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Sustainability and jurisdiction in the international civil litigation market

Alex Mills*

The sustainability of the global economy, particularly in response to the concerns of climate change, is an issue which impacts many different aspects of life and work around the world. It raises particular questions concerning globalised industries or markets which depend on long distance transportation for their function. This article takes as its focus international civil litigation – the judicial resolution of cross-border disputes – as a particular example of a globalised market in which sustainability considerations are presently neglected, and examines how this omission ought to be addressed. It proposes a modification to English law which aims to ensure that jurisdictional decisions by the English courts take into account their environmental impact – that is to say, the environmental impact of the selection of a particular forum. The article also considers the implications of adopting this change on the position of the English courts in the global litigation marketplace, arguing that the effects are likely to be limited, and it could have an incidental benefit in promoting the development and adoption of communications technologies in judicial dispute resolution.

Keywords: private international law; conflict of laws; jurisdiction; sustainability; climate change; litigation; *forum conveniens*; *forum non conveniens*

A. Introduction

The sustainability of the global economy, particularly in response to the concerns of climate change, is an issue which impacts many different aspects of life and work around the world. It raises particular questions concerning globalised industries or markets which depend on long distance transportation for their function. This article takes as its focus international civil litigation – the judicial resolution of cross-border disputes – as a particular example of a globalised market in which sustainability considerations are presently neglected, and examines how this omission ought to be addressed. It is not suggested that this is the most important avenue for addressing sustainability concerns, but rather that the importance of

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the issue requires addressing every industry which contributes to the problem. Although this is a global issue, the focus of this article is on the law and courts of England and Wales[1] as a leading centre of international dispute resolution whose jurisdictional rules, it is argued, could and should be readily modified to take into account sustainability considerations.

The law governing jurisdiction in cross-border civil disputes has historically often been considered, and perhaps even neglected, as a technical part of the law of civil procedure. Its concerns may seem remote from those of sustainability and the global crisis of climate change. Nevertheless, private international lawyers are increasingly recognising the potential significance of their discipline (which includes questions of jurisdiction in civil disputes, alongside other issues including the applicable law and the enforcement of foreign judgments) to a range of important global questions. Research has recently explored, for example, the significance of rules of private international law for the achievement of the UN Sustainable Development Goals[2] – asking a range of questions concerning the practice and potential of private international law in facilitating or obstructing the SDGs, including through rules on jurisdiction. Such analysis of the connection between private international law and sustainability relates at least primarily to the *outcomes of litigation* – whether, for example, private international law assists in obtaining and enforcing judgments which help support the achievement of environmental policy goals, most obviously by facilitating compensation for those harmed by environmental wrongs and thereby disincentivising environmentally damaging activity.[3] This scholarship inevitably focuses on cases which relate in substance to the environment, human rights or other related issues. It views law and legal dispute resolution as a *technology* which may be used to respond to the climate crisis or other sustainability concerns. The focus of this article is on another question which arises not only in these cases but also more generally – whether rules of private international law lead to civil litigation that *itself* has a

[1]Henceforth referred to as "English law" and the "English courts", both for brevity and because the majority of significant international commercial disputes are heard in the Business and Property Courts in London.

[2]See generally, for example, Ralf Michaels, Veronica Ruiz Abou-Nigm and Hans van Loon (eds), *The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law* (Intersentia, 2021).

[3]See, for example, Geert van Calster, "Environmental Law and Private International Law" in Jorge E Viñuales and Emma Lees (eds), *Oxford Handbook of Comparative Environmental Law* (Oxford University Press, 2019); Ugljesa Grusic, "International Environmental Litigation in EU Courts: A Regulatory Perspective" (2016) 35 *Yearbook of European Law* 180. It is important to note, however, that compensation is not necessarily the most important outcome in all such claims, and there are potentially advantages in a local court being able to mandate prevention of damage (see, for example, *The Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006) and supervise restorative activity. See further, for example, Richard Frimpong Oppong, "SDG 6: Clean Water and Sanitation", in Michaels et al, *supra* n 2.

negative impact on the environment. This article is thus concerned not with the outcomes of litigation, but with the *outcomes of jurisdictional decisions* – the question of how jurisdictional authority over a dispute is allocated, and the environmental impact of that allocation.[4] It views law and legal dispute resolution as an *industry* which itself has a climate impact.

The context for this article is an important and well-known phenomenon – economic globalisation, and in particular the globalisation of the dispute resolution marketplace in international civil and commercial disputes.[5] As explained further below, this phenomenon has the consequence that disputes may frequently be heard in a court which is physically remote from the parties or the facts or events underlying the dispute. This means that there may be significant international transportation required for the parties and for their witnesses,[6] lawyers and other advisers, as well as relevant documentation[7] and evidence, leading to an environmental cost.[8] Long distance international transport will generally require aviation, which is estimated to account for 2.5% of global carbon dioxide emissions, but about 5% of global warming taking into consideration vapour trails and other emissions.[9] Indeed, the aviation industry continues to grow, and there is a particular danger that its emissions are not taken into consideration in state-led emissions reduction programmes, because they are often cross-border and/or involve international airspace and are therefore difficult to attribute to particular states.[10] The resolution of disputes in a forum which is physically remote from the parties or events arises because of a claimant's

[4]On the "allocative" approach to private international law, see further for example Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009).

[5]See generally, for example, Alex Mills, "The Privatisation of Private (and) International Law" (2023) *Current Legal Problems* 75; Larry E. Ribstein and Erin O'Hara, *The Law Market* (Oxford University Press 2009).

[6]It should be noted that the need for witnesses to travel is reduced in legal systems which do not rely on adversarial cross-examination, but rather on written submissions from experts, which is more common in the civil law tradition.

[7]The need to transport documentation may, of course, be reduced where electronic documentation is used – see further section D below.

[8]This article focuses on the question of sustainability and environmental impact, but there is also a developmental dimension to these questions, as the allocation of a dispute to a remote forum also reallocates the economic costs and development potential of the litigation itself. See further generally Mills, *supra* n 5.

[9]See, for example, https://www.bbc.com/future/article/20200218-climate-change-how-to-cut-your-carbon-emissions-when-flying; M Klöwer et al, "Quantifying Aviation's contribution to Global Warming" (2021) 16 *Environmental Research Letters* 104027.

[10]Emissions from international aviation are, for example, excluded from national reduction targets under the Paris Agreement on Climate Change: see https://unfccc.int/topics/mitigation/workstreams/emissions-from-international-transport-bunker-fuels. "Aspirational goals" have, however, been identified under the auspices of the International Civil Aviation Authority: see https://www.icao.int/environmental-protection/pages/climate-change.aspx.

choice of forum, as explained further below, but it is also the product of the fact that litigation is in many jurisdictions viewed as a valuable part of the services economy and active steps are taken to facilitate and encourage the provision of those services to a global customer base. The English courts provide a leading example of a jurisdiction which seeks, with some success, to attract litigation from around the world.

