UNCERTAINTIES IN THE FIRST LIMB OF THE *SPILIADA* TEST

I. INTRODUCTION

Lord Goff formulated the first stage of his classic test in the *Spiliada* in the following terms: 'the basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some *available forum, having competent jurisdiction*, which is the appropriate forum for the trial of the action' (emphasis added).

Over the years, much consideration has been given to the concept of 'the appropriate forum for the trial of the action'. By contrast, the concept of an 'available forum' has received little attention. Such limited views as have been expressed on the point are that a forum is an 'available' one if it is exercising jurisdiction 'as of right'. This is the view taken by the learned editors in *Dicey & Morris*, an approach apparently endorsed by the Privy Council in *Gheewala and others v Hindocha and others*.[1]

However, the concept of an 'available forum' is a more difficult one than might at first be thought. Suppose, as is relatively common, parallel proceedings in two jurisdictions, for the sake of argument, Texas and England. The claimant in the Texas proceedings applies for a stay of the English proceedings on the basis that Texas is the more appropriate forum.

The following difficulties could arise in such circumstances:

(1) Suppose the Texas court had assumed jurisdiction not 'as of right' but on some other basis. This, of course, begs the question (considered below) as to what amounts to an assumption of jurisdiction 'as of right'. The question is, where the foreign court has itself determined that it has jurisdiction (on whatever basis), whether such a forum is nevertheless not 'available' according to the *Spiliada* test (meaning there is no need to go on to consider the question whether the foreign court is an appropriate forum).
(2) Suppose there was a dispute, pending before the Texas court, as to whether the Texas court had jurisdiction. Should the English court seek itself to determine whether, according to Texas law, the Texas court was an 'available' jurisdiction, thus anticipating the decision of the Texas court? Or should the English court wait until the outcome of the dispute in Texas?
(3) Suppose—as is often the case in other common law jurisdictions[2]—the existence of a *forum conveniens* doctrine in the foreign jurisdiction. Is the Texas court still an 'available forum' if it has itself determined to stay the proceedings before it?

[1] [2003] All ER (D) 291.

[2] Adoption of *forum non conveniens* as a basis for staying proceedings is now widespread. The courts in Scotland and in the US (albeit in a slightly different form) had already adopted the doctrine prior to the *Spiliada*. Since then, the doctrine has been adopted to a greater or lesser extent in a number of common law jurisdictions including Canada, New Zealand, Hong Kong, Singapore, and India, as well as in Australia (although the Australian courts continue to rely to a much greater extent on notions of vexation and oppression). Traditionally civil law jurisdictions have been more hostile to *forum non conveniens* discretion. The German and French courts have rejected such a discretion, although it has received some degree of statutory recognition in the Netherlands (see generally, Kennett 'Forum non conveniens in Europe' [1995] CLJ 552).

[*ICLQ* vol 54, January 2005 pp 211–220]

What is the position if an application for a stay on *forum non conveniens* grounds has been made, but not yet determined?

Although it is the existence of parallel jurisdiction disputes that brings these questions into sharp relief, these are questions implicit in the 'available' forum concept. What is more, parallel disputes are relatively common, and where such parallel disputes exist, it is more likely than not that there will be parallel jurisdictional issues arising.

So far as the *Spiliada* test is concerned, it is necessary to consider exactly what the concept of an 'available' forum means and, more fundamentally, what the purpose of the test is. In terms of policy there may be said to be three options.

(1) The concept of an 'available forum' could be very narrowly defined so that, once the test has been satisfied, it is more or less guaranteed that the foreign court will have jurisdiction. This approach may avoid some of the problems which otherwise arise, but the consequence of such an approach will be that cases will proceed in England when they would be better heard elsewhere. A narrow concept of available forum—meaning that a stay will be granted less frequently than it would be were the definition of available forum wider—prejudices the rationale of the *forum non conveniens* doctrine.
(2) At the other extreme, the concept of an 'available forum' could require the English courts to carry out their own exhaustive analysis of the foreign court's jurisdiction, examining all aspects of that question in full and seeking to determine whether, according to that foreign law, the foreign court is an available jurisdiction in that particular case. This exercise would inevitably be time consuming and expensive, and in any event might not resolve the problem. The English court can only seek to anticipate what the decision of the foreign court may be, and it may anticipate wrongly.
(3) Finally, determining whether a forum is an 'available' one might involve a more pragmatic approach, essentially giving the courts a broad discretion in how to deal with the issue of 'available forum'. Thus, in some cases, the best course might be for the English court to await the outcome of a *forum conveniens* application in the foreign court, rather than attempt to resolve the question of availability of forum itself. If such an application is imminent, then adjourning the English forum application until the issue of availability is resolved by the foreign court may well be the most appropriate course.

