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What Next For Forum Non Conveniens?

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What is *FNC?*

- E&W courts have inherent discretionary jurisdiction to stay proceedings in E&W.
- For a long time the discretion was viewed narrowly, especially in "service in" cases (proceedings had to be "oppressive or vexatious").
- Test started to be more liberally interpreted in string of House of Lords cases in 1970s. *FNC* recognised as part of law in 1984.

"Basic principle" - *Spiliada*

- Stay "where there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."
- Alternative forum must be "clearly or distinctly more appropriate" than E&W. If not, no stay.
- "Service in": burden on D. "Service out": burden on C.

Appropriateness

- Appropriateness, not convenience.
- Sometimes couched in terms of "natural forum" or "the most real and substantial connection." Factors are "legion".
- Factors affecting convenience and expense relevant, but so are other factors going to connection between forum, parties and claim (such as applicable law, and places where the parties reside or carry on business).

"Second limb"

- If there is another forum that is *prima facie* clearly the more appropriate forum, a stay will be granted.
- Unless C proves there are circumstances by reason of which justice requires that a stay should not be granted.

Procedure

- Supposed to a summary procedure (!)
- Permission for expert evidence?
- Oral evidence of any kind very unusual (*BB and ors v Al Khayyat*).
- CPR Part 11, but applications beyond 14 days can be made.

What is coming?

(1) Far greater scope of application

- Now of central importance.
- Post-Brexit Day, the UK fell out of the rules-based Brussels regime from which, following *Owusu v Jackson*, FNC was banished.
- Applies, with some exceptions, across the board, in situations where it never did before. Now applies to EU cases.
- Montreal, Athens, consumer contract cases such as Package Travel, still outside scope. But all foreign torts now subject to it.

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What is coming?

(2) How cross-border cases are litigated

- In many cases jurisdiction uncontroversial, e.g. D's domicile, *Odenbreit*, consumer and employment claims.
- Now many will be subject to a discretionary regime. Jurisdiction a "live" issue in far more cases. Many "clear cut" cases now "either way", e.g. *Klifa* pre and post Brexit Day.
- Even more "front-loading" of work – e.g. it repays to gather foreign law evidence early. *Klifa* illustrates the value.

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What is coming?

- Litigating in a post-pandemic world
  - Accelerates the shift
  - Accessibility and transfer of documentary evidence
  - Giving evidence remotely(see e.g. *Vedanta*)
  - Expert witnesses

What is coming?

- Application of the second limb to the EU27.
  - Must be "clear and cogent" evidence that proceedings before foreign court would fall below minimum standards of what justice would require.
  - Never had to, or been able to, consider doing this in respect of EU27 before.
  - Probably not in *Cherney*, *Abramovich*, or *Altimo, Qatar Airways* territory. But consider delay, inexperience of judiciary in dealing with certain types of case (brain injury, incapacitous claimants, group actions), use of expert evidence, provision for interim payments.

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What is coming?

(3) Further reform

- Accession to Lugano - “no for now”.
- Already some matters are carved out, e.g. CPR r6.33 - consumer and employment contracts (pre-Brexit Day) - CJJA 1982, jurisdiction agreements.
- Appears to be a recognition of benefits of streamlined, rule-based jurisdiction process. Change to the gateways is actively being considered by the Rules Committee.

What is coming?

- Rules Committee sub-committee determined in November 2021 to consider:

  "wider, post-Brexit related work with the Lord Chancellor's Advisory Committee on Private International Law… The initial objective will be to produce proposals concerning the gateways in PD 6B for service outside the jurisdiction where the court's permission is required. After an inaugural meeting of the expanded sub-committee, the matter is expected to return to the CPRC in the first half of 2022."

- They did meet in February 2022 More of the same?

What is coming?

- They did meet in February 2022:

> "The work "raises many sensitive and legal complexities… the Sub-Committee's main focus has been PD6B and the Gateways… and thus the mechanics, rather than looking at broader issues of jurisdiction… the drafting exercise has been approached in the interests of brevity and usability. Next steps include liaison with the Private International Law Committee… in late February, followed by a focused consultation in the Spring, in readiness of a fuller report to the CPRC in May. The aim is that the amendments are incorporated into the next mainstream Update as part of the October 2022 in-force cycle."

Case Study – Klifa v Slater

- Skiing accident – 27.1.2018
- Courchevel, France.
- C domiciled and resident in France (Orleans area);
- D1 domiciled and resident in England (on holiday);
- D2 = insurer, domiciled in England;
- Accident admitted to be sole fault of D1.
- C brings claim against D for personal injury in High Court.