The argument proceeds in three stages. First, the article outlines (in section B) the rules governing the exercise of civil jurisdiction in the English courts, including the exercise of the *forum conveniens* and *forum non conveniens* jurisdictional discretions. Second, the article argues (in section C) that English jurisdictional rules do not presently allow for consideration of the environmental impact of litigation, and proposes a modification to English law to incorporate what it calls the "*forum non calefaciens*" (non-warming forum) factor. This modification aims to ensure that jurisdictional decisions by the English courts take into account their environmental impact (that is to say, the environmental impact of the selection of a particular forum), a form of negative externality or public interest consideration. Third, the article considers (in section D) the implications of adopting this change on the position of the English courts in the global litigation marketplace, arguing that the effects are likely to be limited, and it could have an incidental benefit in promoting the development and adoption of communications technologies in judicial dispute resolution. A final part (section E) considers the impact of sustainability considerations on the arbitration of international civil disputes, a related but distinctive question.

B. The jurisdiction of the English courts and the global litigation marketplace

As noted above, the question examined in this article arises in part because of an important broader phenomenon – economic globalisation in general, and in particular the globalisation of the dispute resolution marketplace in international civil and commercial disputes. This marketplace, and the possibility of what is known as global forum shopping, operates because it is commonplace that in international civil and commercial disputes a choice of forum is available. In fact there are two importantly distinct types of what is often referred to as "forum shopping", because two distinct forms of choice are available: unilateral selection of a forum at the time of proceedings, and mutual selection of a forum through contractual agreement.[11]

The first type of forum shopping relates to the unilateral choice made by a claimant as to where proceedings will be commenced, after a dispute has arisen (or, where a declaratory judgment is sought, possibly even in anticipation of a dispute arising). Traditionally this requires a connection (sometimes further

[11]On this distinction, see further Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018), 80ff.

qualified as a "real and substantial connection",[12] or significant connection) between (i) either the dispute or the defendant and (ii) the chosen forum, which limits which courts may be chosen. But as cross-border activity has become more prominent and more complex, the possibilities have been increasingly opened up for proceedings to be brought in one of a range of different courts. This is both because actors may have connections with a number of different jurisdictions (as is the case, for example, with multinational corporations), and because actions may have effects in a number of different states (or even sometimes, in the case of action online, in every state).[13] The variety of grounds of jurisdiction accepted in different courts around the world also give rise to substantial overlaps, as different legal systems may consider different types of connections with their territory sufficient to satisfy their jurisdictional rules. The potential availability of multiple courts in a given dispute is further increased by the fact that proceedings may be brought by either party – on the one hand, an action for damages by a party claimant to have suffered a wrong, and on the other, an action by the alleged wrongdoer seeking a declaration of non-liability.[14] In a dispute between two parties from different legal systems more than one forum is, in consequence, frequently available, because jurisdiction will commonly be based on the location of the defendant, and either party might be the defendant.[15]

The possibility that proceedings in international cases might be brought in the English courts in particular has been further increased by the fact that the available grounds of jurisdiction, set out in the Civil Procedure Rules, have been significantly expanded in recent years. The expansion in potential proceedings is not just a result of changes in the rules, but also the fact that, for defendants domiciled in EU Member States, the Civil Procedure Rules have replaced the more restrictive jurisdictional grounds which applied prior to Brexit under the Brussels I Regulation.[16] In a contractual dispute between two commercial parties, for example, proceedings may be brought in England if that is where a contractual breach allegedly occurred,[17] if the contract was made in England (recently

[12]This has been adopted as the foundation of the law of civil jurisdiction in Canada – see, for example, *Club Resorts Ltd v Van Breda*, 2012 SCC 17 (Supreme Court of Canada).
[13]This has created particular difficulties in the context of defamation proceedings: see, for example, Trevor C. Hartley, "'Libel Tourism' and Conflict of Laws" (2010) 59 *International and Comparative Law Quarterly* 25.
[14]See generally, for example, Andreas F Lowenfeld, "Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation" (1997) 91 *American Journal of International Law* 314. On the principles governing proceedings for negative declaratory relief in England, see *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2020] EWHC 2436 (Comm).
[15]In the absence of party agreement on an exclusive forum, as discussed further below.
[16]In its most recent version, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012.
[17]Civil Procedure Rules, Practice Direction 6B, para.3.1(7).

amended to clarify that only one contracting party need be in England at the time the contract was entered into),[18] or if the contract is governed by English law.[19] Indeed, depending on the context, cases may be brought in England based on a range of other connecting factors, including any case in which the defendant is a foreign company with a place of business in England, even if the claim does not relate to the activities of that place of business.[20] The grounds of jurisdiction in tort have been interpreted particularly expansively by the Supreme Court recently, to encompass not only any tort in which the wrongful act or direct damage occurs in England, but also any tort in which the consequential loss incurred by the claimant occurs in England (thus, for example, giving the English courts jurisdiction over any English resident party injured abroad who incurs medical expenses on their return to England).[21] The rules have recently been further amended to provide that jurisdiction may also be established where a claim in tort is based on English law,[22] although it would be unusual for this ground of jurisdiction to be satisfied in circumstances in which another basis of jurisdiction did not already exist. Jurisdiction may also be established even in the absence of any ground of jurisdiction or connection with England if proceedings are commenced in the English courts and the defendant submits to the authority of the courts,[23] although in practice submission is relatively unlikely to occur if both the defendant and the dispute are unconnected with England.

Claimants engaged in cross-border activities are, therefore, often presented with a range of available forums, including potentially in many cases the English courts, and may exercise a choice as to where to commence proceedings. This form of forum shopping is sometimes viewed critically in private international law scholarship, but it is important to be precise about the target of that criticism. There is nothing improper about a party or their legal advisors taking advantage of whatever forum is available to bring a claim – indeed, a lawyer who did not consider the different jurisdictional options before commencing proceedings might well be in danger of not fulfilling their professional duties to their client.[24] Where jurisdictional rules permit a very wide choice, however, this raises the danger that the forum which is

[18]Civil Procedure Rules, Practice Direction 6B, para.3.1(6)(a).
[19]Civil Procedure Rules, Practice Direction 6B, para.3.1(6)(c)
[20]Civil Procedure Rules, Rule 6.3.
[21]Civil Procedure Rules, Practice Direction 6B, para.3.1(9)(a) and (b); see *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45.
[22]Civil Procedure Rules, Practice Direction 6B, para.3.1(9)(c).
[23]See, for example, *Williams & Glyn's Bank Plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438.
[24]Although it has been persuasively argued that duties to clients should not preclude lawyers from taking into account environmental considerations in their professional activities: see Steven Vaughan, "Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms" (2023) *Current Legal Problems* 1. The importance of reducing the climate impact of the legal industry has been recognized in initiatives such as the Legal Sustainability Alliance (see https://legalsustainabilityalliance.com).

chosen by the claimant is not one with a strong connection to the dispute or which is likely to resolve the dispute efficiently, but rather one which maximises the claimant's advantage as a party. Again, a party or their advisers cannot be criticised for seeking such an advantage. But to the extent that jurisdictional rules facilitate such an advantageous choice, the rules themselves may be criticised for leading to dispute resolution which is both inefficient and unduly advantageous to claimants. Given that (as noted above) either party may potentially commence proceedings and thereby act as the claimant, an additional risk arises that disputing parties race to commence proceedings in an attempt to ensure that the court which is more advantageous to them is the forum for any subsequent litigation. This may again create inefficiencies, as it may discourage the settlement of disputes.