This article explores the advantages and disadvantages of each of these solutions and examines the recent case law to see which, if any, have found support. It will seek to show that the first two approaches give respectively too wide or too narrow a role to the concept of 'available' forum, and that the only practical solution is a more pragmatic and flexible approach. It also considers recent cases on submission which have a potentially significant impact on the questions here discussed.

II. JURISDICTION 'AS OF RIGHT'—A NARROW DEFINITION OF 'AVAILABLE FORUM'

Little guidance is given in the *Spiliada* itself as to what is meant by an 'available forum'. Lord Goff simply referred to a court having 'competent jurisdiction'.[3]

[3] This wording is taken from the speech of Lord Kinnear in *Sim v Robinow* (1892) 19 R 665.

https://doi.org/10.1093/iclq/54.1.211 Published online by Cambridge University Press

The starting point for considering the definition in more detail is *Dicey & Morris*.[4] There, the learned editors state:

> [I]t has been held that the foreign court is not 'available' to a claimant unless, at the time of the application for a stay, it was open to him to institute proceedings against the defendant *as of right* before that court. If by contrast, the jurisdiction of that court would be open to him only if the defendant undertook to submit, and did later submit, to its jurisdiction, or if in due course the court granted leave to the claimant to commence the proceedings, the court is not available in the material sense (emphasis added).

The relevance of submission to the jurisdiction will be considered further below, but at this stage it is important to note the suggestion that the foreign court must have jurisdiction *as of right*. Presumably this means territorial jurisdiction over a defendant resident (or possibly simply present) in the jurisdiction and indeed it is said that the fact that the court may in due course grant leave to the claimant to commence the proceedings will not be sufficient.

The authority given for this broad proposition is the decision of the Court of Appeal in *Lubbe v Cape plc*.[5] The litigation concerned claims by employees of South African subsidiaries of the defendant English company in respect of asbestos-related diseases. Initially, three claims were made in England and the defendant applied for a stay of the action on the ground of *forum non conveniens*, South Africa, it was argued, being the more appropriate forum for the action. The stay was granted at first instance but lifted by the Court of Appeal. It is this first Court of Appeal decision that is cited in *Dicey & Morris*. Some six months later, a further 1,538 writs were issued and it was ordered that the claims should proceed as a group action. The evidence suggested that there could eventually be 3,000 or more claimants. The defendant applied, or reapplied, to stay the actions. At first instance Buckley J granted a stay. The claimants appealed. The second Court of Appeal held that there was a sufficient change of circumstance to allow a reconsideration of the issue: the Court of Appeal then dismissed the appeal and upheld the stay.

The second Court of Appeal considered and rejected the argument that South Africa was not an 'available forum'. In the earlier proceedings, it had been suggested that South Africa was not an 'available' forum if it only had jurisdiction by virtue of the defendant consenting to that jurisdiction. The second Court of Appeal held (and, indeed, the proposition appears to have been accepted by the claimants) that the first Court of Appeal had rejected this argument. South Africa did not cease to be an 'available forum' simply because the South African courts had jurisdiction by virtue of the defendant's submission. Rather, the first Court of Appeal approached the application on the basis that the fact that jurisdiction existed only because submission was one of the factors to be taken into account in considering which was the appropriate forum.

The matter was put plainly by Tuckey LJ:

> From *Spiliada* itself and from *Connolley* I think it is clear that by referring to 'another available forum' the Court was simply referring to some other tribunal having competent jurisdiction. The rules which gave that tribunal jurisdiction are unimportant. What matters

Lord Goff also referred to another Scottish case, *MacShannon v Rockware* [1978] AC 795, where Lord Diplock said that the defendant must satisfy the court that there is another forum *to whose jurisdiction he is amenable* in which justice can be done between the parties at substantially less inconvenience or expense.

