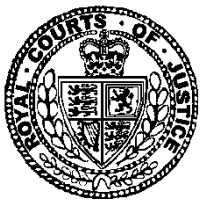

Neutral Citation Number: [2023] EWHC 2674 (KB)

Case No: QB-2021-003044

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 September 2023

Before :
Dexter Dias KC
(sitting as a Deputy High Court Judge)

- -

Between :

Chelsea Roach	**Claimant**
- and -	
Vallarta Adventure, S.A de C.V	**Defendant**

- -
- -

Mr Eliot Woolf KC and Mr Daniel Clarke (instructed by **Anthony Gold Solicitors LLP**) for the **Claimant**
Ms Kate Holderness (instructed by **Clyde & Co. LLP**) for the **Defendant**

Hearing dates: 9 June 2023

- -

JUDGMENT

Dexter Dias KC :

(Sitting as a Deputy High Court Judge)

1. This is the judgment of the court.

2. To assist the parties and the public follow the court's line of reasoning, the text is divided into six sections, as set out in the table below.

Section	Contents	Paragraphs
I.	Facts	5-8
II.	Applications & issues	9-13
III.	Materials	14
IV.	Issue 1: Consumer contract	15-37
V.	Issue 2: Tort gateway	38-76
VI.	Disposal	77-78

B123: hearing bundle page number;

CS/DS §45 claimant/defendant skeleton paragraph number.

3. In this personal injury claim, the parties invite the court to resolve a series of applications and cross-applications. To understand them, it is necessary to briefly set down the facts.

4. The claimant is Ms Chelsea Roach. She is represented by Mr Woolf KC and Mr Clarke of counsel. The defendant is Vallarta Adventure, S.A. de C.V. The defendant is a company incorporated in Mexico and is represented by Ms Holderness of counsel. The court is grateful to all counsel for their invaluable assistance.

§I. Facts

5. In September 2019, the claimant and a close friend Shona Butler took a two-week holiday to Mexico. They went to the tourist resort of Puerto Vallarta on Mexico's Pacific coast. At their hotel, they booked an excursion with a representative of TUI, a well-known international travel agency. It was an adventure excursion - an "All-Terrain Safari" - using "ATVs", All-Terrain Vehicles. They were Polaris RZRs, a type of cross between jeeps and sand buggies.

6. The safari was booked for 18 September 2019. Before the excursion began, both the claimant and Ms Butler attended the defendant's office near to the harbour, where

they were invited to sign an agreement. For the purposes of this judgment, it had two significant clauses: one that purported to waive liability and another that purported to settle jurisdiction for disputes, conferring it on the courts of Puerto Vallarta. Ms Roach and Ms Butler signed the agreement.

7. There was a safety briefing in an area of tropical forest and the tourists were given a safety helmet and tabard. Then the vehicles set off. The claimant and Ms Butler had a vehicle to themselves. There was something like a small convoy of ATVs, led by a tour guide on an off-road trek. Initially, Ms Roach drove, then at a waterfall stop, they swapped over and Ms Butler took over the driving. There is video footage from a mobile phone that the court has viewed. It is harrowing in the extreme. As the ATV rounded a turn to the left in the forest track, the vehicle rolled over and severed Ms Roach's arm above the elbow. As stated, the footage and the accompanying soundtrack are deeply distressing.

8. By a claim form issued 6 August 2021, Ms Roach's claim is for damages for personal injury caused by this incident.

§II. Applications & issues

9. The applications before the court are as follows:

Defendant applications:

1. Set aside of the order granting permission for service out of the jurisdiction (application notice dated 22 November 2022);
2. Set aside of the service of the claim form and particulars of claim on the defendant;
3. Declaration that the English courts do not have or should not exercise jurisdiction in respect of the claim.

Claimant applications:

1. Permission to amend the claim form and particulars of claim (application dated 26 January 2023);
2. Grant of permission to rely on CPR r.6.33(2)(b)(ii);
3. (in the alternative) amendment of the order granting the claimant permission to serve out to include reference to CPR PD6B, paragraph 3.1, (4A)(b) and (c);
4. Dispensing with the requirement for re-service of the claim form with Form N510;
5. Declaration that the court has jurisdiction over the proceedings.

10. This intricate series of applications can be significantly simplified. It is reducible to two essential themes – two prime issues. They are as follows:

Issue 1:

Should the contract be deemed a "consumer contract" for the purposes of section 15B(1) of the Civil Jurisdiction and Judgments Act 1982, and thus can the claimant serve out without seeking the court's permission by reason of CPR r.6.33(2)(b)(ii)? ("Consumer contract issue")

Issue 2:

If not 1., should the court nevertheless be seized with jurisdiction due to the operation of the tort gateway? ("Tort gateway issue")

11. As to Issue 1, this is the essential purpose of the claimant's application to amend the claim form and particulars of claim: to frame the claim also, and alternatively, as a breach of contract – a consumer contract.

12. As to Issue 2, the defendant seeks to set aside a previous order of this court under CPR 6.36 and 6.37 (Master Cook), granting permission to serve out under the tort gateway.

13. Counsel helpfully addressed the court using this broad subdivision, submitting and replying on each issue in turn. The law is materially different on each question. I set the vital legal principles out, to the extent that they are relevant, as each issue is examined.

§III. Materials

14. I have been provided with a hearing bundle running to 1345 pages and a combined authorities bundle extending to 716 pages, containing the relevant statute, 11 cases and two commentaries. Counsel provided me with very helpful skeleton arguments, and I was sent the incident video. Judgment was reserved so the court could consider these materials in more detail and reflect on the rival submissions of counsel.

§IV. Issue 1: Consumer contract

15. By an application dated 26 January 2023 and pursuant to CPR 17.1(2)(b), the claimant applies to amend the claim form and particulars of claim to expressly plead a claim in contract as an alternative to the claim in tort set out in her original claim form from August 2021. Further, she seeks to rely upon the consumer contract gateway as a basis for the court having jurisdiction to determine the matter. The claimant seeks to invoke CPR r. 6.33(2)(b)(ii). This provides insofar as it is material:

> **Service of the claim form where the permission of the court is not required – out of the United Kingdom**
>
> **6.33**
> …
> (2) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under sections 15A to 15E of the 1982 Act and –
> (a) No proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom; and
> (b)

…

(ii) the defendant is not a consumer, but is a party to a consumer contract within section 15B(1) of the 1982 Act

16. Thus the claimant would be entitled to serve a claim form out of the jurisdiction without seeking the permission of the court in circumstances where the defendant is party to a consumer contract within section 15B(1) of the Civil Jurisdiction and Judgments Act 1982 **("the CJJA" or "the 1982 Act")**. To this end, the claimant applies for the contract between her and the defendant to be held to be a consumer contract for the purposes of the 1982 Act. If so, the claimant would be entitled to bring proceedings in this jurisdiction and would not need the court's permission to serve out. Therefore, this application, if successful, acts as another route to the case being tried in the United Kingdom. The application is firmly disputed by the defendant.

