

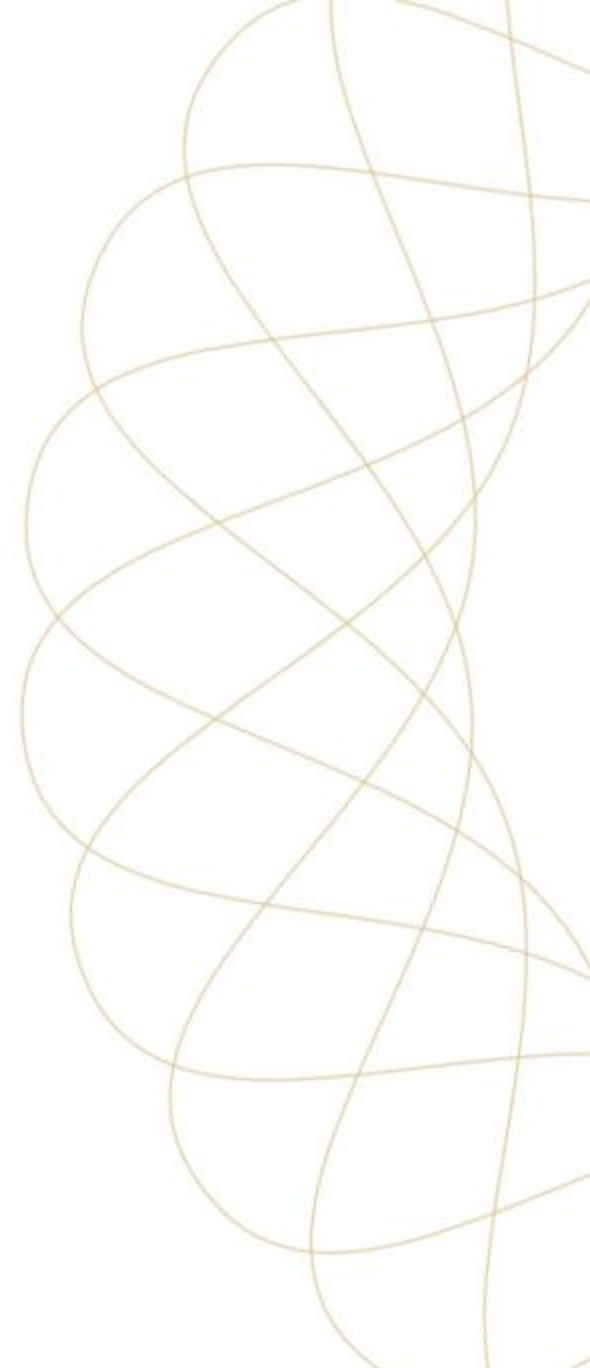
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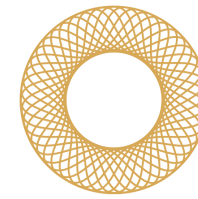
Forum Non Conveniens - Where Are We Now?

Sarah Crowther KC

Dan Clarke

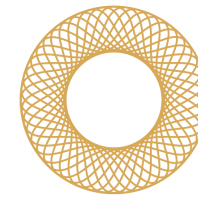
1 June 2023





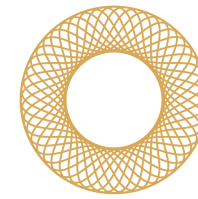
Century in the making

- Inherent discretionary jurisdiction to stay proceedings in E&W. For long time viewed narrowly. More liberally interpreted in string of House of Lords cases culminating in *Spiliada* in 1986: a stay may be ordered "*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.*"



Spiliada

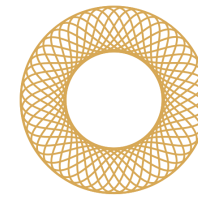
- Appropriateness, not convenience. Factors are “legion”. Convenience and expense relevant, but so too other factors going to connections between forum, parties, and claim.
- Alternative forum must be “*clearly or distinctly more appropriate*” (see e.g. *Klifa*).
- For “service in”: burden on D, for “service out”: burden on C.



Fergie time? The 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.

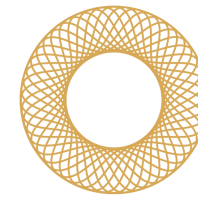




Scope

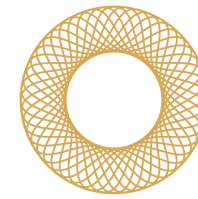
- Post-Brexit Day, the UK fell out of the rules-based Brussels regime from which FNC was banished (*OWUSU*).
- FNC now applies, with some exceptions, across the board, in situations where it did not before, such as EU cases.
- In many cases jurisdiction was as of right. Now discretionary and live issue in far more cases. Many clear cut cases are either way. Plus, a claimant often needs permission to serve out in advance.

Exceptions



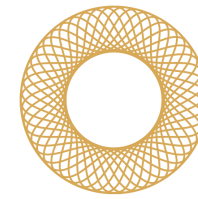
- “Full” exceptions:
 - Convention cases – Montreal and Athens.
 - Package travel (not strictly, but to all intents and purposes).
- Other exceptions:
 - Consumer contracts (s15 CJA 1982).
 - Employment contracts (s15 CJA 1982).
 - Jurisdiction agreements (CPR 6.33).
- Recognition of benefits of streamlined, rule-based jurisdiction process? But FNC probably still applies once D is served.

