Brownlie: implications for cross border litigation

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Starting soon….

Background

- On 03.01.10, Sir Ian and Lady Brownlie and family were on holiday in Egypt. Along with other family members, through their hotel, they booked a car trip to visit sites outside Cairo. The car crashed. Sir Ian was killed and Lady Brownlie injured. (Other family members were also involved but that is not directly relevant to the issues in this case).
- Lady Brownlie brought a claim against the hotel in tort and contract.
- The damages claimed were for (1) her own personal injury, (2) Sir Ian's estate as executrix (3) bereavement and dependency as Sir Ian's widow.
- The substantive applicable law for all claims was the law of Egypt.
- The proceedings had to be served in Egypt.

Requirements for permission for service out

- Under CPR 6.37, a claimant seeking permission to serve proceedings out of the jurisdiction must show:
- (1) a good arguable case that the claims fall within one of the gateways in CPR PD 6B, paragraph 3.1; f**irst issue was whether the claim in tort met this test (the claim in contract did).**
- (2) a serious issue to be tried on the merits; and **second issue was whether claims in contract and in tort met this test.**
- (3) that England is the appropriate forum for trial and the court ought to exercise its discretion to permit service out of the jurisdiction. **Before SC, it was accepted that this test was satisfied.**

Issue 1: how wide is the tort gateway?

- CPR 6B, §3.1(9): “A claim is made in tort where - (a) **damage was sustained**, or will be sustained, **within the jurisdiction**; or (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.”
- Sir Ian Brownlie had died and Lady Brownlie had been injured in Egypt. But Lady Brownlie continued to suffer the effects of her injuries as well as bereavement and loss of dependency in England. Was that enough to amount to damage sustained within the jurisdiction?
- In essence, in a personal injury or fatal accident case, is the damage which the rule requires the initial or direct damage which happened in Egypt (the narrow interpretation) or does persisting or consequential damage suffered in England suffice (the wide interpretation)?

The decision: the wide interpretation wins

- By 4-1 majority, Lord Lloyd-Jones giving the judgment on this issue, SC accepts the wider interpretation. Any substantial damage is in principle capable of passing through the gateway.
- Which includes e.g. continuing pain and suffering, continuing bereavement, medical expenses, loss of earnings, etc, suffered in England.
- What of the complaint that such a wide reading will too easily allow English claimants to obtain the benefit of home court jurisdiction or that it will allow claims with only slight connections to England to be brought here?
- The majority relies on the discretionary power to stay a claim which passes through the gateway as the mechanism for ensuring a sufficient degree of connection between the tort and England before accepting jurisdiction. If England is not the appropriate forum, the claim will not be brought here.

The decision: the wide interpretation wins

- The Brussels regime (a) has preferred a narrow interpretation of damage as founding jurisdiction (*Marinari,* etc.) but (b) lacks the discretionary power to stay a claim in which the basic jurisdictional test is met. In the view of the majority, there is no good reason for the common law to follow the European approach.
- The majority in any event thinks that the distinction between direct and indirect damage which the narrow test necessitates drawing is obscure and likely to be difficult in application: §81.

The dissent of Lord Leggatt

- To have its proper role, a gateway should "*identify some substantial and not merely casual or adventitious link between the cause of action and England*" (§192).
- The wide test effectively makes residence in England path through the gateway and/or means a claimant can select England as a forum e.g. by travelling here for treatment. That is contrary to principle.
- The forum non conveniens rule (FNC) is not sufficient or appropriate to ensure the necessary substantial link between tort and England.
  - The gateway should look back to the tort, FNC looks forward to the litigation.
  - The FNC discretion may include factors irrelevant to the link between the tort and England, e.g. whether C could obtain justice in the foreign court.
- In any event, FNC is discretionary so leads to uncertainty and delay.

Implications for commercial litigation

- *Brownlie* will be of immediate and obvious relevance to tortious negligence claims pursued within commercial litigation, subject to the usual questions about liability for pure economic loss etc.
- The reality is that most cross-border commercial litigation not involving the application of English law (or only partial application of English law) in the Comm Ct, Ch D and TCC concerns:
  - economic torts (typically in civil fraud claims or cartel damages cases),
  - specialist regulatory legislation (especially in the financial services sector), or
  - construction and energy disputes (involving a combination of contract and tort law, whether codified in statute or common law).

Implications for commercial litigation – economic torts

- Lord Leggatt's dissenting judgment on the tort gateway issue recognised the potential implications of the majority's approach in terms of inconsistency with established case law on economic torts and their treatment for gateway purposes: see [184]-[190].
- The main concern raised by him is that the majority's approach to the tort gateway is contrary to several Court of Appeal decisions concerning economic torts, including the clear statement in ***Eurasia Sports Ltd v Tsai*** [2018] 1 WLR 6089, where Floyd LJ said at [21]:

> "*To pass through [the tort] gateway England and Wales must be the place where the damage was sustained.* ***That place is not simply where the claimant sustains financial loss****. It is where the event giving rise to the damage directly produces its harmful effects on the person who is the victim of the act*."

