# *FORUM NON-CONVENIENS* DISCRETION IN THIRD PARTY PROCEEDINGS

Third party procedure has the merits of saving time and expenses and of preventing inconsistent decisions through eliminating the duplication of proceedings. Because of these procedural merits, third party proceedings (called 'Part 20 proceedings'[1] in the Civil Procedure Rules 1998 (CPR)) are often instituted to bring a claim for contribution. In English law, contribution claims are allowed under the Civil Liability (Contribution) Act 1978 (hereafter the 1978 Act) between wrongdoers such as tortfeasors and defaulters in contracts. Not all legal systems allow contribution claims in such wide circumstances. A third party claim form (called a 'Part 20 claim form' in the CPR) may be served out of the jurisdiction under the CPR Rule 6.20(3A),[2] which provides for a special base of jurisdiction for third party proceedings in the case where the third party is a 'necessary or proper party' to the claim against the Part 20 claimant. The service is, however, subject to the permission of the court which will not be given unless England is judged to be clearly the most appropriate forum under the *forum conveniens* discretion.

This article will consider the following issues which arose in the recent case, *Petroleo Brasiliero v Mellitus Shipping*:[3] (1) how should the procedural merits of third party proceedings be taken into account when the *forum conveniens* discretion is exercised under Rule 6.20(3A); (2) when should the 1978 Act be applied; and (3) what effect, if any, should be given, in the exercise of the *forum conveniens* discretion, to the absence, in the alternative forum, of a remedy of contribution as available under the 1978 Act.

## I. FACTS

The receiver of contaminated cargoes brought an action against the shipowner, alleging that the contamination occurred after shipment. The shipowner brought Part 20 proceedings against the charterer and the shipper, claiming the expenses of cleaning the vessel and contribution in respect of their possible liability to the receiver. The

[1] The CPR Rule 20.2 reads in pertinent part:
(1) A Part 20 claim is any claim other than a claim by a claimant against a defendant and includes—
. . .
b. a claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and
c. where a Part 20 claim has been made against a person who is not already a party, any claim made by that person against any other person (whether or not already a party).
(2) In this Part 'Part 20 claimant' means a person who makes a Part 20 claim.

[2] It reads in pertinent part:
In any proceedings to which rule 6.19 does not apply, a claim form may be served out of the jurisdiction with the permission of the court if:
. . .
(3A) claim is a Part 20 claim and the person to be served is a necessary or proper party to the claim against the Part 20 claimant.

[3] [2001] EWCA Civ 418, [2001] 1 All ER (Comm) 993.

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proceedings against the shipper were stayed in favour of arbitration pursuant to an arbitration clause contained in the bill of lading. The charterer brought Part 20 proceedings against the shipper claiming contribution in respect of their possible liability to the shipowner. The Part 20 claim form was served on the shipper in Saudi Arabia in accordance with Order 11, rule 1(1)(c) (now the CPR Rule 6.20(3A)). The shipper did not dispute that they were a 'necessary or proper party' to the shipowner's claim against the charterer but challenged the exercise of the *forum conveniens* discretion and applied for the Part 20 claim form to be set aside.

## II. DECISIONS

At first instance, Longmore J refused to set aside the service of the Part 20 claim form. On appeal by the shipper, the Court of Appeal (Potter LJ, concurred by Jonathan Parker LJ and Sedley LJ) affirmed the judge's conclusion.[4] However, the ways in which they exercised the *forum conveniens* discretion were different.

Longmore J held that service under Order 11, rule 1(1)(c) could not be permitted unless there was some special factor, which, according to him, could not be constituted simply by the procedural merits of third party proceedings. He went on to identify as the special factor the absence in Saudi Arabia of a remedy of contribution which would be available in England under the 1978 Act. He in fact treated this factor as a conclusive factor in favour of permitting service.

The Court of Appeal denied that there must be some special factor, holding that the procedural merits of third party procedure might well be enough. The court gave significant weight to the absence of a remedy of contribution in Saudi Arabia but did not give it a conclusive effect.