Recent cases



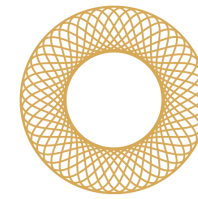
- *Klifa v Slater* [2022] EWHC 427:
 - Skiing accident in France.
 - Claim by French-domiciled C against English skier (D1) and English insurer (D2) permitted to proceed in E&W.
- *Samsung v LG* [2022] EWCA Civ 423
 - Contribution claim in competition case.
 - English proceedings stayed in favour of South Korea or Taiwan.
 - Main proceedings had been settled and were therefore of only marginal relevance to FNC for contribution claim.
 - Failure to evidence *Cambridgeshire* factor.





Recent cases

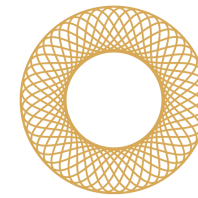
- *Charlton v Deffert* [2022] EWHC 2378:
 - RTA in France. Claim by English C against French driver. Liability and quantum in issue.
 - D had agreed to accept service by solicitors in England. This was not submission to the jurisdiction. D could still contest jurisdiction on FNC grounds. But burden was now on D.
 - As to the factors: *“The claim is on the face of it more one where the complexities of quantum come to the fore than any particular issues of liability likely to be taxing on an English Court and England in my judgment on these facts is the place to which the claim is most closely connected.”*



Recent cases

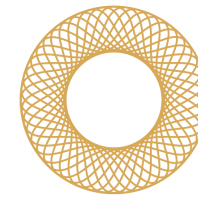
- *Moore v MACIF* (unreported)
 - RTA in France. Liability and quantum in issue (it appears).
 - France held to be the appropriate forum.
 - Accident in France.
 - French law applied to liability and quantum: *“French courts are better placed to examine concepts such as consolidation and future deterioration”*.
 - D domiciled in France.
 - Cs would not have to attend trial in the French proceedings.
 - English proceedings not far advanced.

Upcoming rule changes?



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- Accession to Lugano – dead for the foreseeable. But further internal changes likely. Hard to say what exactly.
- Rules under review by CPRC Sub-Committee and LCD's Committee.
 - CPRC proposed changes to gateways, focusing on *"the mechanics, rather than looking at broader issues of jurisdiction... the drafting exercise has been approached in the interests of brevity and usability."*
 - Gateway proposals came into force in October 2022. Not fundamental. But clarification of contract gateway helpful.
 - Committees' work continues.
- Proposal from Briggs & Dickinson.

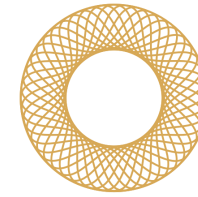
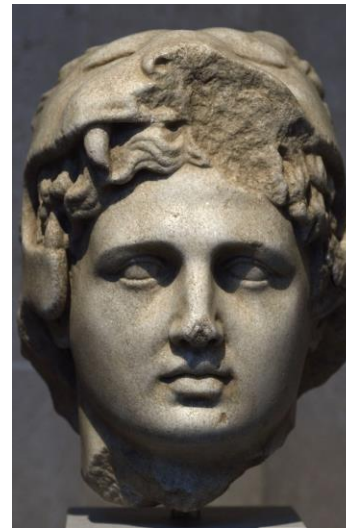


The practical side

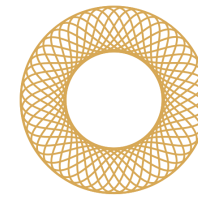
- The application for permission to serve out.
 - Do you need one?
 - Which gateways?
 - Evidence in support.
 - How to use of foreign law.
 - Front loading.
 - *Ex parte* applications - full and frank disclosure.

The practical side

- Service of proceedings
 - How to effect service.
 - Serving within the 6 months.
 - Extensions of time for service – if you do not act promptly and have a good reason, supervening good reason or impossibility will not save you (*Qatar v Phoenix* [2022] EWCA Civ 422).



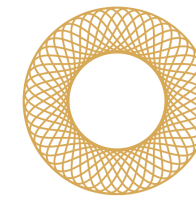
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The practical side

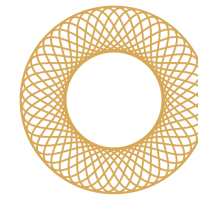
- Applications challenging jurisdiction:
 - CPR Part 11 and time limits.
 - Submission – deliberate and accidental.
 - Expert evidence and case management:

“Permission ought to be sought under CPR 35.4 to reply on foreign law evidence in all cases. It would also assist if there were a list of issues approved by the court for the foreign experts to address at the very latest before the applicant’s initial report (usually served with the application to challenge jurisdiction) is responded to...” (Gulf International v Aldwood [2019] EWHC 1666).



The practical side

- The final hearing: summary procedure (supposedly).
- Oral evidence is theoretically possible but practically never happens.
- Costs risks on a jurisdiction challenge in a PI case.
- Getting it right first time – a compelling point that would have changed the outcome at first instance is no use if taken for the first time on appeal (*Samsung v LG* [2022] EWCA Civ 423).



Thank you

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