Implications for commercial litigation – economic torts

- *Brownlie* as the demise of the direct/indirect loss distinction for economic torts? - **Remains to be seen.**
- In particular, given the Supreme Court's decision in ***JSC BTA Bank v Khrapunov*** [2018] UKSC 19 concerning the tort gateway under the Lugano Convention (Article 5(3)).
- In *Khrapunov*, the Supreme Court interpreted Art. 5(3) Lugano (consistently with case law on current Art. 7(1) Brussels I recast) to be limited to direct damage but accepted that the **place of the conspiratorial agreement** could be classified as the harmful event giving rise to damage. It found English jurisdiction on that basis on the facts.
- The relationship between *Brownlie* and *Khrapunov* is likely to require judicial resolution, though *Khrapunov* is not strictly a decision on the common law jurisdictional rules.
- NB: Lord Lloyd-Jones (majority judgment) also acknowledged the tension between the broad interpretation of damage and "economic loss" cases; see [75]-[76].

Implications for commercial litigation – move away from "necessary and proper party" gateway?

- Long-standing reliance on English "**anchor defendants**".
- Easier under the Brussels and Lugano regimes, given the limited "sole object" exception: see e.g. ***PJSC Commercial Bank Privatbank v Kolomoisky*** [2019] EWCA Civ 1708.
- "necessary and proper party" gateway (PD6B, gateway 3(b)) more discretionary, so fertile ground for jurisdiction challenges.
- Post-*Brownlie*, consider adding the tort gateway alongside reliance on English anchor defendants. With both gateways, the English court can decline jurisdiction where the jurisdictional nexus is weak on *Spiliada* [1987] AC 460 *forum non conveniens* ("FNC") grounds. The approach is ultimately discretionary and fact-sensitive.
- **Momentary victory for claimants? – Probably yes**. Expect FNC test to be applied without major changes post-*Brownlie* in commercial litigation. Key is strength of other connecting factors if connection of tort to England only just crosses gateway threshold.

Implications for personal injury and property damage litigation

- Potentially a big deal.
- Most common place for Brits abroad to be injured is Europe.
- From 2007 until Brexit, an English domiciled C injured in the EU has been able bring a claim against the tortfeasor's insurer in English courts relying on *Odenbreit* (C-463/06) by virtue of the jurisdictional privilege accorded to the weaker party in insurance cases under the Brussels regime.
- In the UK, the Brussels regime is no more, the UK's application to join Lugano (which has equivalent rules to Brussels) is lifeless, and domestic jurisdiction rules contain no equivalent to *Odenbreit.*
- So *Brownlie* re-opens a possible route to home jurisdiction for English Cs which Brexit might have closed. And of course it is not limited to those injured in Europe.

Two considerable uncertainties

- The potential benefit to Cs is reduced by 2 serious uncertainties.
  - Possibility of English court refusing jurisdiction on FNC grounds.
  - Possible difficulties in enforcing the resulting English judgment abroad.

Forum Non Conveniens

- If the claim in tort passes through the gateway, the English court may accept jurisdiction but is not obliged to do so (unlike Brussels regime).
- It will accept jurisdiction if the English court is *forum conveniens,* i.e. the court in which the case "*may be tried more suitably for the interests of the parties and for the ends of justice*" (*Spiliada* [1987] AC 460 at 474), the appropriate forum.
- The burden is on C to establish England is clearly and distinctly the more appropriate forum in a service out case, and is on D to establish that some other forum is clearly and distinctly more appropriate in a service within the jurisdiction case.
- Even if there is a prima facie more appropriate forum elsewhere, the English court may still refuse a stay if justice so demands, e.g. where C could not obtain justice in the alternative forum.

Forum non conveniens

- Typically, the court will consider domicile of parties, location of witnesses and documents, applicable law, place of tort.
- But there is no limit to factors which may be relevant. E.g. in *The Spiliada* itself, the decisive factor in favour of English courts was the fact that other litigation raising similar issues with the same legal parties was already underway here.
- The weight given to factors will vary according to the circumstances. So the applicable law will be significant where issues of foreign law are many and complex but less significant where the law is simple.
- The question may therefore be unpredictable and quite expensive to decide in itself. The exercise is better suited to a multi-million pound commercial dispute than a £100K personal injury claim.