The second type of "forum shopping" relates to a mutual choice made by the parties, generally in the context of a contractual relationship which is established prior to any dispute arising.[25] The English courts may exercise jurisdiction if chosen by the parties in advance through a jurisdiction agreement, and there is no requirement for the parties or their dispute to have any connection with England for such a choice to confer jurisdiction on the English courts.[26] This form of forum shopping thus arises not because of overlapping jurisdictional rules or cross-border activities, but because the law recognises the autonomy of the parties to select their preferred court. Traditionally, such a choice in favour of the English courts has not entirely precluded consideration of whether it is appropriate to exercise jurisdiction (under the discretionary doctrine of *forum (non) conveniens*, examined below).[27] Equally, an exclusive jurisdiction agreement in favour of a foreign court has not inevitably been given effect by the English courts through a stay of proceedings properly commenced under English jurisdictional rules.[28] However, in practice the courts have only rarely departed from an agreement between the parties which seeks to confer exclusive jurisdiction on a single court, and the discretion to do so is now excluded almost entirely in cases covered by the Hague Choice of Court Convention 2005 (also discussed further below).

This form of forum shopping is generally not viewed critically in private international law scholarship, because it involves a mutual choice by the parties rather than a unilateral selection of a forum by the claimant, and is thus thought to be more likely to lead to an appropriate and efficient court for the resolution of subsequent disputes which does not unduly advantage either party.[29] To put this another way, a benefit of this second form of forum shopping is that it precludes

[25]The focus in this article is on a choice of court, although frequently parties may also choose for international commercial disputes to be arbitrated rather than litigated.
[26]Civil Procedure Rules, 6.33(2B) and (3).
[27]See, for example, *Donohue v Armco* [2001] UKHL 64.
[28]See, for example, *The El Amria* [1981] 2 LLR 119.
[29]This may, however, depend on the relative negotiating power of the contracting parties – for this reason, these choices are usually excluded in certain asymmetrical bargaining

(or at least seeks to preclude) the first form, discussed above. The availability of a free choice of forum is also frequently considered desirable because it means different courts are competing globally in a dispute resolution marketplace, which (it is argued) leads to innovation to attract further "business" to the local legal services economy.[30] Not every legal system views international civil litigation in this way – some jurisdictions are more concerned than others about the costs imposed on the local legal system if courts are clogged up with cases brought by foreign parties – but the English commercial courts at least have long positioned themselves as ready and willing to resolve disputes where they are chosen by the parties even in the absence of any connection with England.[31]

An effect of all these developments is that the English courts will often be faced with litigation involving one or more foreign parties, with limited or even no connection with England. Indeed, the majority of the cases brought in the London Commercial Courts involve at least one foreign party, and in many cases only foreign parties are involved, as the English courts may well have been chosen for their expertise and neutrality even in the absence of any substantive connection between the parties or their dispute and England.[32] When proceedings with foreign parties or connections are brought in the English courts, and the defendant wishes to argue that the litigation should not take place in England, the courts generally exercise what is known as the *forum conveniens* or *forum non conveniens* discretion – a determination by the court as to whether jurisdiction should be exercised in the particular case, or whether another foreign court is better placed to resolve the dispute efficiently and justly. Although the two doctrines are closely related they arise in different contexts. *Forum conveniens* arises where a claimant seeks to commence proceedings against a defendant who cannot be served in the territory – this requires the permission of the court, which involves an exercise of discretion. *Forum non conveniens* arises where a claimant has commenced proceedings against a defendant who has been served within the territory – this does not require the permission of the court, but the defendant may apply for the proceedings to be stayed, which again involves an exercise of discretion. In either case, the doctrine works as a

contexts such as consumer and employment contracts. See further Mills, *supra* n 11, 242ff; Mills, *supra* n 5.

[30]See further Mills, *supra* n 5.

[31]See, for example, the analysis of the contribution which dispute resolution services make to the local economy in *Legal Excellence, Internationally Renowned: UK Legal Services 2022*, published by TheCityUK (available at https://www.thecityuk.com/our-work/legal-excellence-internationally-renowned-uk-legal-services-2022/).

[32]See, for example, Portland's *Commercial Courts Report 2023*, available at https://portland-communications.com/publications/commercial-courts-report-2023/, reporting that sixty percent of litigants in the previous year were not from the UK.

filter which reduces the impact of England's expansive jurisdictional rules and the risk that a claimant is unduly favoured by the selection of an advantageous but inefficient forum.

There is no single universally accepted formula to describe the inquiry which the courts undertake in exercising these jurisdictional discretions. Although the well-known *Spiliada* case[33] remains the foundation of the modern law, the pithiest summary is that of Lord Collins in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*[34] – "the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice".[35] This description of the test was quoted with approval by the UK Supreme Court in *Vedanta Resources PLC v Lungowe*.[36] As the Supreme Court in *Vedanta* went on to explain, this test captures two distinct (although not always easily distinguishable) sets of considerations.

The first relates to the efficient resolution of the dispute between the parties, perhaps focusing on the "interests of all the parties" component of Lord Collins' description (although it is not suggested that a bright line can be drawn between the different components). It is based on consideration of a range of factors connecting the dispute to the forum or to alternative forums, to determine which court is the "proper place" in which the dispute should be resolved. In the words of the Supreme Court in *Vedanta*:

> That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred.[37]

Other factors could be added to this list, although there is no finite number of factors and in each case the approach of the court is fact-sensitive. For example, it is likely to be a relevant consideration whether the defendant has assets in the jurisdiction, as if this is not the case a separate set of foreign proceedings is generally required to enforce any judgment obtained from the English courts, adding additional complexity, delay and cost.[38]

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[33] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.
[34] [2011] UKPC 7.
[35] At [88].
[36] [2019] UKSC 20, [66].
[37] *Ibid*.
[38] See, for example, *Colt Industries v Sarlie (No 1)* [1966] 1 WLR 440.

A particularly significant factor is the desirability of avoiding split proceedings where a case involves multiple parties, as consolidation of a complex dispute in a single forum is likely to minimise costs (among other benefits).[39] The existence of advanced foreign proceedings in a matter is also an important consideration, as even if the English courts would ordinarily be the most suitable forum, the fact that expenses have already been incurred in foreign litigation may well favour the continuation of those proceedings.[40] What all these factors have in common is a focus on the efficient resolution of the dispute between the parties, taking a broad approach to both "the dispute" and "the parties". The efficient resolution of disputes is, indeed, undoubtedly an important value in the law of jurisdiction and in private international law more generally.