## III. ANALYSIS

### A. *The procedural merits of third party proceedings in the* forum conveniens *discretion*

The charterer's claim against the shipper and the shipowner's claim against the charterer shared the same central issues, that is the condition of the cargoes upon shipment and arrival and the cause of the damage to the vessel. The charterer argued that by eliminating the duplication of proceedings concerning these issues, third party procedure would save time and expenses and prevent inconsistent decisions.

Longmore J, requiring some 'special factor', did not give much weight to these procedural merits of third party proceedings. His decision was based on the ground that the argument of the procedural merits could be advanced in every case where permission was sought under Order 11, rule 1(1)(c) because of the very nature of the rule.

The Court of Appeal, however, treated these procedural merits as a rather weighty factor. Citing Mustill LJ in *The Eras EIL Actions*,[5] the court held that the procedural merits of third party proceedings might well be enough to permit service. It further went on to quote extensively, with apparent endorsement, from the three cases—*The*

[4] Although the wording of the CPR Rule 6.20 is different from that of O.11, r.1(1), the court proceeded on the basis that the former authorities relating to O.11 remained applicable.

[5] [1992] 1 Lloyd's Rep 570, 591.

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*Kapetan Georgis*,[6] *The Goldean Mariner*,[7] and *The Berge Sisar*[8]—which were relied upon by the charterer to stress the importance of litigational convenience in the exercise of the *forum conveniens* discretion.

It is the Court of Appeal's decision which is consistent with the previous authorities. While most of the other heads of Rule 6.20 give jurisdiction to English courts where the dispute has certain close connection with England, Rule 6.20(3A) gives jurisdiction even if the Part 20 claim (the third party claim) has no connection with England. Therefore, when the *forum conveniens* discretion is exercised under Rule 6.20(3A), the inconvenience of the English forum for the third party is an important factor which is to be weighed against the procedural merits of third party proceedings. Their relative weight will depend on the facts of each individual case but the previous case law[9] has tended to give greater weight to the procedural merits of third party proceedings.

An emphatic statement to this effect was made in the judgment in *Bouygues Offshore SA v Caspian Shipping Co (No 3)*.[10] In this case, the owner of a barge which had been lost in the South African waters whilst under tow brought an action in England against the charterer of the tug. The defendant brought third party proceedings against a South African port authority seeking contribution in respect of their possible liability to the owner. Colman J held:

> I recognize that the joinder of [the South African port authority] involves the exercise of a doubly exorbitant jurisdiction and further will involve it in litigation in a forum which is highly inconvenient. However, in my judgment, the ultimate objective of achieving amalgamation of all the litigants in one forum is so important in the interests of justice that it should prevail over the combined weight of the countervailing considerations.

The conflict-of-laws cases in which high premium was placed on the procedural merits of third party proceedings are not confined to the *forum conveniens* cases. Thus in a leading case of antisuit injunction, *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak*,[11] the widow of a person who had been killed in a helicopter accident brought actions in Texas and Brunei against the manufacturer of the helicopter. The manufacturer sought to bring third party proceedings against the helicopter service company which was responsible for the operation of the helicopter at the time of the accident. The service company contested the jurisdiction of the Texas court on apparently well-founded grounds but showed readiness to accept the jurisdiction of the Brunei court if third party proceedings were brought against them there. The manufacturer applied in Brunei for an injunction restraining the widow from continuing with the Texas proceedings. The Brunei courts refused to grant an injunction but the Privy Council allowed appeal, finding that the widow's conduct of continuing with Texan proceedings was oppressive chiefly because the unavailability of third party procedure there would give rise to a risk of inconsistent decisions.

If the unavailability of third party procedure could make the pursuit of proceedings oppressive in an antisuit injunction case, it should hardly be a surprise that the procedural merits of third party proceedings should be given great weight in the *forum conveniens* discretion.

[6] [1988] 1 Lloyd's Rep 352.
[7] [1989] 2 Lloyd's Rep 390.
[8] [1997] 1 Lloyd's Rep 635.
[9] eg *The Kapetan Georgis* [1988] 1 Lloyd's Rep 352; *Bouygues Offshore SA v Caspian Shipping Co (No 3)* [1997] 2 Lloyd's Rep 493.
[10] [1997] 2 Lloyd's Rep 493.
[11] [1987] AC 871 (Privy Council).

