International and Comparative Law Quarterly (2026), **75**, 285–313
doi:10.1017/S0020589326101572

British Institute of International and Comparative Law

ARTICLE

Strong Cause

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Abstract

Common law courts will enforce jurisdiction agreements unless they find 'strong cause' or 'strong reasons' not to. This article argues that the strong cause test is the product of the fact that jurisdiction agreements should generally be viewed as weighty factors under forum non conveniens. In particular, this is because a jurisdiction agreement reflects parties' well-informed view that their chosen court is the appropriate forum for their dispute, to be departed from only in exceptional circumstances. This account explains various features of the strong cause test which otherwise prove difficult to rationalise, and also holds implications for the law's treatment of non-exclusive jurisdiction agreements and contractual anti-suit injunctions.

Keywords: private international law; jurisdiction agreements; forum non conveniens; stays of proceedings; anti-suit injunctions

1. Introduction

It is said that the common law views jurisdiction agreements as ordinary contracts and treats them as such.[1] Thus, English courts routinely apply rules on the formation, validity and interpretation of contracts to jurisdiction agreements. These agreements also may have their own governing laws, chosen by the choice-of-law rule for contracts.[2] That jurisdiction agreements are separable agreements[3] is consistent with an understanding of them as ancillary contractual obligations;[4] that they are to be broadly construed[5] reflects the likely intentions of rational business people.[6]

[1] See A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2007) paras 1.04–1.05.

[2] *Enka Insaat v Sanayi AS v OOO 'Insurance Company Chubb'* [2020] UKSC 38, paras 27–37 (arbitration agreement, though analysis applies equally to jurisdiction agreements).

[3] *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091, para 24.

[4] See, e.g. Briggs (n 1) paras 3.20–3.23; CH Tham, 'Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye' [2004] LMCLQ 46, 48–49, 52–53.

[5] *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, paras 6–8.

[6] See *Enka v Chubb* (n 2) paras 108–109.

And enforcement, too, seems contractual.[7] Courts will award damages for breaches of jurisdiction agreements as with any other breach of contract,[8] even if the default remedy is specific—a stay of English proceedings or an injunction restraining foreign proceedings—since damages often prove inadequate.[9]

There is, however, one aspect of the common law's treatment of jurisdiction agreements which seems to sit uneasily with the contractual account. This is widely known as the 'strong cause' or 'strong reasons' test, the gist of which is as follows. While courts typically stay English proceedings to give effect to foreign exclusive jurisdiction agreements, and typically exercise their jurisdiction and restrain foreign proceedings to give effect to English exclusive jurisdiction agreements, courts reserve a discretion to disregard these agreements if they find 'strong cause' or 'strong reasons' to do so.[10] And in exercising that discretion, courts will consider several factors, including the prospects of (in)convenience or (un)fairness in the chosen court, and the existence of related proceedings elsewhere.

English courts routinely apply this strong cause test in considering whether to give effect to jurisdiction agreements. Yet, it should be asked: why does the test exist at all? The answer proves surprisingly elusive, which seems unsatisfactory, for without a convincing explanation for the strong cause test, important questions about how it should operate in practice go unresolved. For example, no explanation can be found for why the test should continue to preclude courts from giving effect to otherwise enforceable jurisdiction agreements, why it should take the form of a discretion that balances certain factors and not others, and whether it should apply beyond applications for stays to give effect to exclusive jurisdiction agreements, unless a clear account of that test exists in the first place.

This article seeks to explain the strong cause test. It argues that the strong cause test is the product of a rule prohibiting the enforcement of contracts that interfere with the English courts' power to apply forum non conveniens in deciding how it should exercise jurisdiction. Yet, a jurisdiction agreement usually reflects parties' collective view that their chosen court is the appropriate forum for trial of their disputes. The agreement should usually be treated as a weighty factor under the forum non conveniens analysis because parties' views on the appropriateness of their chosen court are usually well-informed. Thus, a jurisdiction agreement should usually be enforceable because it should usually lead the English court to conclude that the chosen court is the appropriate forum for trial under forum non conveniens. Usually, that is, unless there are compelling grounds—'strong reasons'—to believe that the parties were wrong about the appropriateness of their chosen court.

The argument will proceed as follows. After the strong cause test is described (Section 2), three inaccurate or unhelpful accounts, which explain the test as the

[7] cf the non-enforcement of foreign judgments obtained in breach of jurisdiction agreements, which is a creature of statute; see Civil Jurisdiction and Judgments Act 1982 (UK), section 32.

[8] See, e.g. *Donohue v Armco* [2001] UKHL 64, para 48; *The 'Alexandros T'* [2013] UKSC 70, paras 38, 131–132, 153–156.

[9] *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, para 25.

[10] *The Eleftheria* [1970] P 94 (HC) 99; *Donohue* (n 8) para 24.

https://doi.org/10.1017/S0020589326101572 Published online by Cambridge University Press

doctrine of frustration, the exercise of remedial discretion or the exercise of jurisdictional discretion which respects parties' contractual bargain, will be discussed (Section 3). A fourth account is then constructed, which explains the strong cause test as the product of the fact that jurisdiction agreements should generally be considered weighty factors under the forum non conveniens analysis, reflecting parties' well-informed views on the most appropriate forum for their dispute, to be departed from only in exceptional circumstances (Section 4). Next, it is demonstrated how the account favoured here rationalises the strong cause test's structure better than other accounts (Section 5), before some implications are drawn for cases involving non-exclusive jurisdiction agreements and contractual anti-suit injunctions (Section 6).

As a preliminary, three matters of scope and one clarification. First, for ease of exposition, the term 'jurisdiction agreements' will refer to exclusive jurisdiction agreements, except where otherwise indicated. Second, while this article focuses primarily on English law, it will also draw insights from, and the analysis here should also apply to, Singapore, Hong Kong and Canadian (common) law, which contain roughly the same strong cause and forum non conveniens tests. By contrast, given Australian law's rejection of the contemporary forum non conveniens test,[11] its relevance to the analysis here (and vice versa) is limited. Third, this article is concerned only with jurisdiction agreements under the common law. It will consider neither the Hague Convention on Choice of Court Agreements, which applies only to certain exclusive jurisdiction agreements selecting the courts of the United Kingdom (UK) or other Contracting States,[12] nor the European Union's (EU) Brussels regime, which is no longer part of English law. Finally, for clarification, note that it is not denied here that jurisdiction agreements are generally enforceable contracts.[13] The position taken is just that jurisdiction agreements often *also* reflect parties' view that their chosen court is the appropriate forum. The former may explain why English courts generally treat jurisdiction agreements like contracts; the latter, as will be shown, explains the strong cause test.

2. Strong cause

English proceedings brought in breach of a foreign jurisdiction agreement will be stayed,[14] English proceedings brought in accordance with an English jurisdiction agreement will proceed to trial[15] and an anti-suit injunction restraining foreign proceedings brought in breach of an English jurisdiction agreement will be granted,[16] 'unless strong cause for not doing so is shown'.[17]

[11] See *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55.

[12] See Civil Jurisdiction and Judgments Act (n 7) section 3D, incorporating, inter alia, arts 2 and 5 of the Hague Convention of 30 June 2005 on Choice of Court Agreements (adopted 30 June 2005, entered into force 1 October 2015) 44 ILM 1294. At the time of writing, Singapore is a Contracting State, but Canada and Hong Kong are not.

[13] This is accepted arguendo.

[14] *The Eleftheria* (n 10).

[15] *Bouygues Offshore SA v Caspian Shipping Co (Nos 1, 3, 4 and 5)* [1998] 2 Lloyd's Rep 461 (CA).

[16] *Donohue* (n 8).

[17] *The Eleftheria* (n 10) 99.

In *The Eleftheria*, Brandon J said that, in determining whether strong cause is shown, 'the Court should take into account all the circumstances of the particular case', but '[i]n particular':

> (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.
> (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.
> (c) With what country either party is connected, and how closely.
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.[18]

Brandon J's account of the strong cause test remains influential. However, courts have augmented it in several ways.

First, the strong cause test is even-handed in its operation. As mentioned, courts have applied it to both English and foreign jurisdiction agreements.[19] Courts have also applied the strong cause test both to jurisdiction agreements governed by English law[20] and foreign law.[21] Importantly, a jurisdiction agreement's governing law will not always or even usually coincide with the chosen court. Under common law choice-of-law rules,[22] a dispute resolution agreement will usually be governed by the law of the main contract, rather that the law of the chosen forum, unless the parties expressly stipulate otherwise.[23]

Second, Brandon J's factors (a)–(c) and (e)(i)–(iii), usually described as 'convenience' factors, are often given lower or even negligible weight.[24] These factors generally only amount to strong reasons when their cumulative effect is that, if parties were forced to litigate in their chosen court, they would face inconvenience which was unforeseeable when they entered into the jurisdiction agreement.[25] In 'rare' situations, however, foreseeable convenience factors may amount to strong reasons.[26]

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18 ibid 99–100.

19 See text accompanying nn 14–16.

20 *Donohue* (n 8) para 7.

21 *The Eleftheria* (n 10) 101–102 (Greek law).

22 Art 2(e) of the Rome I Regulation (EC) 593/2008 on the law applicable to contractual obligations ([2008] OJ L177, 6) excludes 'arbitration agreements and agreements on the choice of court'.

23 See *Enka v Chubb* (n 2) paras 43–58.

24 In fact, factor (e)(ii) (enforceability of chosen court's judgment) has never actually established strong reasons; see W Day, '*The Eleftheria* (1970)' in W Day and L Merrett (eds), *Landmark Cases in Private International Law* (Hart 2023) 219, 249. Factor (e)(i) (security), on the other hand, has not featured since *The Eleftheria*, and is disregarded under forum non conveniens: *The 'Sea Justice'* [2024] SGCA 32, para 15.

25 *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368, 376 (HC).

26 See, e.g. *Mercury Communications Ltd v Communication Telesystems International* [1999] 2 All ER (Comm) 33, 41 (CA); *The 'Hyundai Fortune'* [2004] SGCA 41, para 24.