[4] Collins *Dicey & Morris the Conflict of Laws* (Sweet & Maxwell London 2000) [12-023].

[5] [1999] ILPr 113.

https://doi.org/10.1093/iclq/54.1.211 Published online by Cambridge University Press

> are the factors which connect it with the case in question. Such factors will of course include the connection between the defendant sued in England as of right and the foreign forum. In this respect I have no difficulty in accepting that the Court may take into account the fact that the foreign forum only has jurisdiction because the defendant has submitted to it but I do not think this fact should be elevated into some free standing ground for rejecting the foreign forum if it is otherwise clearly more appropriate. I do not think this Court in *Lubbe* decided otherwise.[6]

Accordingly, far from applying any general rule that jurisdiction must be available 'as of right', the Court of Appeal (in accordance with its interpretation of the earlier Court of Appeal decision) acknowledged that submission would be sufficient. Indeed Tuckey LJ, in the passage set out above, emphasized that the rules which give a tribunal jurisdiction are unimportant. Applying that reasoning, in a case where the foreign court has given leave to serve out of the jurisdiction, and has taken jurisdiction on that basis, it is very difficult to see why that forum should not be an 'available forum', even though the court may not technically be exercising jurisdiction 'as of right'.

In the House of Lords,[7] Lord Hope confirmed that Evans LJ in the first Court of Appeal decision had not gone so far as to say that the South African courts were not to be regarded as available in the circumstances; furthermore he confirmed that the undertaking to submit to the jurisdiction of the South African courts was sufficient to make those courts an 'available forum'.

So, nothing in any of the *Lubbe v Cape* decisions seems to support any general proposition that jurisdiction must be 'as of right'. Despite this, the Privy Council in *Gheewala* appears to confirm the existence of this general rule. This litigation arose out of a complex family dispute as to the beneficial ownership of the Gheewala family fortune. Nine of the 10 defendants were members of the Gheewala family. Some were resident in Kenya and some in England. The claimant, who was also a member of the family, brought a claim in Jersey alleging that the family property was held under a Hindu co-parcenary and seeking a partition and distribution of the property. A number of the defendants immediately applied for a stay on the grounds of *forum conveniens*, on the basis that Kenya was the more appropriate forum. That stay was granted at first instance, overturned by the Court of Appeal in Jersey, and was eventually reinstated by the Privy Council.

In considering the availability of Kenya as an alternative forum, it appears to have been accepted by the parties that the claimant could have served Kenyan proceedings out of the Kenyan jurisdiction on all of those defendants not in Kenya, on the basis of Kenyan rules for service with leave (which are analogous to those in CPR 6.20). The claimant's argument before the Privy Council was put on a different basis, ie that although the Kenyan court might give leave to serve process on all of the defendants, the defendants might decide not to appear in Kenya, so raising doubts as to the enforceability (outside Kenya) of any order against them. Their Lordships noted that this was a point of some importance since 'it is clear that an alternative forum is not available (in the relevant sense) unless it is open to the plaintiff to institute proceedings *as of right* in that forum' (emphasis added). The authority given for this general proposition was the passage from *Dicey & Morris* referred to above, which, their Lordships said, had been accepted by the House of Lords in *Lubbe v Cape plc*. On that basis, the Privy Council disregarded the fact that proceedings could have been commenced with leave

[6] [2000] 1 Lloyd's Rep 139, 168. [7] [2000] 1 WLR 1545.

https://doi.org/10.1093/iclq/54.1.211 Published online by Cambridge University Press

in Kenya and went on to consider submission as the only basis for regarding Kenya as an 'available forum' (this aspect of the decision is considered further below).

However, as has been described, neither of the two Court of Appeal decisions, nor the House of Lords decision in *Lubbe v Cape plc*, is authority for such a broad proposition.[8] The question of whether the South African courts were an 'available forum' was entirely dependent upon prorogation and accordingly the validity of the undertaking to submit to the jurisdiction. The question of whether it was enough that the court would allow service out of the jurisdiction did not arise. Furthermore, what indications there were were against such a broad general proposition, in particular the comments of Tuckey LJ in the Court of Appeal set out above. As already stated, in a case where the foreign court has given leave to serve out and has taken jurisdiction on that basis, it is very difficult to see why that forum should not be an 'available forum' even though the court is not technically exercising jurisdiction 'as of right'.