17. Sections 15A-E of the 1982 Act were inserted with effect from 31st December 2020 by virtue of the Civil Jurisdiction and Judgments (Amendment)(EU Exit) Regulations 2019. This was a measure taken in the circumstances of Brexit, this nation's departure from the European Union. The significance for this case is that if s.15B applies, then under s.15B(2)(b), a person is entitled to bring the proceedings in this jurisdiction because of s.15B(6). The provision would override any jurisdiction clause in the waiver agreement.

18. The provisions of Section 15B will apply if:

(1) The consumer is domiciled in United Kingdom (s.15A);

(2) The subject-matter of the proceedings and nature of the proceedings are within the scope of Article 1 of Regulation (EU) No.1215/2012 (*Brussels 1 Recast)* (s.15A);

(3) These are proceedings whose subject-matter is a matter relating to a consumer contract where the consumer is domiciled in the United Kingdom (s.15B);

(4) The claimant is a "consumer" in relation to a consumer contract - a person who concludes the contract for a purpose which can be regarded as being outside the person's trade or profession (s.15E(1));

(5) There is a "consumer contract" concluded with a person who "by any means" directs commercial activities to the United Kingdom (s.15E(1)(c)).

19. Certain aspects of this composite test are beyond doubt. The claimant was domiciled in the United Kingdom. The subject-matter and nature of the proceedings are within the scope of Article 1 of Brussels 1A Regulation as this is plainly a civil and commercial matter (s.15A). The claimant is without doubt a consumer, being for services beyond Ms Roach's trade or profession. What remains is a fundamental dispute about whether

the trading activities of the defendant were "directed at" the United Kingdom by any means.

20. The question of how and when trading activity is directed at the country of a consumer's domicile was considered by the European Court in *Pammer v Reederei Karl Schluter GmbH* [2011] 2 All ER (Comm) 888. The court provided invaluable but not exhaustive guidance about what "directing" commercial activity "by any means" means. The guidance is of such assistance that I cite it more extensively than usual.

21. At p.906 the court states:

> "60. The essential matter to be examined in the present cases is therefore the determination as to whether the undertaking directs its activities to the member state of the consumer's domicile or to several states including that member state. Various aspects have to be taken into consideration when interpreting the concept of the directing of activities under art 15(1)(c) of Regulation 44/2001. First, it is necessary to establish by various methods of interpretation how widely that concept is to be interpreted and then it is necessary to ascertain what criteria are relevant to an assessment as to whether the undertaking directs its activities to the member state of the consumer's domicile via a website.
>
> 61. When examining how widely to interpret the concept of the directing of activities in art 15(1)(c) of Regulation 44/2001 it is necessary, above all, to take up a position on two questions. First, it is necessary to clarify whether the mere fact that a website can be consulted is sufficient for the directing of activities within the meaning of art 15(1)(c). Secondly, it is necessary to examine whether a distinction has to be drawn between so-called 'interactive' and 'passive' websites when interpreting that concept. Interactive websites enable a contract to be directly concluded via the internet, whereas passive websites do not.
>
> 63. It can be established from a literal interpretation that the customary meaning of the concept of the directing of activities to a member state or several member states is that the undertaking actively endeavours to conclude contracts with consumers from that member state or those member states. It is therefore essential for there to be active conduct on the part of the undertaking, the objective and outcome of which is to win customers from other member states. An interpretation whereby mere access in the member state of the consumer's domicile to a website would suffice for the directing of activities to that state would ultimately undermine the significance of the concept of 'directing'. It can therefore be established on the basis of the normal meaning of the concept of the directing of activities that the mere fact that a website can be consulted on the internet is not sufficient to justify a finding that the undertaking is directing its activities to the member state of the consumer's domicile. Nor, on a literal interpretation, can any support be found for the view that, when interpreting this concept, a distinction is to be drawn between interactive and passive websites, as the wording of this article does not make any mention of different kinds of websites.

> 64. In the context of a teleological interpretation of the concept of the directing of activities, as correctly pointed out by the Netherlands government the interests of the consumer, who would like jurisdiction to lie with the courts of the place in which he has his domicile, have to be balanced against the interests of the undertaking, which endeavours to ensure that that court does not have jurisdiction unless the undertaking has consciously decided to direct its activities also to the member state concerned or to pursue its activities there. The objective of this article is therefore to secure special rules of jurisdiction for the consumer if the consumer contract indicates a sufficient connection with the member state of the consumer's domicile. At the same time, however, it must be accepted when interpreting this article that the undertaking can avoid the possibility of suing and being sued in the member state of the consumer's domicile by not directing its activities to the consumer's member state so that there is no sufficient connection with that state. If the legislature had wanted jurisdiction to be determined by the special rules governing consumer contracts simply on the ground that a website can be consulted on the internet, would have made the mere existence of a website a condition for the application of those provisions rather than the directing of activities[37]. It may therefore be concluded on the basis of a teleological interpretation that the mere fact that a website can be consulted on the internet is not sufficient for activities to be 'directed' within the meaning of art 15(1)(c) of Regulation 44/2001."

22. Then at p.929 (note that the paragraphing restarts):

> "64. The question which this raises is whether intention on the part of the trader to target one or more other member states is required and, if so, in what form such an intention must manifest itself.
>
> 65. That intention is implicit in certain methods of advertising.
>
> 69. It does not follow, however, that the words 'directs such activities to' must be interpreted as relating to a website's merely being accessible in member states other than that in which the trader concerned is established.
>
> 70. Whilst there is no doubt that the aim of arts 15(1)(c) and 16 of Regulation 44/2001 is to protect consumers, that does not imply that that protection is absolute (see, by analogy, with regard to Council Directive (EEC) 85/577 (to protect the consumer in respect of contracts negotiated away from business premises) (OJ 1985 L372 p 31), *E Friz GmbH v Carsten van der Heyden* Case C-215/08 (2010) Transcript (judgment), 15 April (para 44))."

23. From all this, I conclude that:

(1) The requirement of directing to or at can be satisfied by an intention by the trader to target the country of domicile, but intentionality is not necessary if the net effect of the trader's conduct and activities results in services being directed to a certain country;

(2) The trader does not have to "purposefully direct" its services towards the country of domicile in a substantial way;

(3) Having a website accessible from the country of the consumer domicile is in itself ordinarily unlikely to be sufficient;

(4) Instead, overall there must be a sufficient connection between the trader offering the service and the country of consumer's domicile.