The second type of consideration involved in the exercise of the *forum conveniens* or *forum non conveniens* discretion relates particularly to the "ends of justice" component of Lord Collins' description of the test. It only arises where the court considers that a foreign court is better placed than the English court to resolve the dispute efficiently. In such circumstances, it allows for the possibility that the English courts may nevertheless exercise jurisdiction where they consider this necessary in the interests of justice. In the words of the Supreme Court in *Vedanta* again:

> Even if the court concludes … that a foreign jurisdiction is the proper place in which the case should be tried, the court may nonetheless permit (or refuse to set aside) service of English proceedings on the foreign defendant if satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction.[41]

There is again no finite list of factors which the courts may look at in determining the risk that substantial justice may not be done in a foreign forum, and the approach of the court is again fact-sensitive. By way of illustration, a finding that there is a risk of substantial injustice may arise from the likelihood of extensive delays in foreign proceedings,[42] an inadequacy in the law that would be applied in the foreign court,[43] practical obstacles to the commencement of foreign proceedings,[44] or evidence of bias against a particular litigant.[45]

[39]See, for example, *Petroleo Brasiliero SA v Mellitus Shipping Inc* [2001] EWCA Civ 418. This factor may, however, be discounted where the risk of split proceedings arises as a result of choices made by the claimant themselves: see *Vedanta Resources PLC v Lungowe* [2019] UKSC 20.
[40]See, for example, *De Dampierre v De Dampierre* [1988] AC 92.
[41][2019] UKSC 20, [88].
[42]See, for example, *The Vishva Ajay* [1989] 2 LLR 558.
[43]See, for example, *Banco Atlantico v British Bank of Middle East* [1990] 2 LLR 504.
[44]See, for example, *Lubbe v Cape Plc* [2000] UKHL 41.
[45]See, for example, *Cherney v Deripaska* [2009] EWCA Civ 849.

In *Vedanta*, the Court went on to observe that:

> The question whether there is a real risk that substantial justice will be unobtainable is generally treated as separate and distinct from the balancing of the connecting factors which lies at the heart of the issue as to proper place, 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. If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice.[46]

Although the suggestion that the "proper place" and "justice" elements are not inherently different questions is perhaps not entirely persuasive (indeed, neither is the suggestion that they involve distinctly different evidence, as some evidentiary points may relate to both questions), it is undoubtedly true that these elements form components of an overall discretion which may be expressed as a single compound question.

C. A missing factor – Environmental costs and consideration of the *forum non calefaciens*

The range of factors taken into consideration in the English approach to *forum (non) conveniens* is broad, and indeed as noted cannot be expressed in a closed list. There are, however, some factors which are notably not taken into account. A contrast here with the development of *forum non conveniens* in the United States is instructive. In the approach which has been developed by the US Supreme Court, a US federal court[47] will take into account the same private interest factors which concern the English courts. In addition, however, the court will look to what are called "public interest factors". For example, the US Supreme Court has noted that:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach, rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.[48]

[46][2019] UKSC 20, [88].
[47]Most but not all US states follow the same approach: see William S. Dodge, Maggie Gardner and Christopher A. Whytock, "The Many State Doctrines of Forum Non Conveniens" (2023) 72 *Duke Law Journal* 1163.
[48]*Gulf Oil Corp. v Gilbert*, 330 U.S. 501, 508–9 (1947).

The final factor in this list – the "appropriateness" of a court applying its own law rather than having to engage with rules on the applicable law – is generally better considered as relevant to the efficient resolution of the dispute rather than an issue of public interest, and (as noted above) is taken into account by the English courts in that way.[49] The other factors are, however, not considered at all by the English courts in applying *forum non conveniens* – the focus is only on the interests of the litigants in resolving the dispute efficiently, with the additional possibility that the courts may be required to exercise jurisdiction despite the availability of a more efficient foreign alternative forum where necessary to ensure justice for the claimant. The possibility of taking into account "public interest" factors was indeed expressly rejected by the House of Lords in *Lubbe v Cape plc*,[50] in which Lord Hope (on behalf of a unanimous court) held that:

> In my opinion the principles on which the doctrine of *forum non conveniens* rest leave no room for considerations 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.[51]

Dicey, Morris and Collins similarly concludes that:

> No account is to be taken of factors of independent public interest, such as the length of the queue of cases waiting to be heard, in considering whether to stay the proceedings. By contrast with the law of the United States, there is no element of public interest separate from the factors relevant to the parties, in the doctrine of forum non conveniens.[52]

The complete exclusion by the English courts of any factors of public interest[53] leaves out certain considerations which, it is submitted, ought to be taken into account. Where a dispute is heard remotely from the evidence or witnesses

[49]But see discussion in Martin Davies, "Forum Non Conveniens: Now We Are Much More Than Ten", in Andrew Dickinson and Edwin Peel (eds), *A Conflict of Laws Companion* (Oxford University Press, 2021), arguing that this reflects the public interest in the correct application of law.

[50][2000] UKHL 41.

[51]At [50]. See further discussion of this issue in Davies, *supra* n 49.

[52]*Dicey, Morris and Collins on the Conflict of Laws* (16th edition, 2022), [12-044].

[53]It may be noted, however, that there are perhaps signs that this exclusion is coming under pressure. In *Município De Mariana v BHP Group Plc* [2020] EWHC 2930 (TCC), the judge attached significant weight to the impact which the trial would have on the resources of the English courts in determining whether the English proceedings constituted an abuse of process (for example, at [58], [65] and [105]), drawing on the general objective of the Civil Procedure Rules "to deal with cases justly and at proportionate cost", which includes for each case consideration of "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases" (Rules 1.1(1) and (2)(e)). Although reversed on appeal, in *Municipio De Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951, the Court of Appeal rejected only the weight attached to these considerations, not their relevance (for example, at [134], [175] and [184]). If these factors are

involved, and/or remotely from the parties themselves, the likelihood that evidence, witnesses, parties and perhaps also lawyers and other advisers will need to be transported long distances does more than add to the costs for the parties. Even the US public interest factor that there is "a local interest in having localized controversies decided at home", while an important policy consideration,[54] does not entirely capture the issue here. The concern which is the focus of this article is rather that where witnesses, parties, lawyers, other advisers, and evidence are required to travel or be transported long distances this will have an environmental cost, particularly in the form of carbon and other chemical emissions, which should be taken into account by the court. The search for the *forum (non) conveniens* should also take into consideration a factor which we might call the *forum non calefaciens* – the "non-warming forum".

To put this another way, at the first stage of *forum (non) conveniens* the English courts are focused on "efficiency" in the resolution of the dispute. This concern with efficiency is, however, almost exclusively centred around the litigating parties. It is true that some third party interests are taken into account, such as where there are additional parties involved (or potentially involved) in complex multi-party proceedings, and the English court will rightly recognise that those parties also share an interest in the efficient resolution of the overall dispute broadly defined.[55] The test applied by the English courts does not, however, capture a broader range of efficiency concerns – the "negative externalities" caused by the parties in litigating their dispute in a location which causes increased carbon or other emissions. These environmental costs are not borne by any litigating party or indeed by any particular party at all, but rather by the public as a whole, and as a consequence they are excluded from consideration by the approach of the English courts. It is submitted that, in light of the climate crisis and the need for all industries to adapt to minimise their environmental impact, the rules governing international civil litigation ought also to adapt by recognising these costs – in England through a modification to the doctrines of *forum (non) conveniens* to incorporate consideration of the relative environmental impact of resolving the dispute in the English courts or an alternative forum.