One possible argument in favour of a narrower rule, that is, that a forum should only be available where the defendant is present in the jurisdiction (or has submitted), relates to enforcement. Any judgment of the foreign court will, of course, only be enforced in England (or elsewhere) where that court had jurisdiction in an international sense, ie through the presence or submission of the defendant. It is not enough that the foreign court gave leave to serve outside the jurisdiction, albeit on grounds identical to those who would give the English court jurisdiction under CPR 6.20. So, the argument may be put, where the foreign court takes exorbitant jurisdiction, the claimant is at risk of being left with a judgment which is not enforceable other than in that jurisdiction itself. This was, in fact, the objection raised by the claimant in *Gheewala* itself. However, there are two difficulties with this argument:

(1) The English court may itself have taken jurisdiction on an exorbitant basis, in which case that judgment would not be enforceable outside England and accordingly there is no relative disadvantage in relation to the foreign proceedings;
(2) Such considerations, if relevant at all, should come in at the second stage of the *Spiliada* test. The importance of the alleged prejudice to the claimant (which it should be for him to prove) will depend on a number of factors, for example, where any assets may be located. If there are sufficient assets in the foreign jurisdiction to meet any eventual judgment there is no real prejudice to the claimant even if the judgment is not enforceable elsewhere.

The Privy Council's decision may be explicable on the basis that, although the evidence suggested that leave would be given, proceedings had not actually been commenced in Kenya. However, as we will see below, in cases depending on submission it is not essential that proceedings have actually been commenced; it is enough that there is an undertaking to submit before the court hearing the application for a stay. Furthermore, in practice, it would be inefficient to make the parties commence proceedings in another jurisdiction before they know whether or not the English court is minded to stay its own proceedings.

[8] See further A Briggs *The Conflict of Laws* (OUP Oxford 2002) 95, where it is stated that an earlier suggestion that a court is not available unless a claimant was able to proceed there 'as of right' made in *Mohammed v Bank of Kuwait* [1966] 1 WLR 1483 was *rejected* by the House of Lords in *Lubbe*. In fact the *Mohammed* case dealt with a different question, ie whether considerations of practical justice could also be considered at the availability stage, a separate question which is not considered further in this article.

https://doi.org/10.1093/iclq/54.1.211 Published online by Cambridge University Press

One consequence of limiting the concept of an 'available forum' to cases where the party was present in or submitted to that jurisdiction is that it may well limit the potential for substantive challenges to that court's jurisdiction (eg on the basis that none of the CPR 6.20 grounds had in fact been established). However, even in a case where the court has jurisdiction because of the presence of the party there may well be a challenge on *forum conveniens* grounds—the issue of how the court should deal with parallel jurisdiction disputes is considered further below. Overall there appears to be little advantage in requiring an 'available forum' to be exercising jurisdiction 'as of right': on the contrary, such a requirement may rule out another court which might be a much more appropriate forum for the dispute. It is therefore submitted that not only is there no authority supporting a strict jurisdiction 'as of right' requirement, but that such a rule would confine cases when *forum non conveniens* can be considered within unacceptably narrow limits.

III. SHOULD THE ENGLISH COURT CARRY OUT ITS OWN INQUIRY INTO THE JURISIDICTION OF THE FOREIGN COURT?

In any case where there are parallel jurisdiction disputes, one solution, which might at first sight be attractive to the English court, is to tackle the problem head on and for the English court to carry out its own exhaustive investigation into the jurisdiction of the foreign court. This would avoid the English courts having to concede the decision as to which is the appropriate forum to the foreign court.[9] Furthermore, it would give the widest possible meaning to 'available forum'. Having heard argument about the possible result of any challenge to the jurisdiction of the foreign court (whether on substantive or *forum conveniens* grounds), the English court would be able to decide for itself whether it was an available forum or not. The problem with this approach is that courts have on numerous occasions stressed that the principle of *forum conveniens* is founded upon the exercise of self-restraint by independent jurisdictions. Consistent with such comity, and in justice to the parties, it is important that any court which has to decide whether it has jurisdiction should be able to do so speedily.[10] The need to inquire, presumably with the assistance of expert evidence on foreign law, into the procedure and likely result in the foreign jurisdiction would make it impossible to deal with jurisdictional questions rapidly and inexpensively.