Third, factor (e)(iv), described as the 'fair trial' factor, appears capable of establishing strong reasons even where foreseeable. This is because, '[i]n principle, an unfair trial is … qualitatively different … from disadvantages relating to pure convenience'.[27] However, foreseeability is not entirely irrelevant: the 'fair trial' factor's weight may be 'reduced' when the prospect of an unfair trial in the chosen court was 'foreseeable at the time of contracting'.[28]

Fourth, the scope of factor (d) is much attenuated. Today, it seems irrelevant whether the defendant 'genuinely desire[d] trial in the foreign [chosen court]' or was seeking a stay only as a delay tactic.[29] Instead, strong reasons would require the defendant's application for a stay to amount to an 'abuse of process'.[30] This is a 'high bar', only surmounted when the defendant has 'clearly admitted to the claim as regards both liability and quantum, but seeks a stay for no reason other than its alleged inability to pay'.[31]

Fifth, strong cause may also be established where giving effect to the jurisdiction agreement will fragment the parties' dispute into various related proceedings. This 'related proceedings' factor, however, holds differing weight in two scenarios. In the first, the related proceedings are parallel proceedings between the parties to the jurisdiction agreement only. These proceedings will be given negligible weight if foreseeable,[32] and no weight when 'self-induced' by the party seeking to avoid the jurisdiction agreement.[33] In the second scenario, litigants in the related proceedings include third parties to the jurisdiction agreement. Courts will give 'great weight' to these related proceedings, which might themselves amount to strong reasons if all related claims can be heard there,[34] even if they were foreseen by the parties to the jurisdiction agreement.[35]

Sixth, strong cause appears easier to establish when parties entered into the jurisdiction agreement with unequal bargaining power. Courts have often suggested that a jurisdiction agreement may more readily be denied effect when it is not 'freely adopted', that is, when one of the parties lacked a genuine opportunity to influence its content.[36] Relatedly, courts will give a jurisdiction agreement contained in a trust instrument less weight when the trustee is attempting to rely on it against beneficiaries.[37] This is because trust beneficiaries are not 'party to [the] contractual bargain', so for them the jurisdiction agreement is 'not a

[27] *Zephyrus Capital Ltd v Fidelis Underwriting Ltd* [2024] EWHC 734 (Comm), para 128.

[28] ibid para 129.

[29] cf *The 'Vishva Prabha'* [1979] 2 Lloyd's Rep 286, 288 (HC).

[30] *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65, para 129.

[31] ibid para 131.

[32] See, e.g. *Konkola Copper Mines plc v Coromin Ltd (No 2)* [2006] EWHC 1093 (Comm), paras 32, 42; *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm), para 7.

[33] *Zephyrus Capital* (n 27) para 484.

[34] See, e.g. *Donohue* (n 8) para 34.

[35] See *Zephyrus Capital* (n 27) paras 497–498.

[36] ibid para 154; *Import Export Metro Ltd v Compania Sud Americana De Vapores SA* [2003] EWHC 11 (Comm), para 14(iii). cf *Vinmar Overseas* (n 30) paras 136–138, leaving the position open. Earlier accounts went even further, suggesting that strong cause might be more easily established when the jurisdiction agreement was not freely negotiated; see *British Aerospace* (n 25) 376; *Mercury Communications* (n 26) 41; *The Bergen (No 2)* [1997] 2 Lloyd's Rep 710, 715 (HC); *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, para 64.

[37] *Crociani v Crociani* [2014] UKPC 40, para 37.

https://doi.org/10.1017/S0020589326101572 Published online by Cambridge University Press

commitment of the same order as a contracting party being bound by the terms of a commercial contract'.[38]

Seventh, although Brandon J said that English courts will consider 'all the circumstances of the particular case', in practice, courts have generally limited themselves to the abovementioned factors and considerations. Conversely, it seems that strong reasons probably cannot be established by showing that giving effect to a jurisdiction agreement would contravene domestic public policies or public interests. There are, admittedly, cases where English courts have suggested otherwise. But these statements are generally obiter,[39] and moreover tend to view this public policy exception as distinct from the strong cause test.[40]

The modern strong cause test may thus be stated in these terms:

1. English courts will give effect to all English and foreign jurisdiction agreements, governed by either English or foreign law, unless there is strong cause not to.
2. Strong cause may be established:
   a. when proceedings in the chosen court would be inconvenient, in a way that was unforeseeable when parties contracted;
   b. when proceedings in the chosen court would not amount to a fair trial, even if this was foreseeable when parties contracted;
   c. when the defendant's stay application is an abuse of process, the defendant having already conceded liability and quantum;
   d. when related proceedings, involving contracting parties, are ongoing outside the chosen court, and were unforeseeable when parties contracted; or
   e. when related proceedings, involving third parties, are ongoing outside the chosen court.
3. Strong cause is easier to establish when parties lacked equal bargaining power.
4. Strong cause probably cannot be established on the basis of public policy.

3. Other accounts

Having defined the strong cause test, this article now proceeds to search for an account that explains its content. There are three accounts of the strong cause test which purport to describe it as either: (1) frustration; (2) remedial discretion; or (3) a jurisdictional discretion which respects the parties' contractual bargain. However, the first and second accounts seem incorrect, while the third proves unhelpful.

3.1. The frustration account

Richard Fentiman has argued that strong cause will be established, inter alia, in 'exceptional circumstances in which a court accepts that changed circumstances have

[38] ibid para 36.

[39] See, e.g. *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 98–100 (HC) (unsuccessful reliance on foreign public policy); *Petter v EMC Europe Ltd* [2015] EWCA Civ 828, paras 50–51, 55 ('public policy' enshrined in EU Regulations with direct effect); *Zephyrus Capital* (n 27) paras 500–502, 519 (leaving question open). cf *Douez v Facebook, Inc* 2017 SCC 33, para 33, where the 'public policy' in question was simply the inequality of parties' bargaining powers.

[40] See *Akai* (n 39) 98–100, 105–08 (separating public policy and strong cause arguments); *Zephyrus Capital* (n 27) para 526 (strong cause established but public policy exception not applicable). cf *Petter* (n 39) paras 50–51 (inaccurately citing *Akai* for this proposition).

in effect frustrated the agreement'.[41] Call this the 'frustration account'. This account may seem to explain why only unforeseeable factors can amount to strong reasons (foreseeable events generally do not frustrate contracts),[42] and why self-induced related proceedings cannot (frustration cannot be self-induced).[43]

However, the frustration account proves inaccurate upon closer inspection, which reveals that foreseeability is much less crucial under the strong cause test than frustration. Reasonably foreseeable events rarely frustrate contracts.[44] This is because frustration occurs when an event's occurrence makes contractual performance 'radically different' from what was promised, and an event's foreseeability 'informs the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk' when they contracted.[45] This proposition is not qualified in the event that the foreseeable event has onerous consequences for the parties. Instead, the opposite seems true: if the parties do not expressly provide for an onerous yet foreseeable event, the proper inference is usually that they 'accepted the risk'.[46]

By contrast, the foreseeability of some of the strong cause test's factors—of an unfair trial in the chosen court and related proceedings involving third parties—seems less consequential.[47] In *Zephyrus Capital Ltd v Fidelis Underwriting Ltd*, aircraft owners sued insurance companies in the UK for losses caused by Russia's detention of their aircraft upon its invasion of Ukraine. Some policies contained English jurisdiction agreements, others contained Russian jurisdiction agreements, and of the latter group, some insurers submitted to the English proceedings, while others sought a stay. Henshaw J denied the stay on two alternative grounds. First, Russian state inference would likely deprive the owners of a fair trial there.[48] Such interference might have been somewhat foreseeable, but that only meant that this factor's weight would be reduced, not that it would be negligible.[49] Second, requiring the owners to sue only some of the insurers in Russia would multiply related proceedings, since all claims raised similar factual issues and many claims would already proceed in the UK.[50] Even though the prospect of related Russian proceedings was 'foreseeable and self-induced' by the owners, who had voluntarily entered into policies containing conflicting jurisdiction agreements, it remained a factor which could 'properly be taken into account'.[51]

Another way in which foreseeability differs in its relevance between frustration and the strong cause test concerns the effect of exclusion clauses. Frustration can be contractually excluded, as is clear from how courts give effect to clauses expressly

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[41] R Fentiman, *International Commercial Litigation* (2nd edn, OUP 2015) paras 2.223, 1.66.

[42] See text accompanying nn 44–46.

[43] *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 452 (HL).

[44] See E Peel, *Frustration and Force Majeure* (4th edn, Sweet & Maxwell 2022) paras 13-014–13-021. cf 'supervening illegality' cases, better explained as illegality rather than frustration cases; see W Day, 'Shades of Frustration' in E Peel and R Probert (eds), *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC* (OUP 2023) 111, 121–24.

[45] *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), paras 26(5)–27, 211.

[46] See, e.g. ibid para 239(4).

[47] See also *Ellinger v Guinness, Mahon & Co* [1939] 4 All ER 16 (CA) 23–24.

[48] *Zephyrus Capital* (n 27) paras 464–466, 472.

[49] ibid paras 468, 129.

[50] ibid paras 487–489.

[51] ibid para 498.

purporting to do so[52] and force majeure clauses.[53] While courts may read these clauses contra proferentem,[54] a clearly worded clause purporting to exclude the operation of frustration will be given effect. The logic here is that the parties, by expressly stating that an event will not affect enforceability or by expressly allocating the risk of that event occurring, have demonstrated that they foresaw that event, which means it cannot trigger frustration.[55]

The strong cause test, by contrast, is incapable of being contractually excluded. This is demonstrated by cases involving jurisdiction agreements coupled with what are called 'forum non conveniens waivers'.[56] The label is slightly misleading: the parties agree to waive any objection to the chosen court's exercise of jurisdiction on grounds of 'convenience' factors,[57] under either forum non conveniens or the strong cause test.[58] Importantly, courts never give these clauses their full effect: strong cause can still be established on the basis of convenience factors. As Field J acknowledged in *Bank of New York Mellon v GV Films*, 'where a party has expressly agreed not to rely on convenience arguments in resisting the jurisdiction of the nominated court … especially strong grounds will be required before the exclusive jurisdiction clause can be departed from on grounds founded on *convenience*'.[59] This is not contra proferentem but a qualification based on principle. 'If even an exclusive jurisdiction clause will not trump a stay application, then at least a similar approach must follow in respect of a stay application brought … in breach of an FNC waiver clause.'[60] In other words, forum non conveniens waivers cannot preclude the strong cause test being applied on the basis of convenience factors. It is irrelevant that parties, by expressly purporting to waive forum non conveniens, demonstrate that they foresaw the inconvenience of their chosen forum—if the inconvenience is 'especially strong', it still amounts to strong reasons.

3.2. The remedial discretion account

Courts have a general discretion to regulate the remedy for breaches of contract.[61] Adrian Briggs, among others,[62] has argued that when strong reasons are established, the

[52] *Joseph Constantine SS Line Ltd v Imperial Smelting Co Ltd* [1942] AC 154, 163 (HL).