The novelty of this suggestion lies not in opening up the test to entirely new considerations, but in the way those considerations are approached and weighed. As noted, transportation costs are already taken into account by the courts in determining which forum is best placed to resolve the dispute most efficiently. Those costs are, however, only taken into consideration to the extent that they

relevant and justiciable in relation to abuse of process arguments it is more difficult to argue for their complete exclusion from *forum (non) conveniens*.

[54]See further discussion in Mills, *supra* n 5.

[55]See, for example, *Petroleo Brasiliero SA v Mellitus Shipping Inc* [2001] EWCA Civ 418; *Limit Ltd v PDV Insurance Co Ltd* [2005] EWCA Civ 383.

are incurred by one of the parties. Taking into account the true costs, including in terms of environmental impact, would at least involve giving additional weight to these considerations. In some cases, one party may even undertake to pay those costs for another party, by way of nullifying their effect on the determination of an appropriate forum.[56] The cost to a party may thereby be removed as a factor altogether, but this does not eliminate the public environmental cost of the litigation taking place in a remote forum, unless the undertaking also includes effective offsetting measures.

Similar considerations may arise in other contexts – for example, where the court is considering the duplication of costs arising from parallel proceedings, or the concern that litigation in one forum might ultimately involve wasted costs if it leads to a judgment which cannot effectively be enforced against assets of the defendant. The "costs" involved in each of these circumstances may not just be those borne by the litigants themselves, but may also encompass environmental costs which (it is submitted) ought to be taken into account by the courts. A focus exclusively on the costs for the parties is once again liable to undervalue the true costs of litigation taking place in a given forum, particularly if it is remote from the location of the parties or the relevant events or objects underlying their dispute.

It is, perhaps obviously, not suggested that environmental considerations ought to outweigh all other factors. The point is not that they are given overriding weight or effect, but only that they ought to be given *some* weight, and *some* effect. They might be outweighed by the interests of the parties in some circumstances, or by the interests of justice (for example, ensuring that a claimant has access to an effective court, even if this comes with an environmental cost). This is perhaps particularly true for environmental claims, where the benefit of ensuring accountability for environmentally harmful conduct might well outweigh the environmental costs of the litigation which achieves this outcome. It is, however, also true more generally that environmental costs might be outweighed both by other factors which point to the convenience of a particular forum, as well as by the interests of justice. Precisely how much weight should be attached to environmental costs is a matter best left to the courts to determine on a case by case basis, consistently with the traditional approach to *forum (non) conveniens*, but for this factor to be given any weight in English law requires a change in approach. It is suggested that the simplest way to achieve this would be for the court to adopt a wider concept of "efficiency" in considering which

[56]See, for example, the undertaking by the defendants to "pay the reasonable costs necessary to enable the Claimants to give evidence in Malaysian proceedings including (if necessary) affidavit affirmation fees and other costs necessary for the Claimants to give remote evidence including travel and accommodation costs, costs associated with the provision/set-up of suitable videoconferencing technology and other costs associated with the logistics of giving evidence remotely" – *Limbu v Dyson Technology Ltd* [2023] EWHC 2592 (KB), [16].

forum is best placed to resolve the dispute most efficiently, which accommodates a broader conception of the potential "costs" of litigation, also encompassing public costs.

The proposed inclusion of such considerations is not intended to suggest, nor does it necessarily imply, that the English *forum conveniens* or *forum non conveniens* tests be opened up to include all "public interest" factors. In *Lubbe v Cape plc*, as part of his rejection of public interest considerations, Lord Hope argued that:

> the court is not equipped to conduct the kind of inquiry and assessment of the international as well as the domestic implications that would be needed if it were to follow that approach.[57]

The context for that statement makes it clear, however, that Lord Hope was concerned with particular "public interests" – not the type of public interest presently under consideration, but rather "broad grounds of public policy" including those concerned with "the expense and inconvenience to the administration of justice of litigating actions such as these in this country on the one hand or in South Africa on the other".[58] Lord Hope also cited with approval the judgment of Justice Deane of the High Court of Australia in *Oceanic Sun Line Special Shipping Company Inc. v. Fay*,[59] in which Justice Deane argued against the adoption of a US-style approach to *forum non conveniens* in Australia, rejecting the relevance of public considerations which he understood as:

> public interest convenience in the sense of convenience of the particular court in which the action is brought (e.g. the workload of its members and the state of its calendar) and of the overall administration of justice (e.g. the need to help courts avoid conducting complex exercises in comparative law and the danger that there would be an increased flow of litigation into the United States and further congestion of already overcrowded court lists).[60]

While Justice Deane doubted that these considerations were appropriate for a court to take into account, in a manner similar to Lord Hope, he did not offer any principled reason for rejecting the form of public interest consideration which is the present concern of this article – environmental costs. It is submitted that it is perfectly possible to allow the latter, without also allowing the former, and indeed this may well be desirable for the reasons expressed by the courts. The assessment of environmental costs is a matter on which a court could readily draw conclusions, based on evidence presented by the parties, and it

[57] *Lubbe v Cape Plc* [2000] UKHL 41, [55].
[58] At [54].
[59] [1988] HCA 32; [1988] 165 CLR 197.
[60] Deane J, at [10].

does not give rise to the same difficulties which might be presented if the court were, for example, required to assess its own workload as a factor in deciding whether to hear a case. The proposal in this article is to expand the range of factors as a question of degree or scope, rather than of kind. Costs including transportation costs are already taken into account by the court as part of their general consideration of the relative convenience to the parties of different courts – the proposal is simply for a more comprehensive accounting of those costs.

In making this proposal, it is acknowledged that the need to modify *forum non conveniens* to achieve this outcome only arises to the extent that environmental costs are not attributed in practice to the parties. For example, if transportation costs included their full environmental cost as part of an emissions pricing mechanism, then there would be no need for any reframing of the *forum non conveniens* factors to take them into consideration. The effect of an emissions pricing mechanism is indeed precisely to convert what are presently "public costs" into "private costs" – to bring the "negative externality" within the relevant market price for a particular product or service. To the extent that transportation costs fully reflected environmental costs, the court would already be taking those costs into consideration in evaluating the relative efficiency *for the parties* of the alternative possible courts. It is submitted, however, that present experience leaves little cause for optimism that a full and effective emissions pricing mechanism is likely to be introduced in the foreseeable future, which means that taking into account the costs of the environmental impact of transportation will require a change in the approach of the English courts.

D. Impact on the position of the English courts

This section examines the impact of the reform proposed in the previous section on the position of the English courts as a leading world centre for international commercial dispute resolution. One immediate concern which might be raised is whether the effect would be to increase the number of cases in which the English courts decline to exercise jurisdiction, particularly given that many cases brought before the English courts do not concern English parties or events in England. Four points may be raised in response to this concern.