Furthermore, even a full inquiry into the jurisdiction of the foreign court may not actually solve the problem. Ultimately the question of jurisdiction will be a question for the foreign court. The best the English court can do is to predict what it thinks the

[9] See, eg, the comments of the court in *Bristow Helicopters v Sikorsky Aircraft Corp* [2004] EWCH 401, [2004] All ER (D) 112, where the suggestion that the English court should 'pass the buck' to the District Court in Connecticut was rejected. Morrison J commented that if it were to abdicate its responsibilities and allow the District Court to decide its approach, unnecessary costs would be involved. However, he also stressed that the fact that the English court was so obviously the correct forum meant that there would be no point in postponing any decision on the application.

[10] See Tuckey LJ in *Lubbe v Cape* 168. See also the opening of the opinion of Lord Walker in *Gheewala* where he referred to the well-known passage in the *Spiliada* where Lord Templeman said of an application for a stay that he hoped that in future submissions will be measured in hours and not days and added that 'an application to stay proceedings is essentially a matter of case management (however important the outcome may be to the parties) and (in line with Lord Templeman's observations in *Spiliada*) it has to be disposed of in a reasonably summary way'.

https://doi.org/10.1093/iclq/54.1.211 Published online by Cambridge University Press

result is likely to be. There can be no guarantee that the English court's prediction will be right.

IV. A PRAGMATIC APPROACH

Given the problems inherent in the two approaches considered above, the thesis of this article is that English law needs to look for a more flexible and pragmatic solution. In most cases, the practical course may well be to put to one side any possible challenge to the foreign court's jurisdiction, to proceed on the basis that the forum is available and then assess which is the more appropriate forum. If England is, in any event, clearly and distinctly the most appropriate forum, then the question of availability of the foreign forum is irrelevant (this may well have been the explanation for the decision in the *Bristow Helicopters* case referred to in note 9 above). If the foreign court is more appropriate, the English court should stay its proceedings in favour of that court. This seems to have been the approach of the Court of Appeal in *Ace Insurance v Zurich Insurance*.[11] Proceedings had been commenced in Texas under a non-exclusive jurisdiction clause. The defendant applied for a stay of the parallel English claim in favour of the Texas proceedings. The Court of Appeal, in granting a stay, held that any challenge to the jurisdiction of the Texan court must be a matter for that court alone. If the Texan court did ultimately decide that it had no jurisdiction, a possibility would be that the claimant could then apply for the stay of the English proceedings to be lifted. So, if the English court proceeded on the basis that Texas was an 'available forum', but eventually it turned out not to be because the jurisdictional challenge in Texas succeeded, the stay of the English proceedings could be lifted. This may well be a practical solution in cases where one forum is clearly the more appropriate on all other grounds. But even this approach is not without problems. In particular, where the foreign court eventually does decide it does not have jurisdiction or stays its own proceedings, there may well have been considerable delay and wasted expense before the English proceedings are revived. This, however, is a disadvantage inherent in the *forum conveniens* approach.

Given the problems with each of the options considered above, it may well be desirable to look more widely for a solution. In particular, it is possible that developments in the case law on the relevance and meaning of submission to the foreign court may well now provide a circuitous route round these difficulties in most cases.

V. THE RELEVANCE OF SUBMISSION TO THE JURISDICTION OF THE FOREIGN COURT

It is clear, following the decision of the House of Lords in *Lubbe v Cape*, that an express undertaking to submit to the alternative jurisdiction will be sufficient to make the forum available even if given after the application for a stay is made.