Enforcement

- Judgments against foreign Ds may need to be enforced abroad. The easy Brussels regime is gone.
- Whether an English judgment can be enforced abroad will depend on the rules of the foreign country in question.
- However, often a question will be whether the foreign court recognises as legitimate the basis on which the English court assumed jurisdiction over the case (if D did not consent to jurisdiction).
- The *Brownlie* basis may look exorbitant to some countries.

Enforcement

- For a flavour, see The Hague Judgment Convention of 2019. NB: it is not yet in force. It will allow enforcement of a tort judgment as between parties if: "*the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred*" (art.5(1)(j)).
- So before commencing proceedings in reliance on *Brownlie*, it may be necessary to obtain advice on the relevant foreign law's enforcement rules.

Ground 4A

- Under CPR PD6B 3.1(4A), the English court will have jurisdiction where "*a claim is made against the defendant in reliance on one or more of paras (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts.*"
- There may often be a tort and contract claim on closely connected facts and indeed in *Brownlie* there were though 4A was not relied on.

Issue 2: The “foreign law” issue

- Roadmap:
  - The distinction between the “default rule” and the “presumption of similarity”;
  - The implications for preparation of statements of case;
  - Types of legal rules likely to engage the presumption of similarity.

Approach to foreign law pre-*Brownlie*

- Starting point in English courts = Issues of foreign law require the English court to make **findings of *fact*** rather than law as to the relevant foreign law(s)
- Contrast international commercial arbitration: accepted that different national laws as well as private and public international law will apply to different issues (*lex contractus*, *lex arbitri* and *lex incorporationis* etc.)
- Norm in English courts = **expert evidence on foreign law** (subject to urgency or proportionality of cost considerations)

Approach to foreign law pre-*Brownlie*

- Summary of pre-*Brownlie* position (see *Dicey, Morris & Collins* (15th ed.) ("DCM"), ch.9):
  - **Parties are generally required to plead and prove matters of foreign law on which they rely** (subject to an exception under the British Law Ascertainment Act 1859 for some Crown Dependencies and British Overseas Territories).
  - **Judges limited to expert evidence provided** in making findings of fact as to content of relevant foreign law. Includes any statutes, case law and commentary provided by the foreign law experts: DCM [9-015]-[9-017]. It is **not appropriate for the English court to conduct additional research on foreign law**.
  - A failure to follow this approach could provide a ground of appeal for procedural irregularity or other error of approach.

Decision in *Brownlie*

- Lord Leggatt giving the unanimous judgment of the UKSC.
- Clarified at [112] that the **default rule and presumption of similarity are conceptually distinct rules**, each having its own rationale:
  - The presumption of similarity is a **rule of evidence** concerned with what the content of foreign law should be taken to be.
  - By contrast, the default rule is not concerned with establishing the content of foreign law but **treats English law as applicable in its own right where foreign law is not pleaded**.

Default rule

- The rationale of the default rule is that it is not for the court to apply any particular rule of law of its own motion. **The onus is on each party to plead it case, including as to any applicable foreign law**. [113-116]

- However, if either party pleads that under the relevant rules of English private international law foreign law is applicable to an obligation, and that case is well founded, it is the duty of the court to apply foreign law. **The burden is on the party who is making or defending a claim, as the case may be, to prove that it has a legally valid claim or defence.** Where the law applicable to the claim or defence is a foreign system of law, this will require the party to **show that it has a good claim or defence under that law**. [116]

Presumption of similarity – limits to application?

- The application of the presumption of similarity is kept within limits by three factors: ([122]-[125])
    - First – while there are differences between legal systems (in particular between common law and Roman/civil law systems), "**insufficiency of difference** will often make it reasonable to start from an assumption that the applicable foreign law is likely to be materially similar to English law."
    - Second - **requirement of materiality**. Unless there is a real likelihood that any differences between the applicable foreign law and English law on a particular issue may lead to a different outcome, there is no good reason to put a party to the trouble and expense of adducing evidence of foreign law.
    - Third - the presumption of similarity **only ever operates unless and until evidence of foreign law is adduced**. Nor does the presumption alter the legal burden of proof. It is always open to a party to adduce evidence of the applicable foreign law showing that it is **in fact materially different from English law on the point in issue**.

Presumption of similarity – the *Brownlie* test

Lord Leggatt [126]:

> *"in the circumstances is it reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue (meaning that any differences between the two systems are unlikely to lead to a different substantive outcome)?"*

Presumption of similarity – *Brownlie* guidance

- **Factor (1): Civil law or common law system?** Presumption more likely to apply if common law system. However, even across civil and common law there are some “great and broad” principles of law.
- **Factor (2): Contained domestic statute?** The presumption is less likely to be appropriate where the relevant domestic law is contained in a statute, but this depends on the nature of the statute and, more specifically, the relevant statutory provision. Difference between a statute which codifies general principles and one which introduces a local scheme of regulation.
- **Factor (3): Greater scope for relying on presumption at an early stage of proceedings.** Distinguish between situations where all that a party needs to show in order to be allowed to pursue a claim or defence is that it has a real prospect of success, in contrast to reliance on the presumption at trial.

