Standard (and burden) of proof for jurisdiction agreements

Courts are often required to determine the existence or validity of jurisdiction agreements. This can raise the question of the applicable standard of proof. In common law jurisdictions, the question is not free from controversy. In particular, Stephen Pitel has argued on this very blog that jurisdiction clauses should be assessed on the balance of probabilities, as opposed to the "good arguable case" standard that is commonly applied (see, in more detail, Stephen Pitel and Jonathan de Vries "The Standard of Proof for Jurisdiction Clauses" (2008) 46 Canadian Business Law Journal 66). That is because the court's determination on this question will ordinarily be final – it will not be revisited at trial.

In this post, I do not wish to contribute to the general debate about whether the "good arguable case" standard is appropriate when determining the existence and validity of jurisdiction agreements. Rather, I want to draw attention to a particular feature of the English "good arguable case" standard that can cause problems when applied to jurisdiction agreements. The feature is that, in cases where the court is unable to say who has "the better argument", it will proceed on the basis of plausibility (*Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] WLR 3514 at [79]-[80]). Application of this lower standard may lead to unfairness in the treatment of jurisdiction agreements. The party who bears the burden of proof will get the benefit of the doubt that is inherent in the test. However, there is no principled way to allocate the burden. Should it be the party seeking to rely on the agreement, with the result that there is a kind of bias in favour of upholding jurisdiction agreements, or should it be the plaintiff, as was the approach taken recently by the New Zealand High Court in *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466?

The High Court in that case had granted an interim anti-enforcement injunction in relation to a default judgment from Kentucky (see *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881, and my earlier post here). Kea Investments Ltd (Kea), a British Virgin Islands company, alleged that the US

default judgment was based on fabricated claims intended to defraud Kea. It claimed that the defendants – a New Zealand company, an Australian resident with a long business history in New Zealand, and a New Zealand citizen – had committed a tortious conspiracy against it and sought a declaration that the Kentucky judgment would not be recognised or enforceable in New Zealand. Two of the defendants – Wikeley Family Trustee Limited and Mr Wikeley – protested the Court's jurisdiction.

The Court set aside the protest to jurisdiction, dismissing an argument that Kea was bound by a US jurisdiction clause. One of the reasons for this was that the jurisdiction clause was unenforceable by virtue of Kea's allegations of fraud and conspiracy (see here for a more extensive case note). The Court applied the "good arguable case" standard to determine the relevance of the allegations. It relied on the test in *Four Seasons Holding Inc v Brownlie* [2017] UKSC 80, which sets out the good arguable case standard applicable to "jurisdictional facts" that form the basis for an application to serve proceedings outside of the forum. Gault J considered that, even though the test in *Four Seasons* was concerned with the different scenario of a plaintiff seeking to establish jurisdictional facts to support an assumption of jurisdiction by the forum court, it was appropriate to apply the test by analogy to the defendants' application for a stay or dismissal of the New Zealand proceeding by virtue of the US jurisdiction clause (at [44]).

However, the good arguable case test is especially difficult to apply in cases where the court is unable "to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument" (at *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] WLR 3514 at [79]). In such cases, the good arguable case inquiry is no longer a relative inquiry, and all that is needed is a plausible (albeit contested) evidential basis. It follows that the question of the *burden* of proof may become determinative.

Gault J considered that it was the plaintiff, Kea, that had to show a plausible evidential basis here. Thus, the Judge considered that Kea had to show "a plausible evidential basis" for its argument that there was no jurisdiction clause: "[t]he test is whether there is a plausible (albeit contested) evidential basis for the claimant's case in relation to the jurisdiction clause (by analogy with the application of the relevant gateway). It is not whether the defendants have a plausible (albeit contested) evidential basis for their position that the Coal

Agreement was executed by Kea" (at [60], see also [63]). In other words, it was Kea who was given the benefit of the doubt inherent in the test, and not the defendants.

It is likely that Gault J's approach can at least to some extent be explained by reference to the peculiar facts of the case. However, if his approach were adopted more generally, the result would be that in cases of evidential uncertainty that cannot be resolved, the good arguable case inquiry necessarily favours plaintiffs over defendants, and New Zealand jurisdiction agreements over foreign jurisdiction agreements. This would not be a desirable outcome.

The alternative is that the burden is on the party seeking to enforce the jurisdiction agreement. This seems to be the view adopted by *Dicey, Morris and Collins on the Conflict of Laws* (16th ed, at [12-093]). However, this approach is problematic too, because it introduces a bias in favour of upholding jurisdiction agreements. In *Kaefer*, the plaintiffs sought to rely on an English jurisdiction agreement under Art 25 of the recast Brussels Regulation. Commenting on the case, Andrew Dickinson argued that the application of the test of plausibility was not consistent with the scheme of the Regulation, which requires that "the defendant, not the claimant, … be given the benefit of the doubt" ("Lax Standards" 135 (2019) LQR 369). Dickinson pointed to the "significant unfairness to the defendant of being required to defend proceedings before a court other than that of his domicile in the absence of conclusive and relevant evidence that the court has jurisdiction under the Regulation". I think that the concern is valid more generally. Why should any party – whether it is the defendant or the claimant – be held to a jurisdiction agreement even though there is only a plausible basis for its existence?

It follows that courts should always try to engage in a relative inquiry when determining the existence and validity of jurisdiction agreements. It is likely that this is already occurring in practice, and so perhaps the concerns raised in this post are more theoretical than real. If so, it is in the interest of legal certainty and accessibility that the test be clarified.