Two arguments had been advanced against such a conclusion. First, that the forum should be available when the application is first brought (ie a timing issue). Lord Hope had little sympathy with this argument and emphasized that the important fact was that an undertaking was before the judge who eventually heard the application. Secondly, it was argued that to permit the defendant to choose to make a jurisdiction available in

[11] [2001] EWCA 173, [2001] 1 Lloyd's Rep 610.

https://doi.org/10.1093/iclq/54.1.211 Published online by Cambridge University Press

this way allowed the defendant to engage in forum shopping in reverse. The complaint of forum shopping is normally made against a claimant who—unless restrained—is free to start proceedings wherever is most advantageous to him: hence the need for a *forum non conveniens* doctrine in the first place. It was argued that forum shopping could also apply the other way. Allowing a defendant to make a forum available by submission allowed him to shop between England and the foreign forum. However, Lord Hope was also unconvinced by this argument which, he said, overlooked the fact that the appropriate forum was for the court to decide.[12]

The principle thus appears to be clear. In any case where the defendant has undertaken to submit to the jurisdiction of the foreign court, that court will be available in the eyes of the English court. It must be noted, however, that this begs a potentially very important question. What if submission to the alternative forum is insufficient, as regards that forum, to establish jurisdiction? Practically speaking, this is highly unlikely to be the case. Submission is generally a recognized means of founding jurisdiction. But it is worth noting that this is an underlying assumption of the discussion in *Lubbe* which, if incorrect, would render the decision a questionable one. Such an undertaking will, of course, be inconsistent with making any challenge to the jurisdiction of that court, whether on grounds of *forum conveniens* or otherwise, and so also avoids any problem arising from parallel jurisdiction disputes.

In cases where there is a formal express undertaking to submit, difficulties inherent in the concept of 'available forum' will no longer arise. Furthermore, the way in which this principle was applied by the Privy Council in *Gheewala* may well provide a practical solution to the problem of available forum in the vast majority of cases.

As we have already seen, in *Lubbe* there was an express formal undertaking to submit to the jurisdiction of the South African courts. Furthermore, there appeared to be no doubt about the validity of those undertakings (in the sense that it was accepted that they were binding).

That was not the case in *Gheewala*, where there were no express undertakings to submit to the jurisdiction of the Kenyan courts. Despite that, their Lordships accepted that it was arguable that the decision of two of the defendants to '*rest à la sagesse de la cour*' in Jersey, having initially supported the application for a stay, amounted to an implied submission to the jurisdiction of the Kenyan court. The basis for that decision was that the evidence submitted in support of the application (before the relevant two defendants decided to take a neutral stance) clearly contemplated that there would be a full trial of the action in Kenya. Consequently, if they had been asked to give a formal

[12] This aspect of the decision, although clear, has been controversial. Williams 'Forum non conveniens, Lubbe v Cape and Group Josi v Universal General Insurance' JPI Law (2001) 72–7 takes the view that it is quite wrong in principle to allow a defendant to create the possibility of a trial in a jurisdiction of his choosing when, at the time the proceedings were commenced by the plaintiff, the courts of that State had no jurisdiction over the defendant. In his view the decision in *Lubbe v Cape* can only increase uncertainty in an already uncertain area of litigation. Peel 'Forum non conveniens revisited' (2001) 117 LQR 187, on the other hand, supports this aspect of the decision pointing out that if South Africa was indeed shown to be the appropriate forum, it is difficult to see how Cape could be criticized for its undertaking to submit to the South African courts. Furthermore, it seems odd for the claimant to complain that another jurisdiction has been made available for his claim (particularly when the result may well be that he has greater procedural rights and/or a more enforceable judgment than if there had been no submission) given that he will not be forced to go to that jurisdiction unless it is clearly the most appropriate forum.

undertaking to submit to the jurisdiction of the Kenyan court, it is hard to see, so their Lordships believed, how they could possibly refuse.

Their Lordships did not expressly consider the position of the other defendants, who were not resident in Kenya, but who had made the application for the stay and who had also not made any express submission to Kenyan jurisdiction. This appears to be because their Lordships took the view that if those defendants had been asked to give a formal undertaking to submit in Kenya, they too could not have refused in a manner consistent with their stay application, ie they too would be held to a form of implied submission arising out of the stay application.

This concept of implied submission gives the decision in *Lubbe v Cape* potentially far-reaching consequences and raises a number of questions.