Presumption of similarity – *Brownlie* guidance

- Strong caveat to general guidance at [144]-[147].

- The application of the presumption of similarity is **fact-sensitive** and the presumption is only ever a basis for drawing inferences about the probable content of foreign law **in the absence of better evidence** [149].

Expert evidence necessarily inconsistent with the application of the presumption?

- Short answer: **no**. Lord Leggatt addressed this point at [151] and it was a live issue on the facts of *Brownlie* because there was expert evidence of Egyptian law.

- The Supreme Court acknowledged that reliance on expert evidence on the content of pleaded foreign law "***narrows the potential for relying on the presumption****; but whether it eliminates the potential for doing so altogether must depend on the circumstances*." In particular, where expert evidence **incomplete**. E.g. where the Court has the text of a foreign statute but no evidence on how it would be interpreted by the relevant foreign court.

Application of Issue (2) analysis in *Brownlie*

- Note D's argument at [26]
- **Did the default rule apply? –** "the only claims made in the amended claim form and particulars of claim are claims for damages "pursuant to Egyptian law". There is accordingly **no scope for applying English law by default**." (Leggatt at [118])
- **Did the presumption of similarity apply?** - Judge at first instance was entitled to rely on the presumption that Egyptian law is materially similar to English law in concluding that Lady Brownlie's claims are reasonably arguable for the purposes of establishing jurisdiction. UKSC stressed **evaluative nature of the judge's conclusion premised on the existence of some obligations to ensure passenger safety under Egyptian law**, even though there were more difficult questions as to concurrent liability in contract and tort and points of detail meaning room for divergence moving forward. [157-160]

Lessons for personal injury and property damage litigation

- Default rule of applying English law when foreign law not raised requires agreement (albeit tacit) between the parties. That should be considered at the outset.
- Presumption of similarity will prove an uncertain and unpredictable tool for cross border claims.
  - There are no hard and fast rules for when it will and will not apply: §143.
  - More likely to be appropriate where foreign country is a common law country (§144) but most injury claims arise in Europe, mostly civil law countries.
  - If English law is found in statute, less likely that presumption will apply: §145. More likely if the statute codifies general principles than lays down specific local rules. So a statute like the Occupiers' Liability Act 1957 might be applied, but an industry specific health and safety regulation probably not.
  - Better either to agree to apply English law or adduce evidence to prove foreign law on all relevant issues.

Lessons for personal injury and property damage litigation

- Note what Lord Leggatt says at §148 about the means of proving foreign law.
- Traditionally done only by expert evidence from a foreign lawyer.
- Legatt suggests that in the right case it may be possible to find the relevant law online and adduce it that way.
- Note a significant risk, however. Merely adducing the text of a foreign code may well give rise to arguments about its significance on the facts of the case. Absent a foreign lawyer to guide the court on interpretation, a party may then be thrown back on the presumption of similarity with all its uncertainty and unpredictability.

Lessons for cross-border commercial litigation

1. **Guidance on the application of the default rule and presumption of similarity is not unique to the cross-border PI fact pattern in *Brownlie*.**
2. **Brownlie is encouraging for claimants in recognising that it is more appropriate to fallback on the presumption of similarity at an early stage of the proceedings**, for example when dealing with a jurisdiction challenge before a Defence or an early strike-out application. At trial – rely on at your peril!
3. **Clear message = (i) identify to which issues foreign law may be relevant and (ii) obtain competent advice on the content of that foreign law for an accurate pleading at an early stage.**
4. **In some cases, the relevant choice of law principles may justify pleading alternative cases under English law and a foreign law**. Example of civil fraud cases possibly involving mix of English and foreign law (typically Russia, Ukraine and CIS countries).

Lessons for cross-border commercial litigation

5. Some degree of recognition to the commonality between common law systems. But UKSC approach is ultimately nuanced in two main ways:

- First – even closely aligned systems like English law and Australian law, for example, can diverge and so **the presumption of similarity is always subject to contrary proof**.

- Second – as demonstrated by the facts of *Brownlie*, there is **no hard and fast rule against applying the presumption of similarity to civil law systems**. Lord Leggatt considered this was the case when dealing with so-called "great and broad principles of law" ([144]). See *Cuba Railroad Co v Crosby* (1912) 222 US 473 cited at [132].

Thank you for your attention!

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