle it so that, in a contractual dispute, a claimant can apply for leave to serve proceedings on the foreign-based defendant if the contract “was concluded in England at a face-to-face meeting at the place of residence or business of one of the parties”. Professor Dickinson is supportive of this means of reforming gateway 6(a).¹⁰² Gateway 6(b) can be revised in the same way, meaning that it would be engaged if the court finds that the contract “was concluded in England by or through an agent trading or residing within the jurisdiction at a face-to-face meeting at the place of residence or business of that agent”. In tort disputes, gateway 9(a) should be reworded so that it would be engaged where “direct damage was sustained, or will be sustained, within England”.¹⁰³ This approach to refining these gateways would make them less ambiguous, thus ensuring that disputes have stronger links with the forum than is presently the case. It is argued that developing the law in this manner would, in turn, help to address some of the main exiting drawbacks with service-out law in England, rendering it more rigorous and predictable in allocating jurisdiction to English courts.

¹⁰⁰ Case C-406/92 *Owners of Cargo Lately Laden on Board the Ship Tatry v Owners of the Ship Maciej Rataj* [1994] ECR I-5439, [53].

¹⁰¹ [1999] 1 AC 32, 41.

¹⁰² Dickinson, *supra* n 91, 194.

¹⁰³ For detailed reasons as to why damage for the purpose of subparagraph 9(a) of CPR PD 6B para 3.1 should be limited to covering direct (as opposed to indirect) harm, see A Arzandeh, “The English court’s service-out jurisdiction in international tortious disputes” (2017) 133 *Law Quarterly Review* 144.

E. Conclusion

One of the preconditions that must be satisfied before a claimant is afforded leave to serve proceedings on a foreign-based defendant is that the dispute falls within one of the heads of jurisdiction – widely known as jurisdictional gateways – listed in CPR PD 6B para 3.1. This requirement has been in place ever since the introduction of service-out jurisdiction in England in the mid-nineteenth century. Even though the gateways have been a deep-rooted feature of service-out law in England, their future relevance has been increasingly subject to scrutiny. In particular, questions have been asked as to why, to obtain permission to serve proceedings on a defendant outside England, a claimant should still be expected to show that the action fits one of the gateways, when he must already prove that England is *forum conveniens*. In addition, problems with the application of the gateways – principally, the ambiguity surrounding the scope of a number of these provisions, but also the fact that some of them do not represent strong factual links between the claim and England – are further likely to add to the scepticism in keeping them as a precondition for granting service-out orders. Due to these considerations, the question whether the gateway precondition should be maintained has become increasingly important.

This question was at the heart of the discussion in this article. After a brief introduction to the gateways and their current role in deciding service-out applications, in Part B, the analysis proceeded, in Part C, to explore the reasons for doubting the continued need for these jurisdictional grounds. Building on the discussion in Part C, Part D sought to evaluate the case for retaining the gateway precondition in the exercise of service-out jurisdiction in England. Various arguments were presented in support of the view that recasting the general basis for issuing service-out orders through abandoning the gateways, and merely examining whether England is the proper forum would be an unappealing way for rethinking the law. Nevertheless, it was acknowledged that the application of the gateways in their current form has highlighted certain shortcomings, and that attempts should be made to remedy these problems. It was argued that a prudent approach to take would be to revisit the provisions with the twin aims of decreasing ambiguities concerning their scope, and also ensuring that only those instances are encompassed within the list of gateways which connote real connection between the dispute and England. It is this approach to revising the law, as opposed to a wholesale abolition of the gateways, that would help to enhance service-out law in England.