Case Study – Klifa v Slater

- French law applied.
- Claim for around £150k - £200k (SOL pleading French law damages).
- Claim issued on 14.1.2021 (LOC 20.4.2018).
- D applied for claim to be stayed on grounds of forum non conveniens
- Hearing before Master Dagnall 2.11.21 (judgment 28.2.22)

Case Study – Klifa v Slater

- French law applies
- But E&W rules concerning adducing of expert evidence apply, hence likely to be higher costs recoverable in English claim than French claim
- Outcome in damages may be different even if both claims would be applying French law:

  - *Wall v Mutuelle de Poitiers* [2014] 1 WLR 4263 (CoA).

Klifa – factors pointing towards stay of English claim

- The location of the commission of the tort is the starting point (albeit that where liability is admitted the weight of this factor is *"very much less that it would otherwise have been"*.
- C's losses were and would be sustained in France, hence the dispute was more connected with France than E&W.
- French law applies – so French court would not need expert evidence on it (although there was not likely to be much dispute, and the issues were *"relatively simple and straightforward*").

Klifa – factors pointing towards stay of English claim

- C was French (but was able to travel to England and to give evidence in English).
- C's medical experts were French and would have required interpreters (this might also apply to D's experts).
- C would need to instruct an accountancy expert, who would be French (but C agreed to instruct one who could give evidence in English).

Klifa – factors pointing towards no stay

- C was able to give evidence in English and in England.
- C indicated that she did not intend to call any further factual witnesses.
- French claim would have to be heard in Abbeville, which was further from C (and much further from D) than London.
- C's French lawyer would not be able to represent her in Abbeville.
- C's accountancy expert would be able to give evidence in English.

Klifa – factors pointing towards no stay

- It was not clear that there would be any material dispute about medical evidence (D having not challenged it so far) – but Master Dagnall assumed there would be at least some.
- D was located in England, as were their solicitors (who had been dealing with case to date).
- Enforcement of French judgment in England would require application under Foreign Judgments (Reciprocal Enforcement) Act 1933 – would incur cost and delay.
- No relevance of potential claim for Subsequent Deterioration under French law

Klifa – conclusion on alternative forum

- Force in D's submissions, and *"if the question before me was an open one of which forum was simply the more appropriate, I suspect I would find it to be France."*
- But the test requires the alternative forum to be *"distinctly"* or *"clearly"* the more appropriate one.

- This test was not met:
  - English Defendant, and automatic enforcement against them;
  - Assessing quantum under French law ought to be a fairly formulaic and straightforward task, and England was no less convenient for the parties.

Klifa – second stage

- In any event, Master Dagnall went on to consider the second stage: *"achieving the ends of justice"*.

- Conclusion was that even had France been clearly the more appropriate forum, he would have declined to enter a stay on English proceedings on the basis of this second stage.

Klifa – second stage

- Claim had proceeded under E&W pre-action protocol:
    - Until 31 Dec 2020 there was not right to object on FNC grounds;
    - PAP involved front-loading of costs and investigations/evidence;
    - These costs would largely be irrecoverable in French proceedings;
    - No challenge from D to C's medical evidence before issue.
    - No suggestion from D before 31 Dec 2020 that the claim should be litigated in France (a *"somewhat tactical"* approach – although note *Bethell v Deloitte* [2011] EWCA Civ 1321 – no obligation to point out errors);

Klifa – second stage

- Plus:
  - Enforcement within E&W is a legitimate procedural or juridicial advantage to C (although see para 47, 50 of judgment – potential inconsistency on the application of this label to the enforcement and the costs point).
  - London is more convenient to C, esp having instructed English/Parisian lawyers (although this was of limited weight).

Klifa – points to take away

- Facts of this case are somewhat unusual (English D seeking stay of English proceedings – i.e. the enforcement point will often be the other way around).

- Transitional case – the costs point had more weight given the pre-Exit day position on FNC (*Owusu*)

- And liability not being in dispute was a crucial point. In other cases that may be determinative.

Klifa – points to take away

- But other more generally applicable points:
  - Applicable law may not be determinative (post-*Wall*).
  - "Convenience" factors may cut both ways, may have limited weight, and/or can be affected by parties (e.g. agreeing to travel/instruct bilingual experts);
  - Connection to the forum is key point;

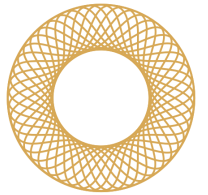
  - But juridicial advantages such as enforcement and possibly (though normally less likely) costs, can be important:
    - Query whether it can be argued that C will not obtain substantial justice in other forum? (hard to argue that re France)

Klifa – points to take away

- Also bear in mind practical evidential considerations:

  - Seemingly full witness statements filed by both parties – covering large number of points.
  - But even so some gaps (possibly arising at hearing):
    - E.g. costs recovery for Defendants in French proceedings c.f. QOCS (para 46).
    - Additional points made re witnesses in post-hearing correspondence (para 32);
    - No evidence on time to trial in France (para 38).
    - No challenge to C's evidence on costs in France (para 36)

  - If parties wish to assert points in their favour, they need to ensure the Court has adequate evidence before it to make a finding.



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