[53] Under which parties allocate the risk of what would otherwise have been a frustrating event; see E McKendrick, 'Force Majeure and Frustration – Their Relationship and a Comparative Assessment' in E McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Informa 1995) 33, 34–35.

[54] See, e.g. *MUR Shipping BV v RTI Ltd* [2024] UKSC 18, paras 43–46.

[55] H Beale (ed), *Chitty on Contracts* (36th edn, Sweet & Maxwell 2023) paras 27-059, 27-061.

[56] These waiver clauses are more often coupled with non-exclusive jurisdiction agreements, but they are sometimes paired with exclusive agreements. See e.g. *Bank of New York Mellon v GV Films* [2009] EWHC 2338 (Comm), paras 15, 18; *Ridley v Dubai Islamic Bank* [2020] EWHC 1213 (Comm), paras 6; *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585, para 31.

[57] For this phrasing, see the clause in e.g. *Deutsche Bank AG v Sebastian Holdings Inc* [2009] EWHC 3069 (Comm), para 105.

[58] See M Keyes, 'Party Autonomy in Dispute Resolution: Implied Choices and Waiver in the Context of Jurisdiction' (2015) 58 JYIL 223, 237–38.

[59] *Bank of NY Mellon v GV Films* (n 56) para 18 (emphasis added). See also *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2015] EWHC 1640 (Comm), paras 107–108.

[60] *Sebastian Holdings* (n 57) para 19. See also Fentiman (n 41) para 2.282.

[61] *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, para 13.

[62] See D Tan and N Yeo, 'Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?' [2005] LMCLQ 436, 438; A Dinelli, 'The Limits on the Remedy of Damages for

court acknowledges that a jurisdiction agreement has been breached, but then exercises its remedial discretion to deny specific relief and award damages instead. Call this the 'remedial discretion account'. As Briggs puts it:

> specific enforcement [of jurisdiction agreements] will be the general rule, but if there is a strong reason for withholding such relief, the court will not grant it. However, an action for damages for breach of the bilateral contract would appear to lie, for the common law considers damages for breach of contract to be a right, not a mere privilege.[63]

The remedial discretion account has its merits. For one, it may explain why the interests of third parties affected by related proceedings are weighty factors.[64] Third-party interests cannot typically ground defences to private law claims, but they can support the denial of an injunction and the award of damages instead.[65]

However, the remedial discretion account ultimately also does not work, because it struggles against the weight of contrary practice and authority. In particular, while courts do sometimes award damages for breaches of jurisdiction agreements, they never do so *after* making a finding of strong cause. Instead, courts award such damages in only three categories of cases. First, damages may be awarded in addition to other specific relief (e.g. the exercise of jurisdiction and/or an anti-suit injunction), if specific relief cannot satisfactorily remedy the claimant's loss.[66] Second, damages may be awarded to remedy the breach of a jurisdiction agreement in circumstances where the English court completely lacks the power to order specific relief (e.g. when EU Regulations prohibited anti-suit relief restraining proceedings in EU Member States), to reverse the losses suffered in the foreign proceedings.[67] Third, damages may be awarded when the claimant would have been entitled to anti-suit relief from an English court, but delayed in seeking such relief.[68] Against this, the only 'authority' that might be cited in favour of courts awarding damages after strong reasons are established are obiter comments in *Donohue v Armco*, which restated parties' concessions to that effect without actually endorsing them.[69]

Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law' (2015) 38 MULR 1023, 1032–33; E Peel, 'How Private is Private International Law?' in A Dickinson and E Peel (eds), *A Conflict of Laws Companion: Essays in Honour of Adrian Briggs* (OUP 2021) 299, 303.

[63] A Briggs, *Private International Law in English Courts* (2nd edn, OUP 2023) 157.

[64] See A Briggs, *Civil Jurisdiction and Judgments* (6th edn, Informa 2021) para 4.53. But see the text accompanying nn 140–141.

[65] See *Fearn* v *Board of Trustees of the Tate Gallery* [2023] UKSC 4, para 122.

[66] See, e.g. *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755, para 38; *Svenborg v Akar* [2003] EWHC 797 (Comm), paras 21–22, 37–38; *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 1742 (Comm), paras 23–25; *Compania Sud Americana de Vapores v Hin-Pro International Logistics* [2014] EWHC 3632 (Comm), 37–41.

[67] See, e.g. *The 'Alexandros T'* (n 8) para 132; *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] EWCA Civ 1010 (Greek proceedings brought in 2011); *AMT Futures Ltd v Boural* [2018] EWHC 750 (Comm) (German proceedings brought in 2008). See also S Gee, *Commercial Injunctions* (7th edn, Sweet & Maxwell 2021) paras 14-082–14-083.

[68] See, e.g. *Ellerman Lines Ltd v Read* [1928] 2 KB 144, 153–54 (CA); *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), para 40.

[69] See *Donohue* (n 8) paras 36, 48. See also obiter comments in *Quaestus Capital Pte Ltd v Everton Associates Ltd* [2021] HKCFI 1367, para 61, which simply cites *Donohue.*

Thus, when courts find strong cause, they will not only refuse specific relief, but also refuse to award any other remedy, like damages for breach of the jurisdiction agreement.[70] This rules out the possibility that the strong cause test is simply the exercise of remedial discretion. After all, remedial discretion in private law involves a choice between remedies, not a choice to award no remedy:[71] the claimant must still receive some relief—a suspended injunction,[72] or at least nominal damages[73]—not nothing at all. It is no response to say that most parties who rely on jurisdiction agreements do not seek damages as an alternative remedy: at least some damages in lieu of specific relief can be awarded without being specifically pleaded.[74] Nor is it sufficient to say that such damages are generally not awarded, in the event of a finding of strong cause, because they would be difficult to quantify:[75] in that case negotiating damages,[76] or at least nominal damages, would be the appropriate remedial response. A better response might be that, in strong cause cases, damages are usually not actively pursued in court. Yet, the fact that parties almost never take up the point—and, indeed, that judges never ask to be addressed on it—itself suggests that, when strong cause is found, no such entitlement to damages exists.

To be clear, it is not denied that damages should be available as a remedy for breaches of enforceable jurisdiction agreements. That follows inexorably from the contractual account. The point is simply that, when strong reasons are established, the jurisdiction agreement is rendered unenforceable, not that it remains enforceable with specific relief withheld and damages awarded instead.

3.3. The qualified contractual account

The frustration and remedial discretion accounts start from the premise that jurisdiction agreements are as enforceable as ordinary contracts, and explain the strong cause test within the confines of that logic. A third account starts from a different premise but attempts to reach the same end.

The starting point here is that an English court always has a discretion to decide whether it should exercise jurisdiction, and that contracts which purport to 'oust' or interfere with that discretion are unenforceable.[77] Ordinarily, the court exercises this jurisdictional discretion by applying forum non conveniens. The strong cause test, it is

[70] There is admittedly no authority expressly affirming this negative proposition; see *Royal Bank of Scotland plc v Highland Financial Partners LP* [2012] EWHC 1278 (Comm), para 182 (question 'not resolved'). But see the position under Arbitration Act 1950 (UK) section 4, described in *Mantovani v Carapell* [1980] 1 Lloyd's Rep 375, 384 (CA) (if strong reasons found to deny stay of English proceedings, there is 'no breach of the [arbitration] agreement in the party not arbitrating' and thus no damages should be awarded).

[71] See *R (Imam) v Croydon London BC* [2023] UKSC 45, paras 41–42.

[72] *United Utilities Water Ltd v Manchester Ship Canal Co Ltd (No 2)* [2024] UKSC 22, para 88.

[73] *Behrens v Richards* [1905] 2 Ch 614, 623 (HC).

[74] Like damages under Senior Courts Act 1981 (UK) section 50. See *Jaggard v Sawyer* [1995] 2 All ER 189, 205 (CA).

[75] For this argument, see *OT Africa Line Ltd v Magic Sportswear Corporation* [2005] EWCA Civ 710, paras 33–34.

[76] Peel (n 62) 315.

[77] *The Fehmarn* [1958] 1 All ER 333, 335 (CA); *Douez* (n 39) para 27.

said, is an alternative test of jurisdictional discretion which applies when parties have entered into a jurisdiction agreement, which is 'similar but different from' forum non conveniens[78] and couched in terms that respect parties' contractual bargain. As Lord Bingham put it in *Donohue*:

> If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties … the English court will ordinarily exercise its discretion … to secure compliance with the contractual bargain … where an exercise of discretion is called for there can be no absolute or inflexible rule … But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it.[79]

In short, where parties have entered into a jurisdiction agreement, the court should generally exercise its jurisdictional discretion in a way that respects 'the contractual bargain'. The strong cause test is just the exception to this general position.

This account of the strong cause test—call it the 'qualified contractual account'—is reflected in many judgments[80] and academic commentaries,[81] most of which simply endorse the above passage in *Donohue.* In a vague and general sense, the qualified contractual account is accurate: the strong cause test is indeed an exception to a general rule holding parties to their jurisdiction agreement. But this is really only a description of the test, rather than an explanation of or justification for it.

If one probes further, the qualified contractual account proves unhelpful, because it is question begging. Why, in fact, should the parties' contractual bargain be respected? The answer cannot simply be that jurisdiction agreements are contracts and contracts should be upheld. As the Supreme Court of Canada held in *Douez v Facebook Inc*, 'because forum selection clauses encroach on the public sphere of adjudication … courts do not simply enforce them like any other clause'.[82] After all, the starting premise here is that the court's jurisdictional discretion exists to protect some interest other than freedom of contract, like the 'efficient administration of justice',[83] which necessarily means that contracts relating to the exercise of jurisdiction cannot be 'enforced as of right'.[84] Indeed, insisting that jurisdiction agreements should be upheld just like ordinary contracts forces the conclusion that the strong cause test should be abolished.[85]

[78] Briggs (n 63) 179 (calling this 'forum non consentiens').

[79] *Donohue* (n 8) para 24.

[80] See, e.g. *Hydropower* (n 9) para 25; *Vinmar Overseas* (n 30) para 72; *Douez* (n 39) para 51.

[81] See, e.g. Lord Collins of Mapesbury and J Harris (gen eds), *Dicey, Morris & Collins: The Conflict of Laws* (16th edn, Sweet & Maxwell 2022) paras 12-105–12-108; P Torremanns and JJ Fawcett (gen eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, OUP 2017) 410–14; D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd edn, Sweet & Maxwell 2015) para 10.05; L Merrett, 'Interpreting non-exclusive jurisdiction agreements' (2018) 14 JPrivIntlL 38, 43, 51.