First, how does such an implied submission arise as a matter of law? The first point to note is that the question will ultimately be one for the foreign court. Suppose, for example, that proceedings were eventually commenced in Kenya. It would be for the Kenyan courts to decide whether it would be open to any of the defendants who had supported the stay application to refuse to submit. If the matter were to arise before an English court, the English court would approach the question of submission in the following way. A person who would not otherwise be subject to the jurisdiction of the court may preclude himself by his own conduct from objecting to the jurisdiction and thus give the court authority over him which, but for his submission, it would not possess. There are many examples of situations where submission has been inferred. In order to establish that the defendant has, by his conduct in the proceedings, submitted or waived his objection to the jurisdiction, it must be shown that he has taken some step which it is only necessary or useful to take if the objection has been waived or never entertained at all (eg *Williams & Glyn's Bank v Astro Dinamico*).[13] So, for example, on that basis, submission has been inferred when a defendant applied to strike out part of the claim endorsed on the writ (eg *The Messiniaki Tolmi*,[14] although the Court of Appeal made it clear that whether such an application to the court amounts to a voluntary submission must depend on the circumstances of the particular case).

If the matter were to come before an English court, the question would therefore be whether the application for a stay of English proceedings in favour of a foreign jurisdiction is only a necessary or useful step to take if there is no objection to submitting to the jurisdiction of the foreign court. The answer to this question may well depend on the precise facts of the case. If the foreign court would not otherwise have jurisdiction, the claimant will probably be required to submit as a consequence of obtaining the stay.[15] However, if the claimant is asserting that the foreign court does have jurisdiction on another ground, as in *Gheewala*, where it was alleged that the Kenyan court would grant leave to serve outside the jurisdiction, arguably an application for a stay does not necessarily imply that the claimant would be prepared to submit to that jurisdiction rather than allow judgment in default to be entered against him. In such a situation it may be unfair to treat the defendant to have submitted without more (although, of course, if the judge decides that otherwise the foreign court would have no jurisdiction or at least not jurisdiction 'as of right' such as to make the foreign court available,

[13] [1984] 1 WLR 438.
[14] [1984] 1 Lloyd's Rep 266, 270.
[15] This has been the approach in the US courts: see *Piper Aircraft Co v Reyno* 454 US 235.

he may choose to require the defendant to make an express undertaking to submit as a condition of granting a stay).

Secondly, what are the consequences of finding an implied submission? Not only will an implied submission have practical consequences, for example, in making the judgment of the foreign court easier to enforce outside that jurisdiction, it may render unnecessary any further examination of the question of availability of the forum. As we have seen, according to *Lubbe*, where a defendant submits, the foreign forum is available and there can be no question of any subsequent challenge to the jurisdiction of that court. Extending this principle to cases of implied submission may well mean that in the majority of cases there can no longer be any question in relation to the availability of the forum. If an applicant for a stay is held, as a matter of course, to have impliedly submitted to the jurisdiction of the forum which he advocates as being the appropriate forum, it is only in cases where not all of the defendants support a stay that the question of 'available forum' will arise.

VI. CONCLUSION

The question of when an alternative forum is available to a potential claimant will often arise in multi-national litigation not least because there will often be parallel jurisdiction disputes. Despite this, the principles which the court must apply are far from clear. There is recent authority supporting a very narrow definition of 'available forum' but such a definition is not supported by earlier cases and seems to confine the doctrine of *forum non conveniens* to unacceptably narrow limits. By contrast, allowing the court to decide for itself in each case whether the foreign court has jurisdiction, and is therefore available, widens the scope but involves expense and delay and may not necessarily solve the problem. The only practical solution is for the courts to adopt a pragmatic approach. In most cases the court could decide the application by consideration of which is the more appropriate forum, deferring the decision of whether the foreign court actually has jurisdiction to that court. However, it may be that consideration of these difficult questions will in the future be unnecessary in the vast majority of cases if, as a matter of course, every applicant for a stay is held to have impliedly submitted to (and therefore made available) the jurisdiction of the alternative proposed forum.

LOUISE MERRETT*

* Fellow, Trinity College Cambridge and Barrister, Fountain Court Chambers, Temple, London.

https://doi.org/10.1093/iclq/54.1.211 Published online by Cambridge University Press