Submissions

24. I now review the factors in favour of each party's case.

25. **Claimant**. The factors relied upon by the claimant are set out in the statement of Mr Samuel David of Anthony Gold, Solicitors LLP (B28-86/§22) and developed by counsel in the claimant's skeleton (see especially §21) and in oral submission. The chief factors can be reduced to:

(1) The defendant offers activities aimed at tourists – that includes British tourists;

(2) The defendant's website at the time of the incident mentions that activities are featured in international publications, including the BBC;

(3) The defendant's website references their excursions as being "world class";

(4) The website banner advertises its airport transfer services from Puerto Vallarta airport, which is an international airport;

(5) Direct flights to Puerto Vallarta are available from UK airports;

(6) The contact telephone number displayed on the banner of the defendant's website is an international number;

(7) Tourists feature in the photographs of the excursions;

(8) A reel of TripAdvisor reviews spooled near the bottom of the website splash page features reviews all in English;

(9) The website is entirely in English

(10) The prices are advertised in US dollars.

26. **Defendant**. The defendant relies on fewer factors but emphasises their cumulative effect. The factors are set out in evidence by Mr Carbajal, the defendant's present finance director (B330 onwards). He is very familiar with the company, having worked with it since 2014.

(1) The defendant has operated in Mexico for 25 years and, apart from a brief period when it was affiliated with a Bahamian company, it has only ever operated in Mexico;

(2) The defendant targets the local tourism market in Mexico, and the North American market;

(3) Steps taken to target the North American market include setting up telephone lines in the USA and Canada, displaying the defendant's website in the English language, showing prices in US dollars, registering Vallarta's website domain in the USA, and targeting its online advertising exclusively to Mexico, the USA and Canada;

(4) The "vast majority" (Carbajal1/19-20 (B333)) of the defendant's customers come from the USA, Canada and Mexico (together accounting for 95 per cent of its customers). By contrast, in 2019 and 2022, between 1.6 per cent and 0.6 per cent of the defendant's customers were British.

Discussion

27. The court must be clear about the meaning of the "directing" test. What does directing activities to a country mean? If a trader has a website accessible internationally, is that sufficient? In the modern world, one must grasp the reality of the unrelenting expansion and penetration of the internet, along with the subtly different world wide web, which is the pages one sees carried by the internet's network of computers. Thus, a website is, with certain limited exceptions, typically accessible from most places in the world, whether or not one is directing or intending to direct one's offering to that country or region. As such, and consistent with *Pammer*, I do not construe availability on the world wide web from a particular country as synonymous with directing activities towards that particular country. Conceivably, state officials in North Korea may be able to access the defendant's website (although the ordinary citizenry cannot). This cannot sensibly mean that Vallarta was directing its services to North Korea. This is made clear by the European Court in *Pammer*: mere accessibility of a trader's website in the consumer's country of domicile is insufficient.

28. Equally, I cannot think that if a single customer from the United Kingdom purchases an activity through the website, that constitutes directing the activities to the United Kingdom. A point powerfully made by Mr Woolf, using the defendant's own analytics, is that in 2019 there were 1600 British customers (B333, 331, 338). Against this, Ms Holderness submits that this must be seen in context: it was approximately 1.6 per cent, a very modest percentage of the defendant's total business activity. By 2022, this figure had fallen to 0.6 per cent (Carbajal B333/§20). Unquestionably, if the company focuses their commercial or marketing activity towards a particular country that would be sufficient to make a finding of "directing" for that country. In this case, I have no doubt that the United States falls precisely into that category. But what are the commercial activities and marketing efforts being directed towards the United Kingdom? I detect nothing specific. The fact that a very small percentage of clients come from the United Kingdom does not to my mind amount to directing commercial to this country. Naturally, no single factor is likely to be determinative, and thus the percentage of UK clients can form part of a global assessment. Decidedly, the 1600 people from the United Kingdom who used the defendant's services in 2019 should not be ignored. But it must be seen in context.

29. Here I find that the true focus of the defendant's commercial operation was Mexico and North America, and especially the USA. The evidence provided by the defendant on this point is persuasive. While the UK was not excluded, it was given no great or focused priority, certainly no more than anywhere else in the world. This is reflected

in the fact that the percentage of consumers that came from the UK was very small. I cannot see how it could amount to the commercial operation being directed towards the UK. Indeed, the percentage of UK customers is commercially negligible. Their disappearance would have very little impact on the defendant's commercial operation or viability. None of these factors, I emphasise, is determinative, but they build up the true picture. Looked at another way, UK clients were certainly not turned away. Why would they be? But they were not actively or specifically courted. Here there was no active targeting of marketing campaigns or spend by the defendant to United Kingdom. Indeed, such targeting as the trader undertook was directed principally at another continent, where the vast preponderance of its client-base hailed from: North America, and specifically the United States. The fact of the defendant being mentioned on the BBC seems to me more akin to establishing the defendant's credentials and reputation rather than a play for United Kingdom clients. It acts more as a stamp of international recognition, as is the reference to "world class". As Mr Carbajal puts it (B332/§14):

> "Notwithstanding this being a British broadcaster, the aim was to reinforce Vallarta's advertisement and marketing strategy to mainly attract customers from the United States and Canada, not the United Kingdom."

30. This is a business that offers services for tourists generally, and it is unsurprising that images appear of tourists using the services – it would be strange if there were no such images. But that is not the same thing as directing the offering at British tourists. There are no TripAdvisor reviews from the United Kingdom included on the website. Indeed, the two reviewers who specified their nationality state that they come from Canada. I cannot see the great significance of the TripAdvisor statistics in the Statista report (B337) cited by the claimant in oral argument about worldwide visits to the TripAdvisor website. The statistics show that after the United States, the website was most frequently accessed by people from the United Kingdom, just ahead of third-placed Canada (65.47, 2.21 and 1.98 per cents, respectively). Canada, of course, has a significantly smaller population than the United Kingdom. But the statistics support the rationale given by Mr Carbajal that the defendant linked to the TripAdvisor website because of the website's very substantial use by residents of the United States (B332/§16).

31. The international telephone number (code) is unsurprising given the large number of customers from outside Mexico, but one must look carefully at the wording on the website. It says that the international number is "Direct or within Mexico" (B335) and the international code is also used for the WhatsApp number, a way to call the trader for free from anywhere. Although the international number would be of use to United Kingdom consumers, it is not exclusively or primarily UK-focussed. In fact, there is a direct-dial number from the United States and Canada, but not from the United Kingdom.

32. Puerto Vallarta is an international airport and it is unsurprising that the defendant offers a transfer service from there. I do not see that as evidence of targeting United Kingdom consumers. While there are direct flights from the United Kingdom to Puerto Vallarta, there are also direct flights from the United States and Canada, and undoubtedly from many other international locations. It is true that the defendant's website is in English, but the language is of equal relevance to the undertaking's core North American market. Indeed, no one in this case disputes the point raised during

oral argument that the majority of the internet is in the English language (estimates vary from approximately 55 to 60 per cent). In any event, the website text is written in American English with licence spelled "license". Further, no one has sought to contest the point made on behalf of the defendant that English is the language very frequently used in tourism throughout the world.