[82] *Douez* (n 39) para 27.

[83] E Peel, 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws' [1998] LMCLQ 182, 222–23.

[84] L Merrett, *Employment Contracts and Private International Law* (2nd edn, OUP 2022) para 5.58.

[85] See S Avraham-Giller, 'The Court's Discretionary Power to Enforce Valid Jurisdiction Clauses: Time for a Change?' (2022) 18 JPrivIntlL 209, making precisely this argument for abolition.

Perhaps, one might respond, the strong cause test does not prioritise parties' contractual bargain over the efficient administration of justice but, rather, strikes an appropriate balance between those competing values. As Edwin Peel has argued:

> The parties must be free to determine for themselves how they wish to protect their "interests", by reaching a prior agreement on the forum for settlement of any dispute. For the most part their agreement should be respected … If, however, enforcement of the parties' agreement … begins to impinge on the public interest, the courts may be justified in determining whether such public interest is sufficiently strong to outweigh the parties' expectations … the need to maintain a balance between the private interest of the parties and the wider public interest justifies the continued exercise of a discretion by the English courts.[86]

But this response itself raises further questions. For one, it is unclear how such a balance might rationally be struck. After all, freedom of contract and the administration of justice are not commensurable values, meaning that they cannot be weighed and compared against each other on some objective scale. Any attempt to strike a balance between the two values will thus simultaneously be capable of being described as an 'appropriate' compromise while also being open to the charge of 'inappropriately' favouring one value over the other. In any event, the strong cause test does not, in fact, require an even balance to be struck between those two values. Rather, it requires courts to lean very much in favour of giving effect to parties' agreement, and to require strong reasons to depart therefrom. One is still left without an explanation for why that should be so.

4. The forum non conveniens account

Having argued against the above three accounts of the strong cause test, this article now constructs a fourth, which may be called the 'forum non conveniens account'.[87]

The starting point here is again that English courts retain a discretion to decide on the exercise of jurisdiction, and that contracts which interfere with that are unenforceable. But, importantly, whether or not the parties entered into a jurisdiction agreement, the test for the English court's exercise of jurisdiction is always the same: forum non conveniens. Yet, forum non conveniens' own underlying logic should generally require the court to consider a jurisdiction agreement a weighty factor under that test, reflecting parties' well-informed view that their chosen court is the appropriate forum for trial. Thus, while contracts interfering with the court's power to decide on the exercise of jurisdiction are unenforceable, courts should nevertheless usually conclude that parties' chosen court is the appropriate forum for trial under forum non conveniens, which means that jurisdiction agreements should usually be enforceable. Usually, that is, unless there are strong reasons to think that parties were incorrect about the appropriateness of their chosen court.

Making good on this account will require elaboration on: (1) forum non conveniens' underlying logic; (2) why, as a result, jurisdiction agreements should be given effect

[86] Peel (n 83) 221–23.

[87] See, for similar tentative views, Day (n 24) 251; M Smith, '*Fiona Trust & Holding Corp v Privalov* (2007)' in Day and Merrett (n 24) 360–62.

https://doi.org/10.1017/S0020589326101572 Published online by Cambridge University Press

thereunder; and (3) why they should be given effect by being treated as weighty factors. These points are now addressed in turn.

4.1. Appropriate dispute resolution

Forum non conveniens is a test that compares available courts as potential fora for litigation. It is commonly described as a two-stage test. At the first stage, the English court will ascertain whether it, or a foreign court identified by the party or parties seeking trial abroad, is prima facie the appropriate forum for trial. Here, courts will consider factors of 'practical convenience',[88] such as the location of witnesses and evidence, the connections that parties have with either jurisdiction, the governing law of the main claim(s) pleaded and the prospect of parallel proceedings in the foreign court.[89] At the second stage, the English court will then consider whether there are 'circumstances by reason of which justice requires' that trial should not occur in the prima facie appropriate forum.[90] A significant consideration is whether there is a real risk that 'substantial justice' would be unavailable to one of the parties in that forum, because that party might face a biased or prejudiced coram[91] or might lack effective means to pursue his case.[92] This two-stage account of forum non conveniens, however, is more a useful shorthand description of its structure, rather than an analytic truth about its content. In reality, the first and second stage bleed into each other, and are really part of a single enquiry.[93] That explains why the factors considered at the first stage also remain relevant at the second stage, where 'all the circumstances of the case' must be considered.[94]

Why do English courts apply forum non conveniens? It is sometimes said that English courts, in staying proceedings in favour of foreign courts, are motivated by a desire to extend 'judicial comity'.[95] Yet, 'comity' here cannot involve deferring to foreign courts for purely diplomatic or prudential reasons.[96] As many have observed, a suggestion by an English court that a foreign court should hear a case instead may reasonably be construed by the latter as an unwelcome instruction rather than

[88] *Lungowe v Vedanta Resources plc* [2019] UKSC 20, para 66.

[89] ibid paras 66, 69.

[90] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460, 478 (HL).

[91] See, e.g. *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, paras 143, 151; *Cherney v Deripaska* [2008] EWHC 1530 (Comm), paras 197–198.

[92] See, e.g. *Connelly v RTZ Corporation plc* [1998] AC 854, 873–74 (HL); *Lubbe v Cape plc* [2000] 4 All ER 268, 277–80 (HL); *Lungowe v Vedanta* (n 88) paras 88–101.

[93] See *Lungowe v Vedanta* (n 88) para 88 (stage two 'generally treated as separate and distinct' from stage one, 'but that is more because it calls for a separate and careful analysis of distinctly different evidence than because it is an inherently different question'). See also Briggs (n 64) 399–400.

[94] *Spiliada* (n 90) 478; Briggs (n 64) 399–400. For a recent example, see *Al-Aggad v Al-Aggad* [2024] 2 All ER (Comm), 995, para 42 (HC). See also *Limbu v Dyson Technology Ltd* [2024] EWCA Civ 1564, para 23, remarking that second stage factors may also be considered at the first.

[95] *The Abidin Daver* [1984] AC 398, 411 (HL).

[96] cf *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, para 97 ('[c]omity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required'). Even here, 'comity' does not justify the existence of forum non conveniens or the content of its relevant factors, only the standard of proof needed to establish factors under the second stage.

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politeness and respect.[97] Instead, 'comity' involves the English court deferring to a foreign court only because the latter is better placed to adjudicate on a particular case.[98] Deference is thus accorded to the foreign court not for its own sake, but because that foreign court is the 'appropriate forum'. Conversely, when the English court is itself the 'appropriate forum', no deference is accorded.

The purpose of forum non conveniens is thus to ensure that trial occurs in the appropriate forum or, in other words, to achieve appropriate dispute resolution. 'Appropriateness' is a term of art. In *Spiliada Maritime Corporation v Cansulex Ltd*, Lord Goff said that the appropriate forum for a dispute is where it might be tried 'more suitably for the interests of all the parties and the ends of justice'.[99] And in *Lubbe v Cape plc*, Lord Hope said that the appropriate forum cannot be determined by considering matters of 'public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice in the case which is before the court'.[100] The impression that emerges is that 'appropriateness' refers to private justice, or 'justice as between the parties',[101] rather than justice in service of broader public interests. To be more precise, 'appropriateness' is measured in three particular senses. First, an appropriate court is effective: it should have the power to facilitate its own proceedings and render decisions which determine parties' rights and liabilities. Second, an appropriate court is convenient: proceedings before it should be quicker and incur less expense for litigants than alternatives. Third, an appropriate court will resolve the dispute accurately on the merits: the resulting decision should be more correct on the facts and the law than alternatives.

That forum non conveniens assesses appropriateness in these three senses—effectiveness, convenience and accuracy—is confirmed by the content of the relevant factors considered under forum non conveniens. The location of witnesses and evidence is relevant because documentary and testimonial evidence is more easily and accurately understood in their original language,[102] and because unwilling witnesses can only effectively be compelled to testify where they are located.[103] The connections of parties to competing fora is relevant only insofar as both parties are resident in the same jurisdiction, given the ease of proceeding there[104] and, relatedly, the likelihood of proceedings culminating in a trial on the merits.[105] The governing laws of the issues in dispute are relevant because local judges will determine their law's content more efficiently and accurately than foreign judges.[106] Related or parallel proceedings are inconvenient because they multiply expenses, would compromise accuracy since no

[97] A Briggs, 'The Principle of Comity in Private International Law (2011) 354 RCADI 65, 120–21; Peel (n 62) 266.

[98] See T Endicott, 'Comity among Authorities' (2015) 68 CLP 1, 11–13.

[99] *Spiliada* (n 90) 475.

[100] *Lubbe v Cape* (n 92) 286.

[101] E Peel, '*Spiliada Maritime Corporation v Cansulex Ltd* (1986)' in Day and Merrett (n 24) 253, 270 (emphasis removed).

[102] See *Lungowe v Vedanta* (n 88) para 85(vi).

[103] See *Ivanishvili v Credit Suisse Trust Ltd* [2020] SGCA 62, para 84.

[104] Briggs (n 64) para 4.24.

[105] See, e.g. *Lungowe v Vedanta* (n 88) para 85(iv).

[106] *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5, para 46.

court will have the 'whole picture' of the dispute and might undermine the effectiveness of resulting judgments given the possibility of conflicting judgments.[107] The fact that one party would not receive a fair trial in a given court, because that court would be biased against it or because that party would lack means to properly run his case there, obviously demonstrates that that court would not decide accurately on the merits.