The first is that, to some extent, this is indeed an inevitable consequence of the proposed reform, and is (subject to the points below) its intention. If a dispute might equally be heard in the English courts or in an alternative foreign court, but hearing the dispute in England would mean a greater environmental cost, then some justification should be necessary as to why the dispute should not be heard in the alternative forum. As explained above, this does not mean that the factor needs to be given overriding weight, and it may well be counter-balanced by other considerations of efficiency or justice, but the decision about whether to exercise civil jurisdiction ought to take into account the relative environmental costs of resolving the dispute in England or an alternative forum alongside those other factors. If the London legal industry, broadly conceived, is responsible

for excessive emissions, then like any other industry this ought to be addressed, even if this global (environmental) harm reduction may come with a local (economic) cost.

A second point to note is that taking into consideration the environmental impact of litigation could equally work in favour of the exercise of jurisdiction by the English courts in some cases. Disputes concerning English parties, or events or property located in England, would under this approach be more likely to be heard by the English courts even if a foreign court would otherwise be more efficient in resolving the dispute. This is because the present approach to the determination of the exercise of jurisdiction fails to take into consideration the additional public environmental costs of resolving the dispute remotely from, for example, the parties, their advisers, the evidence and the witnesses, who may each be in England.

A third important point is that the addition of environmental impact considerations is, for the reasons explained below, likely to have a more limited effect on cases in which the parties have chosen a particular court (whether that is the English court or a foreign court) in an exclusive jurisdiction agreement. That is to say, its impact is greater in relation to the first type of forum shopping discussed above (unilateral selection of a forum at the time of proceedings) when compared with the second type of forum shopping (mutual selection of a forum through contractual agreement).[61] The precise effect will, however, depend on whether the dispute falls under the auspices of the Hague Choice of Court Convention 2005[62] – which will be the case where the exclusive jurisdiction agreement was entered into in favour of a Convention State after the date on which the Convention came into effect for that state.[63] Under the Choice of Court Convention, an exclusive jurisdiction agreement is required to be given effect both by the chosen court (it must exercise jurisdiction)[64] and by any other court (which must not exercise jurisdiction).[65] The exercise by the chosen court of a jurisdictional discretion like *forum conveniens* or *forum non conveniens* is indeed expressly prohibited under Article 5, which provides (in relevant part) that:

[61]See section B above.
[62]Formally, the Hague Convention of 30 June 2005 on Choice of Court Agreements (henceforth, "Choice of Court Convention"), available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.
[63]Choice of Court Convention, Article 16. The UK initially became a party to the Convention on 1 October 2015, in its capacity as an EU Member State, and subsequently acceded to the Convention in its own right with effect from 1 January 2021. Although some doubts have been raised about the relevant date for application of the Convention to the UK, the better view and the view taken by the UK is that it has been a Convention State continuously since 1 October 2015.
[64]Choice of Court Convention, Article 5.
[65]Choice of Court Convention, Article 6.

(1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
(2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

Article 6 of the Convention does set out certain exceptional circumstances in which a court may exercise jurisdiction despite the existence of an exclusive jurisdiction agreement in favour of the courts of another Convention State, but these would not appear to contemplate concerns of relative efficiency or environmental costs. Perhaps the closest consideration is in Article 6(c), which permits jurisdiction to be exercised where "giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised", but it is highly unlikely that increased emissions, however serious as a matter of collective impact, would be considered to give rise to a manifest injustice in resolving a particular dispute. The absence of any mechanism to take into account efficiency considerations under the Choice of Court Convention is a matter of deliberate design, as it is aimed at "making choice of court agreements as effective as possible",[66] favouring party agreements and interests. In so doing, it supports the globalisation of the international dispute resolution marketplace, as it enables parties to make effective choices of courts which are remote from them or their relationship or dispute.[67] Although this may well have a positive impact on the efficiency of dispute resolution, as parties may choose a court with lower costs for them, in evaluating the Choice of Court Convention consideration should also be given to the fact that the parties are unlikely to take into account the public environmental costs of their choices (or indeed other broader efficiency considerations, such as the impact on third parties or the risk of fragmenting complex proceedings),[68] and under the Convention courts are also prohibited from taking into account those costs.

Where an exclusive jurisdiction agreement does not fall within the Choice of Court Convention, its effect is regulated by the common law rules on jurisdiction. Under those rules, the court retains a discretion not to give effect to the agreement. It is not entirely clear whether this is merely a special case of the *forum (non)*

[66]Trevor Hartley and Masato Dogauchi, *Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements* (2013), available at https://www.hcch.net/en/publications-and-studies/details4/?pid=3959&dtid=3.
[67]By implication of Article 19; see, for example, Mills, *supra* n 11, 153ff; Hartley and Dogauchi, *supra* n 66, [229]-[230].
[68]See further, for example, Alex Mills, "The Hague Choice of Court Convention and Cross-Border Dispute Resolution in the Asia-Pacific" (2017) 18 *Melbourne Journal of International Law* 1; Mills, *supra* n 11, 155.

conveniens discretion, with an exclusive jurisdiction agreement as a particularly weighty factor, or whether the impact of the jurisdiction agreement is such that the exercise of discretion in this context ought to be considered doctrinally distinct – leading texts generally favour the latter approach.[69] In any event, it is clear that although the court will give effect to an exclusive jurisdiction agreement in the vast majority of cases (whether by exercising jurisdiction if the English courts are chosen, or not exercising jurisdiction if a foreign court is chosen), a discretion is retained where the jurisdiction agreement is outweighed by other considerations. Those considerations may particularly include the impact of giving effect to the jurisdiction agreement on the efficient resolution of the dispute as a whole, taking into account other parties or potential parties and the risk that the dispute may be fragmented.[70] The proposal in this article is that this be extended so that the court may also, as a factor, take into consideration whether resolving the dispute in the court chosen by the parties would have a negative environmental impact which, alongside other considerations, justifies departing from their agreement. It is, once again, not suggested that the impact of this factor would necessarily outweigh other considerations, but rather that the benefit to the parties from their agreement (such as the legal certainty they aim to achieve, and their preference for a particular forum) needs to be weighed against the costs which that choice imposes on the global public through its environmental impact.

This is, it must be acknowledged, a somewhat controversial suggestion, as there are many policy reasons to give effect to jurisdiction agreements, and perhaps few cases in which this refusal may be clearly justified. Perhaps such a case may arise where two parties from the same foreign jurisdiction have exclusively chosen the English courts to resolve disputes relating to a contract which is local to that foreign jurisdiction, even though their own courts would be capable of resolving the dispute. Such a scenario is relatively unlikely in practice, and it is admittedly more likely that in many circumstances other considerations would weigh in favour of giving effect to the jurisdiction agreement. In some cases, for example, two parties from different jurisdictions will have chosen the English courts exclusively to ensure a neutral forum because of concerns of possible bias – denying them their choice because of its environmental impact would seem unsatisfactory in such cases, because there may be no alternative forum which is any more efficient which offers the same neutrality.[71] In addition, in

[69]See, for example, Paul Torremans *et al*, *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press, 2017), 413; Lawrence Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (16th edn, 2022), [12-105] *et seq*.

[70]See, for example, Mills, *supra* n 11, 142ff.