33. The defendant website is a .com domain, rather than having the bespoke Mexican (.mx) suffix. But this can be readily anticipated for a trader with a tourist business. Here the website was specifically registered in the United States, as Mr Carbajal relates. He adds that the .com was aimed at specifically targeting its United States customer-base. Indeed, the court received written evidence from the defendant's finance director Mr Carbajal that the exclusive focus of its website online advertising, beyond Mexico, was the United States and Canada. His statement reads (B333):

> "17 Finally, in recent years Vallarta has used publicity and advertising channels such as Google Ads and social media platforms including Facebook, Instagram, Tick Tock and Twitter. These channels allow companies to target their advertising to specific jurisdictions.
>
> 18 To date, Vallarta directed the entirety of the annual advertising and publicity budget to the promotion and advertisement of their packages and tours in the United States, Canada and Mexico, through the above-mentioned channels. Contrastingly, I can confirm that Vallarta does not seek to advertise nor promote its services in the European market. As such, over the past few years none of the budget was allocated to the promotion of Vallarta's services in Europe."

34. There is no evidence to suggest any other marketing strategy. Further support for the defendant's claim of North American focus comes from the significant fact that the prices are in US dollars rather than pounds sterling. One might imagine that if there was some focus on the United Kingdom as an alternative client pool, there would be pricing in the sterling alternative. There is not. Beyond the accessibility of the website from the United Kingdom, I cannot see any active steps to target United Kingdom consumers specifically.

35. It is true that the excursion was booked through TUI, an international travel agency. But this was via a Mexican service agreement between TUI and the defendant. Indeed, the services could not be booked through TUI in the United Kingdom. The claimant booked the excursion through the TUI representative in the hotel in Mexico and not from the United Kingdom. It is not unusual for a third party to be used to secure the booking: Mr Carbajal points out that 70 per cent of the trader's booking are made in this way (B333/§21). I acknowledge the point well made by Mr Woolf that the European Parliament rejected wording that the trader must have "purposefully directed his activity in a substantial way" (cited from *Pammer* at [82]). Consequently, the court is examining the net effect of the trading and marketing activity by the trader. There must be a sufficient connection. In this, I do not take directing "by any means" to entail that negligible, trivial or purely very low-level incidental connection is enough. I understand the term to broaden the scope of relevant methods of forming what must nevertheless be a sufficient connection. Looked at in the round and its proper context, I am not satisfied that the 1600 United Kingdom customers of the services in 2019 do indicate that the defendant was targeting its offering towards this country. A sense of balance and proportion must be injected: this was a very small

percentage of its activity, between 1 and 2 per cent and in 2022, it dropped significantly from that level. Indeed, it is established law that the fact the trader has entered into contracts with other consumers from a particular country is not decisive: it is merely one type of evidence that may "lend support to a case that a trader was indeed directing its business to the consumer's place of domicile" (*Bitar v Banque Libano-Francaise SAL* [2022] 2 All ER (Comm) 298 at [28]). I thus weigh the fact of other British consumers, but it must be viewed in its proper factual context and I do not regard it as statistically or forensically significant.

Conclusion

36. The post-Brexit evolution of the legal regulations is aimed at protecting consumers, but it does not grant them absolute protection. I have carefully considered all the competing factors, and cannot find the necessary sufficiency of connection between the defendant and the United Kingdom for the purposes of s.15E and s.15(1). I judge that it would be strained and highly artificial to construe this as a consumer contract within the understanding of s.15E. Therefore, the claimant's application for permission to rely on CPR r. 6.33(2)(b)(ii) and/or CPR PD6B, paragraph 3.1, (4A)(b) is refused. I find that the defendant is not "a party to a consumer contract within section 15B(1) of the 1982 Act".

37. I dismiss this application by the claimant, and necessarily the applications to amend the claim form and particulars of claim.

§V. Issue 2: Tort gateway

38. The question of appropriate forum subsists beyond the rejection of the consumer contract gateway application. The defendant applies to set aside the permission previously granted to serve out of jurisdiction on the basis of the tort gateway. This was by virtue of an order of Master Cook dated 10 September 2021 (B35-36).

39. There are several constituent elements to a permission to serve out. Without the defendant conceding any liability issue, there is no dispute but that the claim in tort has a good prospect of success. The claim passes through the tort gateway, by the defendant's concession (DS §55). But where forum is disputed, the prime principle is that where a defendant is applying for a stay of proceedings on the ground of *forum non conveniens,* such stay will be granted if the court is satisfied that some other available forum with competent jurisdiction exists. That is, that this other forum is the appropriate forum for the trial of the action, the jurisdiction where the case may be tried more suitably for the interests of all the parties and the ends of justice (*Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460 at p.476C). Inevitably, this question has been considered on numerous occasions by the courts.

40. I have been supplied with and gratefully adopt the summary in *Dicey* at §12-029 (*Dicey, Morris & Collins on the Conflict of Laws, 16th edition (2022)* that is derived from the speech of Lord Goff of Chieveley in *The Spiliada.* Merely for presentational purposes, I have further parsed out the propositions for ease of analysis:

(1) In general the legal burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. The evidential burden will rest on the party who seeks to establish the existence of matters, which will assist that party in persuading the court to exercise its discretion in its favour;
(2) If the court is satisfied by the defendant that there is another available forum, which is clearly a more appropriate forum for the trial of the action, the burden will shift to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in England;
(3) The burden on the defendant is not just to show that England is not the natural or appropriate forum, but to establish that there is another forum which is clearly or distinctly more appropriate than the English forum;
(4) The court will look to see what factors there are which point in the direction of another forum as being the "natural forum", i.e. that with which the action has the most real and substantial connection. These will include factors affecting convenience or expense (such as availability of witnesses) and such other factors as the law governing the transaction and the places where the parties reside or carry on business, and also whether the claim is part of a larger overall dispute which would be damaged by being fragmented; or where the court has specialist expertise which ought to be made available in related cases;
(5) If the court concludes at that stage that there is no other available forum that is clearly more appropriate for the trial of the action, the court will ordinarily refuse a stay;
(6) If, however, the court concludes that there is some other available forum that prima facie is clearly more appropriate, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted. In that enquiry, the court will consider all the circumstances of the case, including circumstances that go beyond those taken into account when considering connecting factors with other jurisdictions;
(7) A stay will not be refused simply because the claimant will thereby be deprived of "a legitimate personal or juridical advantage", provided that the court is satisfied that substantial justice will be done in the available appropriate forum.

41. A central dispute between parties on the question of appropriate forum is the validity of a purported jurisdiction clause (Clause 5) in a contract that was signed by the claimant on 18 September 2019. Shortly before the excursion, the claimant signed a "waiver form". The document was in both Spanish and English.