However, while it is true that forum non conveniens does not consider broader public interests as relevant factors in identifying the appropriate forum, it would be inaccurate to say that forum non conveniens as a doctrine does not serve important public policies. Instead, the very pursuit of appropriate dispute resolution in itself furthers at least three important public interests. Appropriate dispute resolution helps to alleviate forum shopping, which avoids the risk of parallel proceedings and inconsistent results with negative rule of law consequences.[108] Moreover, forum non conveniens' second stage also ensures that procedural injustice is not perpetrated against litigants, which upholds common law rules of natural justice[109] and the right to a fair trial.[110] Most fundamentally, by allocating disputes to appropriate fora and keeping them away from inappropriate fora, forum non conveniens facilitates the efficient use of judicial resources. It ensures that English courts try only those disputes that they are well-equipped to adjudicate, which spares judicial time and energy for cases that should be tried in the UK on the merits. This last-mentioned public interest featured as a 'crucial point' in *Spiliada* itself, where Lord Goff reasoned that, in the circumstances of that particular dispute, proceeding in the UK 'would contribute to efficiency, expedition and economy … [and] to promoting a possibility of settlement'.[111] This was not merely a matter of 'financial advantage' to the litigants but, rather, was 'in the objective interests of justice'.[112]

Some may deny that forum non conveniens serves public interests in addition to private interests, because the doctrine is not applied when neither party invokes it.[113] But that latter feature of forum non conveniens can be explained on grounds that, in adversarial legal systems, the appropriate forum cannot usually be accurately identified unless litigants supply arguments or evidence suggesting why one forum is more appropriate than another. The public interests that forum non conveniens serves, then, are simply public interests which can only be effectively furthered if some litigant chooses to pursue his own private interest in appropriate dispute resolution.[114]

107 See *The Abidin Daver* (n 95) 411–12; *Lungowe v Vedanta* (n 88) paras 69–70.

108 A Bell, 'The Natural Forum Revisited' in Dickinson and Peel (n 62) 3, 10.

109 See A Briggs, 'Forum Non Conveniens – Now We Are Ten?' (1983) 3 LS 74, 89.

110 For the comparison made, see JJ Fawcett, MN Shúilleabháin and S Shah, *Human Rights and Private International Law* (OUP 2016) paras 6.127–6.181; A Arzandeh, *Forum (Non) Conveniens in England: Past, Present and Future* (Hart 2018) 129–35.

111 *Spiliada* (n 90) 485–86.

112 ibid 486.

113 See, e.g. A Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003) paras 3.89–3.95.

114 For the idea that the law often grants private persons rights or powers to protect their private interests, because doing that simultaneously furthers certain public interests, see J Raz, 'Rights and Individual Well-Being' (1992) 5 RJ 127, 135–38; J Gardner, *From Personal Life to Private Law* (OUP 2018) 208–10.

4.2. Agreements and appropriateness

Thus, forum non conveniens facilitates appropriate dispute resolution—effective, convenient and accurate dispute resolution—which in turn furthers public interests like the efficient use of judicial resources, the avoidance of forum shopping and the prevention of procedural injustice. Having established this, it may now be asked: why should jurisdiction agreements be given effect under forum non conveniens?

The answer is that parties who enter into jurisdiction agreements will generally be better placed than the English court to determine the appropriate forum for trial of their disputes. After all, the appropriate forum can only be identified once the 'nature and shape of the dispute' is properly understood,[115] which in turn requires an appreciation of the relevant facts and parties' legal arguments. An English judge who adjudicates a dispute must typically work hard to understand the nature and shape of that dispute. However, sophisticated commercial parties (and their legal advisors), taken together, will typically already have a good idea of the facts they will adduce and the legal arguments they will make in any dispute foreseeable at the time they enter into a jurisdiction agreement. It thus seems natural to assume that the parties will generally be better-placed to determine the court which can most appropriately (that is, effectively, conveniently and accurately) try their dispute.

This, then, is the reason why courts should generally give effect to jurisdiction agreements under forum non conveniens. As Alex Mills has argued, another potential justification for 'party autonomy in choice of forum' is that it:

> allows parties to properly cost and indeed reduce their litigation risks, which is in turn likely to lead to more efficient dispute settlement, as commercial parties are less likely to litigate rather than settle a dispute if their legal positions are clear. Giving effect to party autonomy may also allow parties to choose a … court that is very familiar to them, or most effectively or efficiently adapted to their particular relationship or to the types of disputes that they anticipate might arise between them, again reducing the costs and risks of dispute settlement.[116]

What matters here is not that jurisdiction agreements are enforceable contracts; they usually are, but that is beside the point. Instead, the important point is that jurisdiction agreements reflect parties' well-informed view that their chosen court is the appropriate forum, which means that giving effect to the agreement facilitates appropriate dispute resolution—precisely the goal that forum non conveniens is meant to achieve.

One might, however, question whether jurisdiction agreements do indeed reflect parties' well-informed views that their chosen court is the appropriate forum. It should be emphasised that the argument here is only that jurisdiction agreements will *generally* reflect such views, not that they invariably will. For reasons explored in Section 5, in exceptional situations where parties are not well-informed on, or otherwise clearly wrong about, the appropriateness of their chosen court, their agreement should not be given effect. But perhaps even the general assumption that jurisdiction agreements reflect parties' well-informed views on appropriateness might be doubted. These doubts may take three forms.

[115] *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, para 198.
[116] A Mills, *Party Autonomy in Private International Law* (CUP 2018) 76–77.

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It might first be said that parties may have broader views on what constitutes an appropriate forum for trial than the English court. Parties may view their chosen court as appropriate for additional reasons beyond effectiveness, convenience and accuracy. This may be accepted. It just means that parties view their chosen court as, among other things, the most appropriate forum for trial, which does not affect the conclusion that jurisdiction agreements should be given effect under the forum non conveniens analysis.

It might then be said that parties may choose a court for reasons entirely unrelated to its appropriateness as a forum for trial. Perhaps one of the parties might 'price in' a choice of forum that favours their counterparty, in return for the latter agreeing to undertake other obligations for the former's benefit. This, however, may not be a credible explanation for parties' motivations when entering into symmetric jurisdiction agreements—the paradigm with which this enquiry is concerned—since these impose the same benefits and burdens on both parties. And even for asymmetric agreements, the 'pricing in' hypothesis is suspect. Dispute resolution clauses are often seen as 'non-price' terms, which 'cannot realistically be traded off against price terms, but rather present a distinct set of provisions that are bargained for separately'.[117]

Finally, it might be said that, since jurisdiction agreements are often boilerplate clauses, they are unlikely to reflect parties' actual considered views on their chosen court's appropriateness. However, at least for jurisdiction agreements contained in contracts between parties of equal bargaining power,[118] this may be inaccurate. For starters, the assumption that jurisdiction agreements are usually boilerplate clauses is doubtful. While some studies suggest that contract drafting precedents may heavily influence parties' choice of court,[119] others suggest that that choice often reflects parties' genuine preferences.[120] Moreover, even if parties do often use boilerplate jurisdiction agreements, that may well reflect a genuine choice to adhere to prevailing industry standards, based on a considered belief that those standards generally reflect parties' interests in appropriate dispute resolution. This seems a sound decision-making tactic, especially if a precise prior assessment of the costs and benefits of alternative fora would be difficult to make.[121] Parties may thus choose a court on the basis of its popularity among other commercial parties, because they rationally believe that popularity is evidence of the court's appropriateness as a forum for trial of commercial disputes.

4.3. Giving weight

If it is accepted that forum non conveniens' underlying logic of appropriate dispute resolution requires courts to give effect to jurisdiction agreements under that test, the final question is: how should these agreements be given effect? A court cannot

[117] J Nyarko, 'Stickiness and Incomplete Contracts' (2021) 88 UChicagoLR 1, 66–67; B Marshall, *Asymmetric Jurisdiction Clauses* (OUP 2023) paras 3.97–3.98.

[118] Where parties lack equal bargaining power, this has implications for how courts should treat their jurisdiction agreements: see Section 5.6.

[119] See, e.g. Nyarko (n 117) 43–50, focusing on the United States.

[120] See, e.g. S Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' (2013) 1 ERPL 13, 53, focusing on Europe.

[121] Which is often the case on matters like choice of forum: see ibid 21–22.

https://doi.org/10.1017/S0020589326101572 Published online by Cambridge University Press

categorically defer to parties' choice of court, for two reasons. First, since forum non conveniens serves certain public interests in appropriate dispute resolution, a court which defers unquestioningly to parties' pre-existing contract[122] when exercising that discretion would be abdicating its function as guardian of those interests. That is the whole logic of the ouster objection. Second, and more importantly, a court which always defers to parties' jurisdiction agreements runs the risk of making wrong decisions in those cases where parties, well-informed though they might generally be, are exceptionally and obviously wrong about the appropriateness of their chosen court.

Nevertheless, a court in applying forum non conveniens may still legitimately give effect to a jurisdiction agreement in a more qualified manner. That is: the court may treat that jurisdiction agreement, reflecting the parties' view that their chosen court is the appropriate forum for trial, as a weighty piece of evidence or a weighty factor, to be considered alongside all other evidence or factors, in the court's process of reaching its own answer. The notion that one should accord weight to the views of others, on matters where those others are more epistemically well-equipped, is commonsensical, and is also an approach that courts routinely adopt, for example, when relying on the testimony of experts at trial.[123] The primary responsibility for reaching its own conclusions remains with the court, but the court can and should treat the views of those more well-informed than it as a weighty piece of evidence in reaching its own conclusion. However, the court can and should depart from expert evidence which is obviously wrong, as may be apparent from the fact that the other evidence before the court is overwhelmingly to the contrary. This is because the expert is only there to assist the court, and while their view is usually persuasive, it is not authoritative, and the court must disagree when it feels compelled to.

5. Explaining strong cause

The argument thus far may be summarised as follows. Jurisdiction agreements are contracts, and contracts are unenforceable to the extent that they interfere with the English court's power to apply forum non conveniens in deciding whether it should exercise jurisdiction. However, parties to a jurisdiction agreement are generally more well-informed on the appropriateness of their chosen court. Thus, an English court applying forum non conveniens should usually give effect to jurisdiction agreements because these agreements usually reflect parties' well-informed views on the appropriateness of their chosen court. Usually, that is, unless there are strong reasons to think that parties' views about their chosen court's appropriateness are incorrect.

If the forum non conveniens account is accepted, it is now possible to rationalise those seven aspects of the strong cause test described in Section 2—(1) its even-handedness;

[122] cf the court's unquestioning acceptance of parties' mutual position, once proceedings are afoot, not to invoke forum non conveniens, which is explicable on grounds that neither party will have adduced evidence from which the appropriate forum can be identified (see text accompanying nn 113–114). The position is different when one party is seeking to avoid a jurisdiction agreement, because that party will then provide evidence and arguments showing why the chosen court is not the appropriate forum, which other party may rebut with contrary evidence and arguments.

[123] See *Davies v Edinburgh Magistrates* 1953 SC 34, 40; T Ward, 'Expert Testimony, Law and Epistemic Authority' (2017) 34 JOAP 263, 270–73.