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### B. Application of the 1978 Act

In the present case, there was no dispute that charterer had no right of contribution against the shipper in Saudi courts, which they would have under the 1978 Act. The shipper, however, disputed the application of the 1978 Act by the English court, arguing that as they were a Saudi company, they owed no allegiance to an Act of the United Kingdom Parliament.

Longmore J dismissed this argument, saying that any civilised system of law should have some system of contribution between those jointly responsible for the same loss. The Court of Appeal downplayed the significance of the judge's reference to the 'civilised' system of law and instead stressed that the right to contribution was based on the general principle of justice. Therefore, although their reasonings were different, neither Longmore J nor the Court of Appeal entertained any doubt that the 1978 Act would apply to all proceedings brought in England. In fact, this is the latest addition to a line of cases[12] in which the 1978 Act was applied directly without assessing how closely the claim was connected with England or English law.

The direct application can draw some support from the history of widening availability of contribution claims. While the civil law systems generally have been recognising contribution claims in a wide variety of situations, the common law systems were traditionally hostile to contribution between wrongdoers. The origin of hostility can be traced back to an eighteenth century English case, *Merryweather v Mixan*,[13] in which a claim for contribution among joint tortfeasors was denied on the ground of *ex turpi causa*. Since then, the no-contribution rule has been repudiated step-by-step in many common law jurisdictions. Thus in England, a contribution rule between tortfeasors was introduced by the Law Reform (Married Women and Tortfeasors) Act 1935. That Act was replaced by the Civil Liability (Contribution) Act 1978 which has sanctioned contribution more generally among wrongdoers. The bodies in charge of law reform in a number of other common law jurisdictions have recommended the enactment of a statute similar to the 1978 Act.[14] Therefore, a wide consensus is steadily emerging among the common law jurisdictions that the no-contribution rule should be restricted, if not abolished altogether. Furthermore, even among those rules which allow contribution claims, the rule of the 1978 Act which apportions liability in accordance with the proportional responsibility of each wrongdoer (comparative fault rule)[15]

[12] *R. A. Lister & Co. Ltd. and Others v E. G. Thomson (Shipping) Ltd. and Another (No 2) (The Benarty)* [1987] 1 WLR 1614; *Virgo Steamship Co SA v Skaarup Shipping (The Kapetan Georgis)* [1988] 1 Lloyd's Rep. 352; *Arab Monetary Fund v Hashim (No 9)* The Times 11 Oct 1994.

[13] (1799) 8 TR 186, 101 ER 1337.

[14] eg, Law Reform Committee of South Australia, *42nd Report of the Law Reform Committee of South Australia to the Attorney-General Relating to Proceedings Against and Contributions between Tortfeasors and Other Defendants* (1977) 10–11; Victoria, Chief Justice's Law Reform Committee, *Contribution* (1979) para 5; Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers* (Topic 5, 1984) para 5.3; Ontario Law Reform Commission, Contribution among Wrongdoers and Contributory Negligence (Report 89, 1988); Law Reform Commission of Saskatchewan, *Proposals Relating to Joint Obligations* (Report to the Minister of Justice, 1985) 8–10; Law Commission (New South Wales), Contribution Between Persons Liable for the Same Damage (Discussion Paper 38, 1997).

[15] S 2(1), which reads in pertinent part: 'the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.'

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may be seen as a better rule than the rules which divide liability equally among the wrongdoers (equal share rule).

Do these, however, constitute sufficient reasons to justify applying the 1978 Act without assessing how closely the claim is connected with England or English law?