> ***"READ THIS DOCUMENT CAREFULLY BEFORE SIGNING, THIS DOCUMENT HAS LEGAL CONSEQUENCES, WILL AFFECT YOUR LEGAL RIGHTS AND WILL LIMIT OR ELIMINATE YOUR ABILITY TO BRING FUTURE LEGAL ACTIONS.***
>
> *In consideration of being permitted by Vallarta Adventure, S.A. de C.V., ("Vallarta Adventures") to participate in the Program, I understand and acknowledge that by signing below I am legally agreeing to the statements in the following Program Registration, Release and Waiver of Liability, and Assumption of Risk and Indemnity Agreement ("Agreement") and that these statements are being accepted ad relied upon by the Released Parties, as defined below…*

> ***5. WAIVER OF JURY TRIAL/VENUE/HEADINGS.*** *This waiver extends to any claim that may be made by my heirs, assigns or legal representatives in Mexico and abroad, as well as any claim against any person or entity … who have been involved directly or indirectly in the promotion, marketing and/or sale of the Program or any other way. Should this Agreement be violated and suit be brought against any of the Released Parties, my right to a jury trial is waived and the proper jurisdiction and venue for resolution for any such suit, which shall be tried non-jury, shall be that of Puerto Vallarta, state of Jalisco, Mexico…*"

42. The defendant argues that this settles jurisdiction in favour of the courts of Puerto Vallarta, Jalisco State, Mexico. By virtue of the Clause 5, the courts of Puerto Vallarta are deemed to have exclusive jurisdiction. Since it is disputed, this court must examine whether this clause is valid in Mexican law. On this question, parties have adduced reports from experts in Mexican law. The court has read them in detail, no oral evidence having been adduced. Mr Jorge A. Torres Gonzalez provided the report relied on by the claimant. Mr Ramiro Besil prepared the report filed by the defendant. These are substantial documents (Besil, 6 April 2023 (B399-546); Gonzalez, 24 April 2023 (B547-818). There is a supplemental report by Mr Besil dated 25 May 2023 (B1065-76).

43. The court has the benefit of guidance from the Supreme Court about how to approach disputed forum claims. In *Goldman Sachs International v Novo Banco SA (Banco de Portugal intervening), Guardians of New Zealand Superannuation Fund v Novo Banco SA (Banco de Portugal intervening)* [2018] UKSC 34, Lord Sumption JSC stated at [9]:

> "For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had "the better of the argument" on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 2 All ER 91, [2018] 1 WLR 192 (at [7]) this court reformulated the effect of that test as follows:
>
> > "… (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway ["Limb 1"]; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so ["Limb 2"]; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. ["Limb 3"]"
> >
> > It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."

44. Lord Sumption's approach was relied upon by this court in *Bitar v Banque Libano-Francaise SAL* [2022] 2 All ER (Comm) 298. I turn back to the instant case and apply Lord Sumption's rubric. For the purposes of Limb (i), parties agree that the claimant must satisfy the court that the jurisdictional gateway is passed (met).

However, there is an issue of fact about Limb (ii). The prime dispute is the dispute between the Mexican experts about whether the jurisdictional clause would be valid in Mexican law. That falls into the category of "some other reason for doubting whether it applies". In such circumstances the court "must take a view on the material if it can reliably do so".

45. Further assistance has been provided by the Court of Appeal about what Limb (ii) of the rubric means. In *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] 2 All ER (Comm) 315, Green LJ held at [78] that the court must "use judicial common sense and pragmatism". I intend to do just that. Here the claimant relies upon the third limb of Lord Sumption's rubric. The argument advanced powerfully by Mr Woolf is that the evidence is insufficient for the court to "take a view" and thus one should resort to Limb 3. It was explained by this court in *Bitar* at [80] in this way:

> "Limb (iii) is intended to address the case where the court is unable to form a decided conclusion on the evidence before it and is unable to say who has the better argument. The court must ask 'whether the claimant's case had "sufficient strength" to allow the court to take jurisdiction … To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence … [T]his is a more flexible test which is not necessarily conditional upon relative merits' [80]"

46. Thus it is that the claimant argued orally that this court "does not have to determine the expert dispute, but decide that there is a good arguable case or whether it is plausible that the claimant expert is right". It seems to me that this is leaping to the last limb without sufficient analysis of the Limb (ii). Lord Sumption's rubric is carefully measured and calibrated. It is sequenced in the way it is so trial courts may work through the stages in order. On Limb (ii), I judge from the authorities supplied, looking at the matter pragmatically and applying common sense, that the evidence adduced and the factual background to the case supply sufficient material for this court to "take a view" about the validity or otherwise of the clause. What I have found of particular importance, given the Mexican authorities, is the factors that speak to the clause's validity or otherwise. The clause forms just one part of the analysis about forum, and I evaluate it as such. The overall appropriateness involves a careful and holistic consideration of all the relevant competing factors about which the court must then make a judgment.

47. For the sake of clarity, I subdivide my analysis into two constituent parts. First, I examine the jurisdiction clause. Then I look at all the competing factors in the overall appropriateness evaluation.

48. Where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it (*Donohue v Armco Inc* [2002] 1 All ER 749 at [24]). In exercising their discretion, the court should take into account all the circumstances of the particular case (*Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria v The Eleftheria (Owners) (The Eleftheria) [1969] 2 WLR 1073* at p.1077B). The relevant circumstances are materially the same as those to be considered by the court when exercising its discretion in respect of a stay of

proceedings on the ground of *forum non conveniens*. To take a view on the validity of the clause, I turn to the Mexican authorities presented to the court.

49. In Mexican law, a contract of adhesion is defined as:

> "document unilaterally prepared by the provider to establish in uniform formats, the terms and conditions applicable to the acquisition of a product or the provision of a service…" (Article 85, Federal Consumer Protection Law)

50. The first Mexican authority ("Authority 1") is *1a./J. 1/2019 (10a.),* a decision of the Mexican Supreme Court of Justice (B574). It examines the validity of contracts of adhesion in light of the right to access to justice in Mexican law under Article 17 of the Constitution. I cite it in detail using the words in which it has been translated for the court.