(2) the relationship between foreseeability and the 'convenience' factors; (3) the relationship between foreseeability and the 'fair trial' factor; (4) the content of the 'abuse of process' factor; (5) the relevance of related proceedings; (6) the relevance of parties' respective bargaining positions; and (7) the role of public policy—better than under the other three accounts.

5.1. Even-handedness

The strong cause test applies even-handedly, that is, to both English and foreign jurisdiction agreements governed by either English or foreign law. The frustration account struggles to explain this. On that account, the strong cause test should only apply when the jurisdiction agreement is governed by English law or a materially similar foreign law, which will not necessarily be the case even for English jurisdiction agreements, since these are usually governed by the law of the main contract.[124] The remedial discretion account fares better, since English private international law may still view remedies as governed by the lex fori.[125] Yet, it cannot explain why the strong cause test also operates even-handedly in many other common law jurisdictions where remedies are generally governed by the lex causae, like Canada,[126] Singapore[127] and Hong Kong.[128]

By contrast, on the forum non conveniens account, the strong cause test's even-handedness is self-explanatory.[129] The exercise of jurisdiction is always a question for the lex fori, and forum non conveniens is always applied with the same factors considered. A jurisdiction agreement should generally be one of those relevant factors, because it generally reflects parties' well-informed views about the appropriateness of their chosen court. The jurisdiction agreement's governing law is irrelevant here: that informs the agreement's enforceability and the remedies that flow from its breach, but not the test applied to determine the exercise of jurisdictional discretion.

5.2. Convenience

Under the strong cause test, 'convenience' factors can generally amount to strong reasons only if unforeseeable. The frustration account can explain this general position, but not the exception where foreseeable inconvenience which is 'especially strong' establishes strong cause.[130] The qualified contractual account fares similarly, since holding parties to foreseeable but extremely inconvenient outcomes which they bargained for would respect rather than undermine their contractual bargain. The remedial discretion account fails to explain the relevance of foreseeability to the 'convenience' factors at all. Whether the inconvenience of contractual performance is grounds to deny specific relief depends on its gravity—that is, whether it amounts to excessive hardship[131]—rather than its foreseeability.

[124] See text accompanying nn 22–23.
[125] *Harding v Wealands* [2006] UKHL 32.
[126] *243930 Alberta Ltd v Wickham* (1990) 75 OR (2d) 289, paras 9–10 (Ontario Court of Appeal).
[127] *Goh Suan Hee v Teo Cher Teck* [2009] SGCA 52, paras 20–22.
[128] *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* (2012) 15 HKCFAR 569, para 95.
[129] This may admittedly also be so under the qualified contractual account.
[130] See text accompanying nn 52–60.
[131] See N Andrews, A Tettenborn and G Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (4th edn, Sweet & Maxwell 2023) paras 27-066–27-067, 28-020–28-021.

https://doi.org/10.1017/S0020589326101572 Published online by Cambridge University Press

On the forum non conveniens account, by contrast, it is clear why 'convenience' factors will typically, but not invariably, establish strong cause only if unforeseeable. Forum non conveniens generally gives significant weight to parties' views on their chosen court's appropriateness because parties are generally more familiar with the facts and legal arguments relevant to any subsequent disputes between them. However, parties' actual familiarity with the facts and legal arguments relevant to their current dispute will depend on the extent to which this actual dispute was foreseeable when they contracted. Insofar as it was unforeseeable, parties' views on appropriateness should count for less in the forum non conveniens analysis.

'Convenience' factors—the location of witnesses and evidence, and the governing law—are precisely those factors which are relevant under forum non conveniens because they concern the facts and legal arguments relevant to a dispute. To say that 'convenience' factors were foreseeable is thus to say that parties were probably familiar with the facts and legal arguments relevant to their current dispute when they contracted. If so, parties' views on appropriateness should be given significant weight, and this will usually outweigh the 'convenience' factors themselves in the forum non conveniens analysis. Conversely, to say that 'convenience' factors were not foreseeable is to say that parties were probably unfamiliar with the facts and legal arguments relevant to their current dispute when they contracted. If so, parties' views on appropriateness should not be given significant weight, and so will not usually outweigh the 'convenience' factors in the forum non conveniens analysis.[132]

However, it should be noted that on the forum non conveniens account 'convenience' factors, foreseeable or otherwise, do not cease to be relevant factors under the forum non conveniens enquiry, independent of the jurisdiction agreement. That is because the jurisdiction agreement, representing parties' views on appropriateness, is still only one (weighty) factor informing the court's view on appropriateness, to be weighed alongside all the other relevant factors under the forum non conveniens analysis.[133] This should mean that, even where 'convenience' factors were foreseeable, it should theoretically remain possible (albeit improbable) that they might outweigh the jurisdiction agreement. And this explains why English courts acknowledge that, although generally foreseeable 'convenience' factors cannot establish strong reasons, they still may do so in 'rare' situations of extreme foreseeable inconvenience.[134]

5.3. Fair trial

The prospect of an unfair trial in the chosen court will generally amount to strong reasons, even if that prospect was foreseeable at the time the jurisdiction agreement was entered into. The frustration account cannot explain this, since foreseeable events rarely frustrate contracts.[135] The qualified contractual account faces the same problem, for it would respect the parties' bargain to send them to their chosen court, fair or otherwise. The remedial discretion account fairs better, since an unfair trial probably counts

[132] See A Mills, 'The Privatisation of Private (and) International Law' (2023) 76 CLP 75, 107–08.
[133] cf Peel (n 83) 190.
[134] See text accompanying n 26.
[135] See text accompanying nn 44–49.

https://doi.org/10.1017/S0020589326101572 Published online by Cambridge University Press

as excessive hardship justifying the denial of a specific order to subject oneself to such a trial.

The forum non conveniens account squarely explains why the 'fair trial' factor should typically, but not invariably, establish strong cause even if the prospect of an unfair trial in the chosen court was foreseeable. An unfair trial is, by definition, inconvenient for one party and inaccurate for all parties, and so it is strong evidence that the relevant court is an inappropriate forum. This means that the 'fair trial' factor should always be a weighty factor militating against a conclusion that the chosen court is the appropriate forum.

What logically follows from this? It does not follow that English courts should now treat jurisdiction agreements as having negligible weight in the forum non conveniens analysis, if parties could reasonably foresee when contracting that they would likely get no fair trial in their chosen court. To the contrary, if parties could foresee that risk, then their view that their chosen court remains the appropriate forum would have been well-informed by that risk, and should still be given significant weight. However, what does follow is that, even if the jurisdiction agreement remains a weighty factor, it should still be (more than just theoretically) possible for it to be outweighed by the 'fair trial' factor, because the 'fair trial' factor is itself a weighty factor. And this explains why English courts suggest that the 'fair trial' factor, even if foreseeable, can amount to strong reasons by itself.

Yet, even if the 'fair trial' factor might outweigh the jurisdiction agreement, the converse—that the agreement might outweigh the 'fair trial' factor—remains a distinct possibility as well. Everything will depend on the weight of the jurisdiction agreement, which should in turn depend on the extent to which the prospect of an unfair trial in the chosen court was foreseeable to the parties. And that explains why English courts also acknowledge that the chance of establishing strong reasons on the 'fair trial' factor will be 'reduced' if parties foresaw the actual risk that they would not get a fair trial in the chosen court.[136]

5.4. Abuse of process

Courts will refuse to give effect to foreign jurisdiction agreements on the ground of 'abuse of process' only when the defendant seeks a stay of English proceedings despite conceding both liability and quantum. The frustration account cannot explain this, since anyone who foresees litigation with one's contracting counterparty must certainly foresee the possibility that that counterparty may sue frivolously. The remedial discretion account may seem more plausible, since specific remedies may be withheld to prevent equity from acting in vain. Yet, a stay of English proceedings, despite a concession of both liability and quantum, may not be a fruitless remedy: it may be that losing in the foreign court holds certain advantages for the defendant unrelated to the content of his liability to the claimant.[137] The qualified contractual account fares worst here. On that view, a defendant should be entitled to insist on a stay of English

[136] See text accompanying n 49.

[137] e.g. the foreign court's mechanisms for the enforcement of its judgments may be less coercive than those of the English court.

proceedings on the basis of a foreign jurisdiction agreement, even if the writing is manifestly on the wall, since that is his contractual right. After all, 'parties do not choose a contractual forum for dispute resolution only because they want to win in that forum; they choose a forum because they want to win or lose in that forum'.[138]

By contrast, on the forum non conveniens account, the content of the 'abuse of process' factor is easily explained. Once the defendant seeking the stay has conceded both liability and quantum, it becomes irrelevant that the foreign chosen court was more appropriate for trial of the parties' dispute, or that the parties held that view when entering into the jurisdiction agreement. There is now literally no dispute, nothing by way of appropriate dispute resolution to be gained by staying English proceedings in favour of the foreign appropriate forum[139] and, thus, no justification for giving effect to the foreign jurisdiction agreement.

5.5. *Related proceedings*

Related proceedings in a non-chosen court will generally be insignificant if they involve only the parties to the jurisdiction agreement, but will likely amount to strong reasons if they involve third parties even if foreseeable. The frustration and qualified contractual accounts cannot explain this, at least when the related proceedings are foreseeable. The remedial discretion account also falls short. It is true that English courts may deny specific remedies to protect third-party interests.[140] However, where strong reasons are established on the basis of related proceedings involving third parties, the English court is not necessarily acting to safeguard the interests of those third parties, who may be facing trial in those related proceedings in any event. Instead, strong reasons may also be established when giving effect to the jurisdiction agreement would force one of the contracting parties to litigate in the chosen court against their counterparty, while also participating in related proceedings in a non-chosen court against the third parties—and here, the court's disregard of the jurisdiction agreement furthers that contracting party's interests, not those of third parties.[141]

The forum non conveniens account, however, explains exactly why related proceedings are treated as they are. Where related proceedings involve only parties to the jurisdiction agreement, it is difficult to see these as materially different from other 'convenience' factors—at most, they compromise the accuracy and effectiveness of adjudication. Thus, the prospect of these related proceedings, even when foreseeable, will rarely establish strong cause, for reasons explored above relating to 'convenience' factors.[142]

By contrast, where the related proceedings in the non-chosen court involve third parties to the jurisdiction agreement, it makes sense that this should be capable of establishing strong cause by itself, even when those proceedings are foreseen by parties