The desirability of the rule of the 1978 Act is not so obvious when it is compared with, for example, the law which allows a contribution claim by a negligent wrongdoer but not by an intentional wrongdoer on the ground of *ex turpi causa* principle. If an intentional wrongdoer seeks contribution from a negligent wrongdoer in the circumstances where the claim is closely connected with the law adopting such a rule, it would seem wrong to give the claimant the benefit of the right to claim contribution under the 1978 Act merely by coming before an English court. Examining the application of the Law Reform (Married Women and Tortfeasors) Act 1935, Glanville Williams said:[16]

> The Tortfeasors Act allows recovery of contribution between parties 'liable' in respect of damage. Literally speaking, it is possible for parties to be liable under a foreign system of law. This does not mean, however, that the Act is capable of being applied indiscriminately to liability for foreign torts. If three Ruritanians are involved in tort litigation in Ruritania, under whose law there is no right to contribution, it is inconceivable that merely by coming to England and suing here they could obtain the benefit of the Tortfeasors Act.

Moreover, where a contribution claim is made in third party proceedings, the court may have a wider-than-usual jurisdiction by virtue of such rules as Rule 6.20(3A) and, therefore, Briggs has called for a greater-than-usual sensitivity to the issue of choice of law.[17]

The present case was concerned with a contribution claim between defaulters of different contracts, ie the charterparty and the bill of lading contract. Prior to the passing of the 1978 Act, this type of contribution claims was not recognised in English law. It is possible that Saudi Arabian law has a good reason not to recognise this type of claims. According the shipper's submission, no evidence appears to have been presented in the present case that Saudi Arabian law did not recognise various other types of contribution claims which had been recognised in English law prior to the 1978 Act. It would, therefore, seem wrong to apply the 1978 Act directly without assessing how closely the claim is connected with England or English law. Briggs has argued that the application of the 1978 Act should be limited to the cases where the law with the closest and most real connection to the claim is English law.[18] With a view to introducing a measure of certainty, the present author has previously suggested the following test.[19]

(a) The Civil Liability (Contribution) Act 1978 should be applied to a claim falling within its scope only where English law is the law with which the claim for contribution has the most real connection.
(b) English law is *prima facie* the law with which the claim has the most real connection if:
    (i) where there is a contract between the claimant and the defendant which is

[16] G Williams, *Joint Torts and Contributory Negligence* (1951) para 39.
[17] A Briggs, 'The International Dimension to Claims for Contribution: *Arab Monetary Fund v Hashim*' [1995] LMCLQ 437.
[18] Ibid.
[19] K. Takahashi, *Claims for Contribution and Reimbursement in an International Context: Conflict of Laws Dimensions of Third Party Procedure* (Oxford, 2000), 67–77.

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connected with the occurrence of the wrong and the governing law of that contract is English law; or

(ii) where there is no such contract, the law governing the defendant's liability to the victim is English law.

If one applies this test to the present case, English law may well be the law with which the claim has the most real connection. First, although it is not clear whether there was a contract between the claimant (the charterer) and the defendant (the shipper), if there was, this would be a carriage contract as evidenced by the bill of lading which the judgment treated as being governed by English law. Secondly, even if there was no contract between them, the law governing the defendant's (shipper's) liability to the victim (the shipowner) was the governing law the bill of lading contract, ie English law. Therefore, if the connection of the claim with English law had been evaluated, the application of the 1978 Act might well have been justified in this case.

### *C. The absence, in the alternative forum, of a remedy of contribution as available under the 1978 Act*

Longmore J, after stating that there must be some special factor to justify permitting service under Order 11, rule 1(1)(c), went on to identify as the special factor the absence in Saudi Arabia of a remedy of contribution which would be available in England on the basis that in England the 1978 Act would be applicable in the present case. Moreover, he effectively treated this factor as the conclusive factor which justifies permitting service.

The Court of Appeal held that the draftsman of the 1978 Act and the Supreme Court Rules Committee might be taken to have had in mind that the combined effect of the 1978 Act and Order 11, rule 1(1)(c) would be to permit joinder of a foreign party who would not be liable if sued in his own country. The court, however, stopped short of treating the absence of a remedy in Saudi Arabia as the conclusive factor. Before reaching the conclusion that the service should not be set aside, the court took trouble to point out other factors which militated in favour of permitting service: first, that in issuing third party proceedings for contribution, the charterer was acting reasonably to protect its position and; secondly, that the shipper would only be liable to contribute if they were directly liable to the shipowner pursuant to the latter's claim which had already been asserted and fallen to be determined in England (albeit in arbitration proceedings) under English law.