> **"COMPETENCE THROUGH EXPRESS SUBMISSION. THE RULE ESTABLISHED IN ARTICLE 1093 OF THE COMMERCIAL CODE DOES NOT APPLY TO CLAUSES STIPULATED IN BANKING ADHESION CONTRACTS WHEN INVOLVING A VIOLATION OF THE GUARANTEE OF ACCESS TO THE GRANTING OF JUSTICE.**
>
> In accordance with the provisions of Articles 1093 and 1120 of the Commercial Code, territorial competence can be extended where the parties to a legal act can submit, for the matter in dispute, to the courts of a specific location under a submission agreement in which the interested parties expressly declare their will and intent. Nevertheless for this submission to be configured, there must of necessity be the will of the parties to waive the jurisdiction granted by Law and the designation of competent courts, however with the condition that these solely be that of the domicile of one of the parties, that of the place of performance of any of the contracted obligations, or that of the place of the res. Whilst it is true that under the terms of Article 78 of the Commercial Code, the will of the parties is the supreme arbiter for contracts — among them adhesion contracts for the provision of banking services —; it is also the case that this generic rule in commercial matters is not applicable to a submission agreement when submitting the financial user to the jurisdiction of a place different to that of his habitual residence. Indeed it is a well-known fact that banking institutions do not solely offer their services within a specific territorial jurisdiction but rather do this over the entire national territory, earning money from such activities.
>
> By merit of the above it is logical and reasonable to consider that, in the event of dispute, one should no obligate financial users to have to relocate and incur extraordinary costs in order to be able to have effective access to justice, all the more so if we are looking at a commercial adhesion contract whose terms and conditions are not negotiable. Consequently and regardless of the contracting parties having specified an express Clause of submission to the courts and tribunals of a specific territorial circumscription, the fact is that when involving adhesion contracts concluded with banking institutions, this rule does not apply, the parties having to follow the interpretation that most favours the right of access to justice enshrined in Article 17 of the Federal Constitution, which states that individuals have freedom to set competence where the case is being heard, taking

> as the parameter the place of their domicile, always provided this safeguards the interest of the defendant credit institution, translated into the right to defence not being impaired through lacking the infrastructure or representation in the places where the dispute unfolds."

51. The second authority ("Authority 2") is *I.11o.C.134 C (10a.)*. It is a decision of the Federal Court. Its significance comes from the explanation it provides for the scope of the principles within Authority 1, which were extended to all contracts regulated by the Federal Consumer Protection Law. The Federal Court held that in such contracts:

> "it is not valid to extend the territorial jurisdiction agreed in a contract for the provision of services if the where the case is to be heard is different to that of the consumer's habitual residence."

52. The position of Mr Gonzalez is that the jurisdiction agreement "is likely to be held invalid under Mexican Consumer Law" based on precedents which (he says) establish that "jurisdiction clauses on such agreements can be discarded when they entail an affectation to the human right of access to jurisdiction" (Gonzalez/B552). Given this answer, he was sent written (CPR Part 35) questions to clarify his opinion. He stated in response to Question 9 that in deciding the validity of such clauses, the Mexican courts take into account several factors (B1091):

> "In determining whether a jurisdiction clause of a contract of adhesion entails a violation of the human right of access to jurisdiction, Mexican Courts would mainly take into consideration: (i) if the place where the trial should be conducted is different to the one where the consumer has its habitual residence, and (ii) if the economic burden imposed to the consumer may eventually make difficult or even impossible to defend their rights, considering an inherent disparity between the parties involved in an adhesion contract."

53. He continues (B1093):

> "So, in my opinion, in deciding to apply by analogy precedent 1a./J. 1/2019 (10a.), and precedent I.11o.C.134 C (10a.) to Waiver, Mexican Courts would not restraint its analysis to merely determine whether provider of services has branches in the place of consumer's residence, but would determine a decision considering the best way to "safeguard the rights of the public user and consumer and to seek fairness, certainty and legal security in relations between providers and consumers" considering that a disparity exists between the parties, whereas the consumer is the weak one, and provider the strong one that imposes the contract of adhesion. And at the same time deciding in a way that services provider's right to a legal defense should not be diminished due to a lack of infrastructure or representation at the places where the dispute unfolds."

54. The approach in Mexico, therefore, begins to equate to that of the English courts in *forum non conveniens* determinations. There must be an evaluation of the overall justice of the case. I have examined Authority No. 1 carefully. Close reading reveals that the case was expressly about clauses in banking adhesion contracts. It says nothing about contracts between consumers and other kinds of contracting parties such as tour operators. However, in Authority 2, the Federal Court applied the reasoning from the Supreme Court in Authority 1 broadening its scope by analogy.

55. What is clear about both these cases is that they were considering questions of which location within Mexico a dispute should be litigated. The focus is on the "financial user" of banking services and preventing her or him from "submitting" to a jurisdiction different to the habitual residence. This is because "it is a well-known fact that banking institutions do not solely offer their services within a specific territorial jurisdiction but rather do this over the entire national territory" (Authority 1). Thus it is envisaged that banking institutions will be to be adequately represented through the "national territory", that is, Mexico. As Mr Gonzalez accepts in Part 35 answers (B1091):

> "It is true that in both cases the Courts indeed considered that the services providers had branches in the place where the consumers had his place of residence."

56. This is significantly different from the instant case where the defendant, a Mexican company, has no institutional or other presence in the United Kingdom. Thus, as Mr Woolf realistically accepted in oral argument, the facts of the Mexican cases relied upon are different to the situation of this claim. It seems to me, however, that Mr Woolf is correct that it is possible to derive a principle from these authorities. But one must be clear what that is. I cannot see how it can safely be deduced from the two Mexican cases that all contracts of adhesion, that is contracts such as the disputed (adhesion) agreement, where a party with superior bargaining power makes a "take it or leave it" offer, are necessarily invalid in Mexican law. It will depend on the circumstances. The principle that can be readily and safely distilled from the two authorities is that where there is a jurisdiction clause in a contract of adhesion, the Mexican courts are very likely to consider a wide range relevant factors and consider where the balance of justice – or injustice – lies. Thus it is that Mr Gonzalez replies (B1093):

> "So, in my opinion, in deciding to apply by analogy precedent 1a./J. 1/2019 (10a.), and precedent I.11o.C.134 C (10a.) to Waiver, Mexican Courts would not restraint its analysis to merely determine whether provider of services has branches in the place of consumer's residence, but would determine a decision considering the best way to "safeguard the rights of the public user and consumer and to seek fairness, certainty and legal security in relations between providers and consumers" considering that a disparity exists between the parties, whereas the consumer is the weak one, and provider the strong one that imposes the contract of adhesion. And at the same time deciding in a way that services provider's right to a legal defense should not be diminished due to a lack of infrastructure or representation at the places where the dispute unfolds."

57. Once more, Mr Woolf submits that this provides "a good plausible evidential basis to allow the case through the gateway". I judge that this is another instance of jumping to Limb (iii) before examining the applicability of Limb (ii). To the question of whether this court can "take a view", the answer is yes. That is because through the iterative Part 35 process, a material convergence appears between the experts. Mr Besil states (B1314):

> "Considering the foregoing, I do not agree that jurisdiction clauses in contracts of adhesion are necessarily invalid where the consumer has its habitual residence in

> another jurisdiction, but depending on the elements of the specific case, they may be considered invalid by a court of law."