[71]It would, in any case, be difficult for the courts to second-guess whether the doubts as to the neutrality of alternative forums, expressed by the parties through their selection of the English courts, are justified.

many cases the fact that the English courts have been chosen exclusively might lead other courts not to accept jurisdiction, creating the risk that if the claimant is denied access to the English courts, they will be denied access to justice. Such considerations may play a role in either the first dimension of the *forum conveniens* or *forum non conveniens* discretion in England (as they affect whether a more appropriate alternative foreign court is available), or in the second dimension, focused on whether it is necessary for the court to exercise its jurisdiction to ensure that the claimant has access to a forum which is able to provide justice in the case at hand. This may lead the court to exercise jurisdiction even if, having taken environmental factors into account, the balance of convenience or efficiency would be in favour of the dispute being resolved elsewhere. Accepting that in some cases inefficient choices will therefore be enforced, the environmental cost which choice of court agreements may cause could and should also be addressed through persuading parties not to enter into agreements in favour of physically remote courts, or through adopting measures to minimise the impact of an environmentally costly choice of forum.

This leads immediately to a fourth point which is important to note. In evaluating the environmental impact of litigation it is necessary to take into account any technological measures which might be available to reduce that impact.[72] The experience of recent years has demonstrated that, in many contexts, it is possible to have meetings or hearings remotely without the need for travel. Indeed the English courts demonstrated a significant degree of adeptness in adapting to lockdown conditions,[73] and operated throughout the period of the pandemic – although these changes were justified by health rather than environmental concerns, there is no reason why they may not be continued even if their motivation changes, and indeed that prospect seems likely.[74] The Business and Property Courts have a long established reputation for the

[72]Such measures will, of course, potentially also affect the costs to the parties of litigation which is remote from the underlying facts, as virtual hearings may be less expensive for them than transportation costs. See discussion of this issue in Davies, *supra* n 49. The additional impact such measures will have on environmental considerations does, however, potentially give them greater weight which is not captured in the traditional approach to the exercise of jurisdictional discretion.

[73]See, for example, the Remote Hearings Protocol issued by the Judiciary of England and Wales on 26 March 2020; Practice Direction 51Y of the Civil Procedure Rules ("Video or Audio Hearings During Coronavirus Pandemic").

[74]Chapter 2 of the Judicial Review and Courts Act 2022 establishes a framework for more enduring rules for online procedures, including in section 22 providing for a new Online Procedure Rule Committee (which was duly established in June 2023), suggesting that the shift online is more long term. On the other hand, there may be a trend toward reverting to in-person witness evidence as a default requirement: see, for example, *United Technology Holdings Ltd v Chaffe* [2022] EWHC 150 (Comm); *Jackson v Hayes* [2022] EWHC 453 (QB). Time zone differences may also sometimes present obstacles to the remote participation of witnesses, although such inconvenience ought to be weighed against the impact of requiring travel.

use of electronic documentation and filing, have increasingly utilised video-conferencing facilities for hearings, and are likely to do so more in the future.[75] In international cases, the Supreme Court has further already endorsed taking into consideration the possibility of using such processes and facilities when determining the relative convenience of alternative forums under the doctrines of *forum conveniens* or *forum non conveniens*.[76] Taking into account the environmental costs of transportation as an additional factor in determining where proceedings will take place would, indeed, be beneficial in adding weight to these considerations and providing additional incentives for these developments. First, there would be incentives for the English courts to further develop and utilise remote conferencing facilities, as this would increase the prospect of proceedings being heard in England even if the witnesses are located elsewhere.[77] Second, there would be an incentive for parties to agree to utilise virtual alternatives to transportation, particularly as a means of persuading a court to exercise or not to exercise jurisdiction. For example, a claimant seeking to bring proceedings in the English courts in a case in which witnesses are located remotely might seek to persuade the

[75]See further, for example, The Right Hon. Sir Geoffrey Voss, Master of the Rolls, "The Future for Dispute Resolution: Horizon Scanning", Sir Brian Neill Lecture 2022, The Society of Computers and Law, available at https://www.judiciary.uk/wp-content/uploads/2022/03/MR-to-SCL-Sir-Brain-Neill-Lecture-2022-The-Future-for-Dispute-Resolution-Horizon-Scannings-.pdf. A recent example of evidence given by videolink may be found in *CRF Ltd v Banco Nacional de Cuba* [2023] EWHC 774 (Comm); in another recent example, however, the quality of the video evidence presented difficulties: *Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd* [2023] EWHC 1839 (Ch). See further Business and Property Courts of England and Wales, *Commercial Court Guide* (11th edn 2022, revd July 2023), available at https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/litigating-in-the-commercial-court/commercial-court-guide/, section H.4; Civil Procedure Rules, Practice Direction 23A, paras 6.1 and 6.3.

[76]See, for example, *Vedanta Resources PLC v Lungowe* [2019] UKSC 20, [86]. See also, more recently, *Limbu v Dyson Technology Ltd* [2023] EWHC 2592 (KB), [87], noting that "the English Court will direct that evidence can be given remotely if that is requested by any party", and (framing this exclusively in terms of benefit to the parties) that this would "reduce the practical inconvenience and cost of witnesses flying to, and being accommodated, in England". For a similar argument in relation to the US, see Christabel Narh, "Zooming Our Way Out of the Forum Non Conveniens Doctrine" (2023) 123 *Columbia Law Review* 761.

[77]It is important to note, however, that some states may object to a party giving evidence before the English courts remotely from their territory – see discussion in *Interdigital Technology Corp v Lenovo Group Ltd* [2021] EWHC 255 (Pat); *Agbabiaka* (evidence from abroad, Nare guidance) [2021] UKUT 286. In some cases assistance may be found in the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to which the United Kingdom is a party: see https://www.hcch.net/en/instruments/conventions/full-text/?cid=82, and the additional information at https://www.hcch.net/en/instruments/specialised-sections/evidence. See further Annex 3 to Practice Direction 32 of the Civil Procedure Rules.

English courts to hear the case by undertaking to use remote hearing procedures rather than incur transportation costs with an environmental impact. A defendant seeking to persuade the English courts not to hear a case, despite the presence of witnesses in England, might similarly undertake to use any remote hearing procedures available to the foreign court. In either case, the benefit of taking into account environmental costs is to incentivise parties to reduce those costs, which would very likely assist in the development of technological alternatives to carbon emitting transportation. Another possible measure to increase the efficiency of proceedings is for a judge to carry out hearings in a foreign state in which the majority of the evidence and witnesses are located – separating the physical venue from the legal forum – a measure which is possible in at least some circumstances, although "very exceptional".[78]

The establishment of such alternatives is arguably precisely what is necessary to maintain a global commercial litigation marketplace in a world in which the real costs of global transportation ought to be recognised – the marketplace needs to function in an increasingly "virtual" manner, without incurring transportation costs, as the free choices of parties ought to be restricted where they impose negative externalities in the form of public costs. Taking the lead in incentivising the development of a (lower-emissions) virtual litigation market is an opportunity for the English courts to maintain their position as world leaders in international commercial litigation. Being at or near the forefront of the development of virtual alternatives to traditional litigation procedures would potentially attract more litigants from around the world to resolve their disputes in the English courts – reduced environmental costs will invariably also come with lower costs for the parties, even if that reduction does not fully capture the environmental benefit. As a result, even if taking into account sustainability considerations leads to a small number of cases not being heard in the English courts, the ultimate impact may well be economically beneficial to the United Kingdom.