Therefore, although differing on the conclusiveness of the weight, the Court of Appeal was in agreement with Longmore J that when exercising the *forum conveniens* discretion, at least some weight should be given to the absence, in Saudi courts, of the remedy of contribution which would be available in English courts under the 1978 Act. Were they right to take such views?

Where the contribution claim does not have sufficient connection with English law, it would seem wrong to take into account the absence, in the alternative forum, of a remedy of contribution available under the 1978 Act in exercising the *forum conveniens* discretion. As discussed above, it is wrong to apply the 1978 Act in such circumstances in the first place, especially where the claim is brought in third party proceedings over which the court has a wider-than-usual jurisdiction by virtue of such rules as Rule 6.20(3A). Then, it would seem doubly wrong to rely on a remedy

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contained in the 1978 Act to justify exercising the already wider-than-usual jurisdiction under Rule 6.20(3A).

Where, on the other hand, the contribution claim has sufficient connection with English law to warrant the application of the 1978 Act, should any weight be given to the absence, in the alternative forum, of the remedy of contribution which would be available in English courts under the Act and, if so, should it be given a conclusive effect to justify permitting service?

As mentioned earlier, in previous cases the English courts have been applying the 1978 Act without assessing how closely the contribution claim is connected with English law. Although it has been submitted that this is a wrong approach, it demonstrates the fact that the English courts in these cases have felt compelling needs to allow contribution claims available under the 1978 Act. Such feelings are legitimate to a large extent, given the history of widening availability of contribution claims, outlined above. It is, therefore, suggested that where the contribution claim is sufficiently connected with English law to warrant the application of the 1978 Act, the court should be allowed to take into account, when exercising the *forum conveniens* discretion, the absence in the alternative forum of the remedy of contribution which would be available in English courts under the 1978 Act.

It would, however, seem wrong to give such a factor the conclusive effect of justifying permitting service, save in exceptional cases where the reasons for the non-recognition of the remedy in the alternative forum are known and are utterly indefensible. In the present case, it does not appear that Longmore J had enquired into the reasons why Saudi Courts would not allow the type of contribution claims sought by the charterer.

Therefore, only as one of the factors in the *forum conveniens* discretion, should the English courts be allowed to take into account the absence, in the alternative forum, of the remedy of contribution which would be available in English courts under the 1978 Act. As regards other factors, it is somewhat doubtful whether the two factors the Court of Appeal pointed out merit any significant weight. As to the first of these, anyone who is claiming contribution in third party proceedings by invoking jurisdiction under Rule 6.20(3A) would be acting to protect their interests and, therefore, may advance the argument that they are acting reasonably. As to the second factor, if the shipowner's claim against the shipper had been determined in litigation in England, the judgment would be binding upon the shipper in the charterer's contribution claim against them pursuant to section 1(5) of the 1978 Act, which reads:

> A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.

This provision does not, however, apply where, as in the present case, the victim's (the shipowner's) claim against the person from whom contribution is sought (the shipper) is to be determined in arbitration. It does not, therefore, provide much support for giving any significant weight to the fact that the shipowner's claim against the shipper was to be determined in arbitration in England. Nor is there any good reason why the fact that that claim was governed by English law should be given any significant weight. According to section 1(6) of the 1978 Act, the application of the Act does not depend on the governing law of the victim's claim against the defendant of a contribution claim. It reads:

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> References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.

Notwithstanding this, the conclusion reached by Longmore J and the Court of Appeal, ie not to set aside the service, may well be justified. This is because the absence in Saudi courts of the remedy of contribution which would be available in English courts under the 1978 Act could be taken into account together with the procedural merits of third party proceedings which would, as examined earlier, militate in favour of permitting service under Rule 6.20(3A) and have in the previous case law tended to outweigh the inconvenience of the English forum for the third party.

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