58. At B1313 he was asked a Part 35 question:

> "7. Is it agreed that a jurisdiction clause in a consumer contract is invalid if the place where the trial should be conducted is different to the one where the consumer has its habitual residence as it will affect their right to access to jurisdiction contained in Article 17 of the Constitution3 and the jurisprudence? If not, why not?"

59. His answer was:

> "This is not agreed. I assume that this question refers to precedents 1a./J. 1/2019 (10a.) and I.11o.C.134 C (10a.), which may be distinguished from the current proceedings on the facts. 1a./J. 1/2019 (10a.) provides that the rule regarding jurisdiction clauses in the Code of Commerce ('Código de Comercio') is not applicable to contracts of adhesion when, in the specific case, there is a violation of the consumer's right to access to jurisdiction; however, it does not provide that all jurisdiction clauses in contracts of adhesion are invalid where the consumer has its habitual residence in another jurisdiction. Moreover, the case law provides that the rights of the banks should also be protected, including their right to a proper legal defence, which may be affected by not having infrastructure or representation in the jurisdiction in which the consumer seeks to have the dispute heard.
>
> Precedent I.11o.C.134 C (10a.) does not meet the requirements to be considered as binding within the Mexican legal system; however, as a summary, it provides that the reasoning in precedent 1a./J. 1/2019 (10a.) should apply by analogy to all consumer contracts. This precedent also came from a case in which the contract of adhesion was signed in the jurisdiction where the consumer resided, and the services were mainly supplied in that same place. Also, the defendant was a telephone company
> which had offices in said jurisdiction."

60. Carefully examining the answers of the experts, I am satisfied that the court must look holistically at the variety of factors that speak to convenience or otherwise of Mexico as trial forum to determine the overall justice of the case, something akin to, but not exactly equivalent with, what in this country may be variously termed the balance of convenience or the balance of prejudice (without importing the jurisprudence of those concepts in a 1:1 correspondence). I now turn to the competing factors in the overall evaluation of forum.

61. **In favour of United Kingdom**. I have identified the following factors in favour of the United Kingdom:

(1) The claimant is habitually resident and domiciled in the United Kingdom;
(2) The claimant is suffering ongoing financial losses in England caused by the injury;
(3) (It is asserted that) "all necessary medical and other evidence would need to be obtained from experts based in England" (David1/28.ix. [18/289]);

(4) The claimant would need Spanish documents translated into English;
(5) The claimant would need an interpreter for the trial;
(6) Mexican courts, it is said, are less adept at dealing with catastrophic injury;
(7) It is submitted that it is "unaffordable, and disproportionately costly, for the Claimant to have to frequently travel to and from Mexico as needed to progress her claim";
(8) This is a personal injury case and not a complex financial or commercial transaction between institutions, and has a vulnerable claimant at its heart;
(9) There is likely to be, as Mr Woolf put it, "a raft of expert issues concerning quantum";
(10) The claimant is likely not to qualify for legal aid due to her means and this would restrict her ability to effectively contest the case in Mexico (according to the claimant's expert Mr Gonzalez).

62. **In favour of Mexico**. The following factors have been identified:

(1) The defendant is a company incorporated under the laws of Mexico;
(2) The defendant operates exclusively within the jurisdiction of Mexico;
(3) The alleged tort took place in Mexico;
(4) Much of evidence will focus on events in Mexico;
(5) Mexican law governs liability;
(6) Mexican law governs quantum;
(7) The nature of the issues and the witnesses needed to address them are set out in the particulars:

"The accident was caused by the negligence and/or breach of statutory duty of the Defendant by its servants or agents in that it
(i) Failed to carry out any or any adequate risk assessment.
(ii) Failed to ensure that all drivers were sufficiently trained and instructed in the safe
use of the ATV before commencing the Safari In particular, failed adequately or at all to advise the Claimant and her driver (in accordance with the Owner's manual for the vehicle), that
(a) the ATV's were liable to roll over and the steps necessary to avoid or minimise the risk of the same;
(b) to minimise or avoid the risk of rollovers, it is necessary to avoid abrupt manoeuvres, sideways sliding, avoid acceleration when turning, plan for bills, rough terrain, ruts and other changes in traction and terrain; and avoid side hilling.

(8) A number of individuals who will in all likelihood to be called as witnesses by the defendant are Mexican nationals (Jarque Branguli [B346]). These include witnesses testifying about:
a. the safety briefing
b. the waiver form
c. the medical treatment in Mexico

The relevant clause of the waiver is Clause 2:

> ***"2. RELEASE AND WAIVER OF LIABILITY.*** *I, for myself and on behalf of my heirs, estate, insurers, successors and assigns, hereby fully and forever waive, release and forever discharge Vallarta Adventures, its owners, shareholders, parent, subsidiaries and affiliated companies and their respective officers, employees and agents ("the Released Parties") for any and all claims, liabilities of every kind or causes of action I may have or have in the future for damages for loss or damage …, losses (economic and non-economic), or expenses … arising from personal injuries including my death and/or damage to property which may, in any way, result from or arise out of, my participation in the Program, whether arising from negligence of any of the Released Parties or otherwise, to the fullest extent permitted by law."*

(9) Much of the contemporaneous documentary evidence is in Mexico and in the Spanish language;
(10) The defendant's D's expert, Mr Besil, states that the Mexican courts are "well versed in the handling of injury claims";
(11) He also states that "since 2011 Mexico has consistently become a more favourable jurisdiction for claimants in personal injury cases";
(12) Mr Besil states that since the Covid pandemic, Mexico, along with many other jurisdictions, has used IT and remote hearings.

63. These competing factors, for and against, speak to whether the jurisdiction clause is valid. But should it be, they are also relevant to the question about how this court should exercise its discretion.

Discussion

64. If it is able to, the court must do the best it can and take a view about the construction of the clause in Mexican law. I am satisfied that there is sufficient material to take such a view and determine whether the jurisdiction clause is likely to be valid under Mexican law.

65. I am far from satisfied that the Mexican court would conclude that the claimant's rights would be so adversely affected not give effect to the clause. This is because while she is domiciled in the United Kingdom, there is the prospect that she can be legally represented in Mexico with public funding assistance as a person with clear disability – indeed, the trial is about how her disability came about. It may be that in respect of the disbursements for experts, she may have to provide funding. But she has already secured through the generosity of other people significant sums which could be used to fund or partially fund at least the most vital experts. It is obvious that if the venue of the trial in Mexico becomes a reality, she can endeavour to raise more funds as she has already succeeded in doing. My conclusion is that the economic imbalance or human rights interference is not so severe to render the jurisdiction clause void. As such, this is an additional factor that I weigh in the balance: a valid jurisdiction clause. I emphasise that I do not consider it determinative or dispositive. It is simply a further matter to weigh.