[138] TM Yeo, 'Natural Forum and the Elusive Significance of Jurisdiction Agreements' [2005] SJLS 448, 454.
[139] As is the position under forum non conveniens generally; see Briggs (n 64) 423–24.
[140] See Andrews, Tettenborn and Virgo (n 131) paras 27-071–27-072, 28-019.
[141] See, e.g. the position of the Armco parties in *Donohue*, who were party to an English jurisdiction agreement with Mr Donohue but not his co-conspirators in the US, and who benefitted when the jurisdiction agreement was disregarded: (n 8) paras 30, 33–34.
[142] See text accompanying nn 132–134.

https://doi.org/10.1017/S0020589326101572 Published online by Cambridge University Press

to the jurisdiction agreement. Forum non conveniens is concerned not only with the appropriateness of trial for contracting parties, but for all parties to the 'larger, complex, dispute'.[143] And when there are related proceedings involving third parties, this means that the issues in dispute between the contracting parties will either be identical to those in dispute between the contracting parties and third parties, or the former will depend on the resolution of the latter or vice versa. All proceedings will thus form part of the same broader dispute. Now, if a jurisdiction agreement is a weighty factor under forum non conveniens because it reflects the parties' well-informed views on the appropriate forum for trial of the dispute, when not all parties to the broader dispute are parties to the agreement, that agreement should be given far less weight. This will then lead to the conclusion that the most appropriate forum for the broader dispute is simply the court which can receive the best evidence and arguments from all (or at least most of)[144] the parties to the broader dispute, since that is the court which can 'make a reliable, comprehensive judgment on all the matters in issue'.[145]

5.6. Unequal bargaining power

When a jurisdiction agreement is between parties of unequal bargaining power, strong reasons seem easier to establish. The frustration and qualified contractual accounts struggle here, at least for English jurisdiction agreements, since English contract law routinely enforces contracts between parties of unequal bargaining power. The remedial discretion account also faces difficulties, as it is the hardship eventuated by specifically performing an obligation, rather than the quality of the consent in undertaking it, that is relevant to the exercise of remedial discretion.[146]

On the forum non conveniens account, however, the relevance of unequal bargaining power becomes clear. A jurisdiction agreement should be a weighty factor under forum non conveniens because it reflects the parties' collective, well-informed view on their chosen court's appropriateness. That, however, assumes that all contracting parties will generally have an equal ability to form and express their own views on that matter. Conversely, when the parties' abilities in that regard are unequal, any contract between them would simply reflect the stronger party's self-serving interests rather than a collective, well-informed judgment on the chosen court's appropriateness.[147] Thus, a jurisdiction agreement's weight under forum non conveniens should logically decrease—and strong cause should logically be easier to establish—the more parties lacked equal ability, in terms of knowledge or opportunity, to form and contribute well-informed views on their chosen court's appropriateness.

143 Briggs (n 64) 411; *Limbu* (n 94) para 33.

144 See, e.g. *Zephyrus Capital* (n 27) [497]; *Konkola Copper Mines* (n 32) 400 (Zambian jurisdiction agreement not disregarded because five out of six defendants were party to it, despite parallel proceedings in UK against the last defendant).

145 *Donohue* (n 8) para 34.

146 cf Beale (n 55) para 31-051, suggesting that unequal *and* unfair bargains may not be specifically enforced.

147 Mills (n 132) 112–13, 115, 119.

5.7. Public policy

English courts have never found strong reasons to disregard jurisdiction agreements on the basis of public policy, despite obiter comments to the effect that jurisdiction agreements may be denied effect on public policy grounds. The frustration account sheds no light on this issue, public policy being a non-sequitur in that context. Under the remedial discretion account, by contrast, public policy considerations should sometimes amount to strong reasons, since English courts do sometimes consider public interests in the exercise of remedial discretion.[148] The qualified contractual account would also support a broader role for public policy. If the court's jurisdictional discretion may be influenced by the parties' contractual bargain, understood here as a consideration external to the logic of forum non conveniens, there seems no reason why that discretion cannot be influenced by other external considerations like fundamental public policies.

On the forum non conveniens account, by contrast, public policy should have no role under the strong cause test. After all, forum non conveniens ignores any 'public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice in the case which is before the Court'.[149] If the strong cause test is just forum non conveniens, public policy should also be irrelevant thereunder. This, however, does not mean that jurisdiction agreements cannot be denied effect on grounds of public policy—only that that should be viewed a reason for non-enforcement which is separate from the strong cause test. Courts may still cite public policy to deny enforcement of an English jurisdiction agreement under the English doctrine of illegality, and may do the same for foreign jurisdiction agreements under private international law's public policy exception.[150]

6. Further implications

Beyond rationalising the strong cause test, the forum non conveniens account also holds implications for the test's relevance in two contentious contexts. These involve proceedings where English courts are asked to: (1) stay proceedings or exercise jurisdiction in the face of a non-exclusive jurisdiction agreement; or (2) issue an anti-suit injunction to enforce an exclusive jurisdiction agreement.

6.1. Non-exclusive jurisdiction agreements

Must a party to a non-exclusive jurisdiction agreement establish strong reasons to stay proceedings in, or to bring proceedings outside, the non-exclusively chosen court? The law on point is not the picture of clarity but, in general, the answer seems to be 'no'. Instead, a non-exclusive agreement is simply one factor in favour of the non-exclusively chosen court, to be considered alongside other factors in the forum non conveniens analysis. Thus, despite earlier decisions to the contrary,[151] the modern position with

[148] See *Fearn* (n 65) para 122.
[149] *Lubbe v Cape* (n 92) 286.
[150] See *Zephyrus Capital* (n 27) paras 500–502 for this suggestion.
[151] The locus classicus was *British Aerospace* (n 25) 375–76.

https://doi.org/10.1017/S0020589326101572 Published online by Cambridge University Press

regards to English non-exclusive agreements is reflected in Toulson LJ's comments in *Deutsche Bank AG v Highland Crusader Offshore Partners LP*:

> by agreeing to submit to the non-exclusive jurisdiction of state X the parties implicitly agree that X is an appropriate jurisdiction, and therefore either party should have to show a strong reason for later arguing that it is not an appropriate jurisdiction … On the other hand, a non-exclusive jurisdiction clause self evidently leaves open the possibility that there may be another appropriate jurisdiction. The degree of appropriateness of an alternative jurisdiction must depend on all the circumstances of the case.[152]

A similar position for foreign non-exclusive agreements is captured by Colman J's statement in *BP plc v Aon Ltd* that:

> when [an English] court considers whether England is clearly the appropriate forum in the *Spiliada* sense, [the applicant] is not called upon to justify English jurisdiction by establishing as strong reasons for preferring it … as would be called for if [a foreign court] were designated under an exclusive jurisdiction clause … It is sufficient for it to be shown that although [the foreign non-exclusively chosen court] is an appropriate forum, there is a clear balance of justice and fairness as between the parties in favour of London … a balance which while not overwhelming, is substantially more than a fine balance.[153]

Are English courts correct to treat all non-exclusive agreements in this way—as factors leaning against, but not as requiring strong reasons for, a stay of proceedings in or the bringing of proceedings outside the non-exclusively chosen court? Canadian courts have adopted a similar position.[154] However, courts in Singapore[155] and Hong Kong[156] have treated forum non-exclusive agreements differently from foreign non-exclusive agreements: the former imposes a requirement of strong reasons for stays of forum proceedings, but the latter does not do the same for the institution of forum proceedings. Which approach is correct? The answer here ultimately turns on the proper understanding of why courts enforce jurisdiction agreements, and what the strong cause test represents in that analysis.

Under the frustration and remedial discretion accounts, the strong cause test functions as a full or partial excuse for breach of contract, and under the qualified contractual account, the test reflects a general inclination to give effect to the parties' contractual bargain. Either way, parties' contractual obligations are the paramount consideration. And so, whether strong reasons must be shown by the litigant who seeks to stay or bring English proceedings reduces to this question: what obligations do non-exclusive agreements impose, and are they breached by the litigant's application?[157]

In this regard, it has been said that while exclusive agreements impose both a positive obligation to submit to the chosen court and a negative obligation not to sue elsewhere, non-exclusive agreements impose only the positive obligation to submit to the chosen court. Thus, where the English court is non-exclusively chosen, an application to stay

[152] *Highland Crusader* (n 36) para 64.
[153] *BP plc v Aon Ltd* [2005] EWHC 2554 (Comm), paras 31–32. See also Mills (n 116) 143.
[154] *3289444 Nova Scotia Ltd v RW Armstrong & Associates Inc* 2018 NSCA 26, paras 76–77.
[155] *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] SGCA 11, paras 86–88.
[156] *Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] HKCA 255, paras 35–37.
[157] Merrett (n 81) 44–45.

English proceedings does breach the positive obligation to submit, and strong reasons are required to obtain a stay.[158] By contrast, when a foreign court is non-exclusively chosen, the maintenance of English proceedings does not breach the positive obligation to submit, so strong reasons are not required to maintain them.[159] This differential treatment—the English non-exclusive agreement requires strong reasons to stay English proceedings, but the foreign non-exclusive agreement seems legally irrelevant to the exercise of the English court's jurisdiction—inevitably carries 'unwelcome overtones of parochialism'.[160] Yet, it is the logical consequence of focusing purely on parties' contractual obligations.[161]

Under the forum non conveniens account, however, the reasoning changes. Now, the proposition that a non-exclusive jurisdiction agreement imposes a positive obligation to submit to the non-exclusively chosen court is irrelevant or at least inconclusive. Instead, the important questions are: is the non-exclusively chosen court the appropriate forum for trial? And what views did the parties express on that?

Properly understood, when the parties make a non-exclusive choice, they are expressing the view that their chosen court, but not only that court, can appropriately try their dispute. In other words, the parties view their chosen court as '*an* appropriate forum',[162] not *the* appropriate forum, for trial. The proper judicial response should then be to treat a non-exclusive jurisdiction agreement as simply one factor suggesting that the non-exclusively chosen court is the appropriate forum under the forum non conveniens analysis. Thus, the litigant seeking a stay of English proceedings despite there being an English non-exclusive agreement need not show strong reasons to depart from the positive obligation to submit, since that obligation will only be given effect when the English court is indeed the appropriate forum. Similarly, the litigant arguing for the exercise of English jurisdiction in the face of a foreign non-exclusive agreement need not establish strong reasons to secure that, since the English court will exercise jurisdiction so long as it is the appropriate forum. Yet, in both situations, the English court's assessment of the appropriateness of competing courts will be informed by the parties' view that their chosen court is appropriate, which goes some way toward establishing that it is more appropriate than the non-chosen court.