E. Arbitration as an alternative to litigation

This article has examined the environmental impact of international civil litigation, with a focus on the rules governing the jurisdiction of the English courts. It is important to note, however, that many international civil disputes are not

[78]Business and Property Courts of England and Wales, *Commercial Court Guide* (11th edn 2022, revd July 2023), available at https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/litigating-in-the-commercial-court/commercial-court-guide/, section H.5.2. This unusual step was taken in the case of *Kalma v African Minerals Ltd*, as noted at [2018] EWHC 3506 (QB), [396], and [2020] EWCA Civ 144, [44]. For discussion of the relevant rules and the advantages and disadvantages of different options for sitting or hearing evidence remotely, see also *Skatteforvaltningen v Solo Capital Partners LLP* [2024] EWHC 19 (Comm).

resolved through litigation in court, but rather through arbitration. Arbitration offers an alternative "service" in the global dispute resolution marketplace, and thus the possibility of an additional form of "forum shopping", in favour of a private alternative to public courts. It requires the consent of both parties, and thus ordinarily arises as a result of the second form of forum shopping discussed above (selection of a forum by mutual agreement in advance of a dispute arising), although it is also possible for arbitration to occur under the first form of forum shopping discussed above (unilateral selection of a forum by the claimant after a dispute has arisen) if the defendant accepts the claimant's submission of a dispute to an arbitral tribunal. The questions of sustainability addressed in this article raise distinctive concerns in this context, which are briefly addressed in this section. Three points in particular ought to be noted.

The first is that arbitral tribunals do not (unless the parties exceptionally provide otherwise) have a discretion as to whether or not to exercise their "jurisdiction" on public interest grounds. Arbitrators are, in this respect, in a similar position to judges in the courts of states which are party to the Hague Choice of Court Convention 2005 – if the parties have designated a given forum, then there is little scope to depart from their choice on the basis of externalities or public interest considerations, such as the environmental costs of their choice. Certain forms of dispute may be considered non-arbitrable because of the public interests they raise,[79] but this relates to the subject matter of the dispute, not any public interest in the impact of the process under which it is resolved.

A second important point is that the separation of the "venue" from the legal "seat" of an arbitral tribunal is, however, more common than the separation of venue and forum in the context of litigation (a possibility noted above).[80] The selection of an arbitral seat by the parties commonly carries with it an expectation that the arbitration will physically take place in the territory of the seat, but this is at least generally not a legal requirement.[81] Arbitrators may prefer for a variety of reasons – including sustainability considerations – to hold hearings in a different location, or indeed to hold hearings in various locations. As a consequence, arbitrators will frequently have more scope to reduce the environmental impact of the

[79]See generally, for example, Mills, *supra* n 11, Chapter 6; Loukas A. Mistelis and Stavros L. Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Kluwer, 2009).

[80]See, for example, *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194 (Comm).

[81]In theory the law of the seat might impose a restriction on venue, either as part of its arbitration law or through the supervisory jurisdiction of its courts, but this is unlikely in practice. Although courts distinguish between and generally allow separation of venue and seat, if the parties indicate a venue in the absence of an express choice of seat that may, depending on the circumstances, be taken as an implied choice of the seat. See, for example, *Shashoua v Sharma* [2009] EWHC 957 (Comm); *Bharat Aluminium Co. v Kaiser Aluminium Technical Services* (2012) 9 SCC 552 (Supreme Court of India); *BGS SGS Soma JV v NHPC Ltd* (2020) 4 SCC 234 (Supreme Court of India).

choice by the parties of an arbitral seat which is remote from the events or evidence underlying the dispute. The practice of determining the most efficient venue separately from the seat arguably ought to increase to reduce the environmental impact of arbitration, both as a matter of public concern and as a matter of minimising costs for the parties.

A third and related point is that, in comparison with national courts, arbitral tribunals often have greater flexibility in determining the procedures under which an arbitration will be carried out. That flexibility may be exercised by the parties, in customising the arbitral procedures by agreement, or by the arbitrators in the absence of party agreement. Many arbitrations are carried out under the auspices of arbitral institutions which generally also provide flexible procedural rules. Such institutions operate in competition with one another, as well as with national courts, in seeking to attract dispute resolution business.[82] In consequence, they are often innovative in developing procedures which might resolve disputes more efficiently to the benefit of the parties. There are already signs that this innovation may spur arbitral institutions to take the lead in developing a virtual dispute resolution marketplace – we may note, for example, the 2023 launch of the Dubai International Arbitration Centre's "metaverse" platform for virtual dispute resolution proceedings for parties from anywhere in the world, potentially offering a completely deterritorialised service.[83] An increased consciousness of the environmental impact of international arbitration is also reflected in the arbitration "Green Pledge" campaign,[84] which (among other things) encourages the use of videoconferencing facilities as an alternative to travel, as well as electronic correspondence and documentation. If courts are slow to move in response to these concerns, there is a risk that in the global dispute resolution marketplace they will be perceived as less adapted to the needs of a global economy which is becoming increasingly focused on sustainability considerations.

F. Conclusions

One of the defining issues of our time is the tension between globalised markets and sustainability considerations. This tension equally arises in relation to the globalised litigation market, which facilitates the resolution of international civil disputes remotely from the parties or events underlying the proceedings – frequently necessitating greater transportation expenses, leading to a negative environmental impact. At present, this impact is not taken into account by the English courts in their determination of whether or not to exercise jurisdiction in a given case,

[82]See generally, for example, Mills, *supra* n 5.
[83]See, for example, https://uaenews247.com/tag/dubai-international-arbitration-centre-diac-launches-its-metaverse/.
[84]See https://www.greenerarbitrations.com.

because their exclusive focus is on the efficient and just resolution of the dispute as between the parties, excluding public interest considerations and only considering the costs incurred by the parties themselves. Environmental costs, which are not (in the absence of full and effective emissions pricing mechanisms) captured by such considerations, are therefore ignored. This article has argued that the English courts should open up the *forum conveniens* and *forum non conveniens* discretions to such considerations, taking into account not just the interests of the parties but also the collective public interest in minimising the environmental cost of resolving international disputes – a consideration which this article has dubbed the *forum non calefaciens* factor. This consideration ought to affect the jurisdiction of other international commercial courts as well, but this article limits its conclusions to the English courts because the mechanism for doing so may vary between systems, although similar changes might readily be adopted in other common law systems. Even if this change might mean declining jurisdiction in some cases which would otherwise be heard in England, one incidental benefit of this approach would be to incentivise the use of technological alternatives to transportation, thereby assisting to construct a virtual globalised litigation market which could ultimately support and promote, on a more sustainable basis, the leading position of the English courts.

Disclosure statement

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