**Forum shopping and proof of foreign law**

This element introduces the concept of forum shopping and also explains how the courts of England and Wales can apply foreign law when deciding a dispute.

**Forum shopping**

Situations can arise where the courts of two or more countries might have jurisdiction to hear a dispute. Consider, for example, the position where a defendant is based in the United States of America. In that case, one option for the claimant would be to sue the defendant in the jurisdiction in which it is based – the USA. However, the claimant may also have an option under the common law rules of England and Wales to bring the claim in the courts of England and Wales. The complicated rules on jurisdiction accordingly mean that more than one country’s courts might have jurisdiction to hear a claim. In situations where a claimant has a choice of jurisdictions and is considering where it would be most appropriate to commence proceedings, 'forum shopping' becomes an issue. Similarly, parties may be at the beginning of a relationship and wishing to agree which jurisdiction should be used for any future dispute, in which case similar questions of choice arise.

**Key word: 'Forum shopping'** – the process of deciding in which jurisdiction proceedings should be issued, based on an analysis of the advantages of one available jurisdiction over another available jurisdiction.

**You must not assume that England is the best forum for your client's proceedings.**

Factors to consider when comparing jurisdictions:

- Issues relating to enforcement including the location of the parties’ assets and ease of enforcement in that jurisdiction of a judgment from a particular court

- Cost of proceedings

- Speed of proceedings and length of time to reach judgment

- Availability of interim remedies

- Funding arrangements available

- Ability to join parties / counterclaim

- Extent of disclosure obligations

- Costs recovery

- Location of documents / witnesses

**Fact specificity and the need for foreign qualified lawyers**

Some of the advantages or disadvantages of a jurisdiction are relatively unaffected by the specific details of the dispute being considered or contemplated. For example, the facts that the courts of England and Wales are served by a skilled legal profession and the courts are not compromised by corruption in a way that troubles some other jurisdictions, are going to be advantages regardless of the specific details of the dispute.

The relevance of other advantages or disadvantages varies according to the specific details of the dispute being contemplated, and which party you are acting for and what they hope to achieve. For example, if you need an injunction to prevent disclosure of information, the availability of such an injunction on an emergency basis in a particular jurisdiction is clearly a significant advantage. A skilled lawyer can draw on a broad understanding of the jurisdiction of England and Wales to understand the implications of choosing that jurisdiction for a particular dispute.

The advice of a lawyer with a broad understanding of the features of any alternative jurisdiction(s), **most likely a lawyer qualified in the foreign jurisdiction concerned**, will be needed to understand the implications of choosing that jurisdiction for a particular dispute, and for the client to then make a choice between the available jurisdictions.

**Proof of foreign law**

Remember that jurisdiction (in which court(s) should / can a claim proceed) and applicable law (which country's laws apply to determine a dispute) must not be confused. For example, parties based in France and Russia might choose the courts of England and Wales as the jurisdiction in which a dispute should be resolved (perhaps having considered the factors on the previous page), but still want French law to apply to any dispute.

How will the courts of England and Wales apply a foreign law when determining a dispute? The relevant laws must be proved as a matter of fact just like any other fact. Evidence of such foreign laws must be provided by:

*“…a person who is suitably qualified to do so on account of his knowledge or experience … irrespective of whether he has acted or is entitled to act as a legal practitioner [in the relevant country or territory outside England and Wales].”* (s 4(1) of the Civil Evidence Act 1972).

The above provision therefore includes academics as well as practitioners. Their evidence is treated as a form of expert evidence and they may be subjected to the process of examination-in-chief and cross-examination. Any authorities on which they rely will be open to the scrutiny of the court.

**Proof of foreign law guiding principles**

- The Court assumes English law applies unless pleaded otherwise by either party (even when it obviously does not apply). If the Court has determined that foreign law does apply, the Court presumes that English law is the same as foreign law unless it is not reasonable to do so or is proved otherwise.

- Where experts disagree on the implications of a foreign source of law, such as a statute, the court can look at that source of law and try to understand it as part of resolving the conflict in the expert evidence. This is not the same as carrying out independent research, which is prohibited (see next point).

- An English court must determine what the foreign law is on the basis of the evidence presented to the court - the court cannot do its own research into the foreign law, because (in the absence of suitable expert explanation) it would not know how such law would be interpreted and applied.

**Summary**

- A party may need to compare the attractiveness of different jurisdictions, for example, because the courts of more than one country have jurisdiction to determine a particular dispute, or because the parties are at the outset of a relationship determining which jurisdiction should be chosen for any future disputes.

- The broadest range of factors needs to be considered as part of this comparison.

- Some factors are unaffected by the specific details of the dispute being considered, others vary according to those details.

- The advice of a lawyer with a broad understanding of the features of any alternative jurisdiction is likely to be required.

- The courts of England and Wales can apply a foreign law to determine a dispute.

- The foreign law is proved as a matter of fact using expert evidence.

- Where the foreign law is not proved, it is assumed to be the same as English law – so effectively English law is applied by default, unless a foreign law is proved.