66. That being the case, I go on to consider the overall question of forum. I begin with some general principles. The most appropriate forum is not written in stone, but depends on all the circumstances of the case. Generally, however, it is better to try

case in country of the governing law. As stated by Lord Mance in *VTB Capital Plc v Nutritek International Corp* [2013] 2 AC 337 ("VTB") at [46]:

> "The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two."

67. A further factor of significance is the place of commission of the alleged tort. Here it is Mexico. The proper approach to the significance of the location of the tort was explained by Lord Mance in *VTB* at [51]:

> "The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors."

68. Although the parties have different domiciles, this was not an "international transaction" in the sense that Lord Mance envisaged it. Here was not a complex multi-territorial commercial transaction. Using the precept of Lord Mance, the commission of the alleged tort in Mexico does establish a "prima facie" basis for treating Mexico as the appropriate jurisdiction. The factual focus is also significant. In respect of liability, the focus is exclusively Mexico. As Lord Mance said in *VTB* at [62], the question of the location of witnesses is "a factor at the core of the question of appropriate forum". Nevertheless, in respect of liability, there will be witnesses about (1) the signing of the waver; (2) safety briefing; (3) the circumstances of the injury to the claimant; (4) the claimant's medical treatment in Mexico and the phantom pain (albeit this does not appear to be a clinical negligence claim). Indeed, the claimant accepted in oral argument that "some witness evidence will be needed on these matters" of prime liability. As to quantum, I anticipate, as Mr Woolf correctly submits, that there may be a body of quantum evidence about the treatment and care of the claimant that is generated in the United Kingdom. This will principally be from experts, to the extent it is disputed. If so, I cannot see why the experts could not give evidence remotely as they very frequently do in England already. As Mr Besil has made clear, since Covid, Mexico has increasingly used remote hearings and IT. I have no doubt that to the extent necessary there will be flexibility in the Mexican court and the use of remote platforms. Should the trial take place in England, there would be a good probability that medical experts would give evidence remotely to minimise interference with their important professional duties.

69. Further, I do not see why the claimant would have to travel back and forth repeatedly to Mexico. It is entirely feasible for her to join preliminary or preparatory hearings

remotely from the United Kingdom. She would have to be there for the trial, of course, or at least part of it.

70. Wherever the trial is held, a substantial amount of document translation will be necessary. This factor applies in both directions. I am not persuaded that the Mexican courts are or will be hostile or non-receptive to a claim like the claimant's. In addition to Mr Besil's evidence that Mexican courts have become increasingly disposed to personal injury claimants, the court received evidence from Mr Besil that:

> "a major legal reform enacted on 10th June 2011 which included the express right of victims to a full and complete reparation of damages, they have taken major steps forward mostly in favour of the victims."

71. Indeed, Mr Woolf accepts that unless and until the point is "formally conceded, this cannot be said to be a strict liability trial". This must be correct. However, he submits that the question of damage will "take up more of the court's focus". It seems to me to be premature to reach such a conclusion. Indeed, should liability be proved, it is at this point speculative to determine the extent to which quantum will be contested and on what points and with what evidence.

72. The claimant's solicitors have made enquiries with the Social Office of the State of Jalisco. They provide evidence that that they were informed that the claimant is likely to be disqualified from receiving legal aid (public funding): the annual means limit is £6600 and the claimant earns £35,000 annually. Mr Besil on behalf of the defendant states against this that due Ms Roach's disability, she is likely to receive legal aid for free representation at trial. Mr Besil cautions that she may not be eligible for disbursements such as experts. I understand the claimant's enquiries to be about financial qualifications and disqualifications, rather than engaging with this question about a separate basis for eligibility: disability. On the evidence before me, I conclude that there is a reasonable prospect, given her disability, of the claimant qualifying for some state-funded legal assistance in Mexico.

Conclusion

73. In very short order, I accept Mr Woolf's submission that the claim clearly raises triable issues and that the claimant has a real prospect of success. It is conceded by the defendant that it passes through the tort gateway. Further, the claimant is domiciled in the United Kingdom. Against this, the defendant is a Mexican company, having being established and operating exclusively in Mexico for 25 years, save for a brief previous affiliation (now ended) with a Bahamian company; the venue of the alleged tort is Mexico, and the establishes a prima facie basis for the claim to be heard in Mexico; the safety briefing was in Mexico; the claimant was medically treated in Mexico; the defendant is Mexican company; the defendant's commercial activities are in Mexico; the applicable law that governs the case is Mexican law; almost all the significant witnesses in respect of liability are in Mexico; there is contemporaneous documentation that is in Spanish in Mexico; there is the prospect that the claimant due to her disability would be eligible, at least in part, for public funding for her claim in Mexico; the Mexican courts have competence to deal with cases of serious personal injury; in recent times, Mexican courts have become increasingly claimant-friendly; British experts may well be able to testify using remote platform technology from the United Kingdom; there is no evidence that the claimant would fail to receive a fair

hearing simply by reason of her nationality; there is a jurisdiction clause that is not likely to be void in Mexican law. To use Lord Bingham's formulation in *Donahue v Armco*, I do not consider that the claimant has shown "strong reasons" not to try the case in Mexico. I have considered all the "facts and circumstances" and do not find the reasons advanced by the claimant to be "sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain". But that is not the end of the matter.

74. I look wider and examine the matters in the round. I examine the other factors, such as the claimant's domicile and the quantum evidence amongst others, and see whether taken together they outweigh or act to displace the factors in favour of Mexico. I conclude that they do not. Overall, I judge that the defendant has shown that the natural and appropriate forum to try this case is Mexico. The burden then shifts to the claimant to show that due to the specific circumstances of the case and in particular how it would unfairly impact her, the courts should nonetheless refuse the stay of English proceedings that the defendant seeks and order that the trial should be heard in this jurisdiction. On this question, I judge that the factors in favour of trying this matter in Mexico are far more compelling than the factors in favour of this jurisdiction. The overall ends of justice, weighed for both parties, will be better met in Mexico.

75. The claimant accepts (CS §29) that "If this [jurisdiction] clause is valid and if s15B CJJA 1982 does not apply … that the principles established in *The Eleftheria* apply". I have found that the clause is likely to be valid in Mexico and that s.15B does not apply. Thus, *The Eleftheria* principles present the claimant with a formidable obstacle. There is a prima facie presumption of a stay that requires strong reason to successfully rebut. Such strength of contrary reason does not exist in this case.

76. I judge that the set aside application by the defendant and the concomitant declaration must be granted.

§VI. Disposal

77. Finally, I summarise the overall conclusions of the court:

(1) The claimant's application to amend the claim form and particulars of claim on the consumer contract basis is dismissed;
(2) The defendant's application to set aside the (1) order granting permission for service of out of jurisdiction, (2) particulars of claim and (3) claim form is granted;
(3) The court declares that the English courts do not have and should not exercise jurisdiction in this claim;
(4) As such, the proceedings in this jurisdiction are stayed.

78. That is my judgment.