6.2. Contractual anti-suit injunctions

When applicants seek 'contractual anti-suit injunctions' to enforce English jurisdiction agreements, they only need show that the foreign proceedings sought to be restrained are indeed brought in breach of an enforceable English jurisdiction agreement.[163] These are contrasted with what are commonly termed 'non-contractual anti-suit injunctions',

[158] ibid 49, 51–52. See also Briggs (n 1) para 4.22.

[159] See *Shanghai Turbo* (n 155) paras 87–88.

[160] A Chong, 'Singapore: A Mix of Traditional and New Rules' in M Keyes (ed), *Optional Choice of Court Agreements in Private International Law* (Springer 2020) 325, 346, discussing *Shanghai Turbo.*

[161] For this view, see J Saunders, 'A Critique of the English Courts' Treatment of Non-Exclusive Jurisdiction Agreements: Contracts, Promises, and their Breach' (2026) 22 JPrivIntlL (forthcoming).

[162] *Berisford (S & W) v New Hampshire Insurance* [1990] 2 QB 631, 646 (emphasis added) (HC); *Highland Crusader* (n 36) para 64.

[163] *Donohue* (n 8) para 24.

issued to restrain foreign proceedings which are 'vexatious and oppressive'.[164] Both contractual and non-contractual injunctions are said to require proof of some kind of wrongdoing,[165] like a breach of contract (a jurisdiction agreement) or an equitable or procedural wrong (vexatious foreign proceedings).[166] However, while non-contractual injunctions require the applicant to show that the English court would be the appropriate or natural forum for trial,[167] contractual injunctions will issue unless there are strong reasons not to enforce the English jurisdiction agreement.

Why the apparent difference? In the context of non-contractual injunctions, Lord Goff held in *Airbus Industrie GIE v Patel* that 'comity' requires the English issuing court to be the appropriate forum, 'to justify the indirect interference with the foreign court which an anti-suit injunction entails'.[168] By contrast, for contractual injunctions, courts have said that they are only seeking 'to secure compliance with the contractual bargain',[169] and that '[c]omity … has little if any role to play'.[170] But this is unconvincing: foreign courts often take offence at English contractual anti-suit injunctions,[171] and English courts respond in kind 'when the boot is on the other foot'.[172] Yet, if comity does remain relevant in contractual injunction cases, should it not impose the same requirement as in non-contractual injunction cases, that the English issuing court be the appropriate forum for trial?

It is submitted that comity does, in fact, impose the same requirement: the English issuing court must always be the appropriate forum for trial. Yet, in contractual injunction cases, this requirement will *always* be satisfied when the English court finds no strong reasons to disregard an *English* jurisdiction agreement. After all, on the forum non conveniens account of the strong cause test, that jurisdiction agreement reflects the parties' well-informed view that the English court is the most appropriate forum for trial, which should be a weighty factor under forum non conveniens. So, where an English court finds no strong reasons not to enforce an English jurisdiction agreement, the court is still asking itself whether the UK is the appropriate forum for trial—just that the court also ultimately agrees with the parties' view that it is.

This analysis may seem purely academic for contractual injunctions to enforce English jurisdiction agreements. Yet, it has real consequences for the issuance of contractual injunctions to enforce foreign jurisdiction agreements by restraining proceedings in a third State. Courts[173] and commentators[174] generally recognise that

[164] *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871, 896 (HL).

[165] Briggs (n 63) 298.

[166] See *British Airways v Laker Airways* [1985] AC 58, 95 (HL); *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24, para 25.

[167] *Airbus Industrie GIE v Patel* [1999] 1 AC 119, 138–39 (HL).

[168] ibid 138.

[169] *Donohue* (n 8) para 24.

[170] *Enka v Chubb* (n 2) para 180; see also para 293 (Lord Sales).

[171] See, e.g. *UniCredit Bank GmbH v RusChemAlliance LLC* [2025] EWCA Civ 99 (Russian court imposing heavy penalties on litigant who obtained English injunction restraining Russian proceedings).

[172] J Harris, 'Agreements on Jurisdiction and Choice of Law: Where Next?' [2009] LMCLQ 538, 542. See also Torremanns and Fawcett (n 81) 439–40; Briggs (n 97) 125–26; A Dickinson, 'Taming Anti-Suit Injunctions' in Dickinson and Peel (n 62) 77, 83–86.

[173] See, e.g. *People's Insurance Co Ltd v Akai Pty Ltd* [1997] SGHC 165, para 12; *CSAV v Hin-Pro* [2015] HKCA 107, para 45.

[174] T Raphael, *The Anti-Suit Injunction* (2nd edn, OUP 2019) paras 7.48–7.50; Harris (n 172) 541–42; Fentiman (n 41) paras 16.33–16.35; Dickinson (n 172) 86. Other commentators appear to take this stance by

courts should not grant such contractual anti-suit injunctions in aid of foreign proceedings. But why not, if comity is not a concern, and the English court need not be the appropriate forum before contractual anti-suit injunctions issue? That logic, it should be noted, is precisely what supported the UK Supreme Court's decision in *UniCredit Bank GmbH v RusChemAlliance LLC*.[175] There, a German bank obtained an anti-suit injunction restraining a Russian company from maintaining Russian proceedings brought in breach of a Parisian arbitration agreement. Lord Leggatt reasoned that, while the UK had to be the 'proper place in which to bring the claim', it did not matter 'whether a forum other than the English court is more appropriate or suitable for the trial of the [underlying] action.'[176] Instead, '[t]he basic principle applied is "pacta sunt servanda"'.[177]

In fairness, Lord Leggatt did acknowledge in *UniCredit* that English courts should not issue anti-suit injunctions unless that would be 'consistent with comity'.[178] Yet, that concept was reinterpreted there in a way that denuded it of its original import. 'Comity' only meant that the English anti-suit injunction should not 'clash with any exercise of [supervisory] jurisdiction by the French courts', which would not occur on the facts, since French courts could not issue anti-suits to assist Parisian arbitrations.[179] The analogy here seems to be with cases where English courts are asked to issue freezing injunctions to aid foreign proceedings,[180] in which context 'comity' only requires that such aid should not interfere with the main proceedings.[181] In other words, in *UniCredit* and the freezing injunction cases, 'comity' refers to a concern about interference with the proceedings of the court assisted (here, the Parisian court and tribunal), not, as in *Airbus v Patel*, those of the court restricted (here, the Russian court). But this analogy is inapposite,[182] for in freezing injunction cases, there is usually only a court assisted, while in anti-suit injunction cases, there is always also a court restricted. Reinterpreting 'comity' in this way side-steps, rather than addresses, the concerns that anti-suit injunctions raise about interfering with foreign proceedings in the court restricted.

The tenor of the post-*UniCredit* literature is thus that the decision should be viewed with suspicion and confined to the arbitration context.[183] To do this, English courts

implication, only discussing the granting of contractual injunctions to enforce English jurisdiction agreements: see, e.g. Collins and Harris (n 81) para 12R-121; cf n 491; Torremanns and Fawcett (n 81) 437–40; Gee (n 67) paras 14.021–14.023. The only exception seems to be Briggs (n 64) 554–55.

[175] *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, paras 67, 75.

[176] ibid para 66.

[177] ibid.

[178] ibid para 77. For a discussion, see A Arzandeh, 'Anti-Suit Injunctions in Support of Foreign Dispute-Resolution Clauses' (2025) 74 ICLQ 723, 737–38.

[179] *UniCredit* (n 175) para 101.

[180] As suggested by Lord Leggatt's citation of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, para 88 (HL), a seminal case on freezing injunctions in aid of foreign arbitrations.

[181] See *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's Rep 159, 173–75 (CA).

[182] And, on the facts of *UniCredit*, self-defeating, since it is also a requirement that the freezing injunction in aid of foreign proceedings would be effective if issued, see ibid 173–75. Given that the Russian defendant had no English assets, the *UniCredit* injunction was, predictably, ignored; see source cited in n 171.

[183] See, e.g. A Dickinson, 'Anti-Suit Injunctions – Beyond Comity' (2024) 20 JPrivIntlL 586, 594–95; A Giannakopoulos, 'Anti-Suit Injunctions Untethered' (2025) 141 LQR 196, 201–02; R Fentiman, 'Enforcing Foreign Arbitration Agreements' (2025) 84 CLJ 47, 47–50; Arzandeh (n 178) 736–37. cf A Briggs, 'Restoring Order to International Arbitration (for the Time Being)' [2025] LMCLQ 6, 6–7.

must affirm that 'comity' comports a requirement that the English court be the appropriate forum for trial before it issues any anti-suit relief, contractual or non-contractual. Contractual injunctions to enforce foreign jurisdiction agreements would then usually be unavailable, because those agreements suggest that a foreign court is the appropriate forum for trial.[184] Contractual injunctions to enforce English jurisdiction agreements would, however, remain readily available. This is because, on the forum non conveniens account, when an English court finds no strong reasons to depart from an English jurisdiction agreement, it is agreeing with parties' view that it is the appropriate forum for trial.

7. Conclusion

The common law generally treats jurisdiction agreements like ordinary contracts. Yet, unlike other contracts, English courts may refuse to give effect to jurisdiction agreements when they find strong reasons to do so. This article has argued that the strong cause test is the product of a rule prohibiting the enforcement of contracts interfering with the English court's power to apply forum non conveniens in determining the exercise of its jurisdiction. Key to this is acknowledging that a jurisdiction agreement reflects the parties' well-informed view that their chosen court is the most appropriate forum for the trial of their dispute. English courts should logically treat these agreements as weighty factors in the forum non conveniens analysis, to be departed from only in exceptional circumstances.

Acknowledgments. Many thanks to Ardavan Arzandeh, Adrian Briggs, William Day, Ewan McKendrick, Jonathan Saunders, Tham Chee Ho, Yeo Tiong Min and the anonymous reviewers for their helpful comments. Earlier drafts were presented to audiences at the University of Melbourne in December 2024 and the University of Hong Kong in April 2025, whose inputs are also gratefully acknowledged. The usual caveats apply.

[184] One might argue, as the German claimant did, that France was not an 'available' forum because French courts could not issue anti-suit relief to aid the Parisian arbitration, thus making England the appropriate forum: see [2025] AC 1177, 1190–91. However, it seems doubtful that the unavailability of particular claims or remedies can itself make a particular forum unavailable or inappropriate: see Briggs (n 64) 403. Thanks to the reviewer for raising this.

Cite this article: M Teo, 'Strong Cause' (2026) 75(2) ICLQ 285–313. https://doi.org/10.1017/S0020589326101572