



Seminar: Travel Law

SERVICE OUT OF THE JURISDICTION

By Sarah Crowther and Pierre Janusz

2011

3 HARE COURT



About us

Chambers work as advisers and as advocates across a range of civil and commercial areas of law.

Members are frequently recognized in the leading legal directories for the depth and breadth of their expertise, and for their persuasive advocacy and sound advice.

Described as a 'leading civil common law set', Chambers has established a first-class reputation in its fields of practice, providing a wide range of advisory and advocacy services both domestically and internationally in an environment that meets modern business needs.

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Our work is concentrated in the following areas:

- ❖ Appeals to the Privy Council
- ❖ Commercial and business law
- ❖ Constitutional law and judicial review
- ❖ Defamation
- ❖ Employment
- ❖ Insolvency and restructuring, and chancery work
- ❖ International arbitration
- ❖ Personal injury
- ❖ Professional indemnity work
- ❖ Property (including landlord and tenant and construction)
- ❖ Public law (including civil liberties and human rights)
- ❖ Sports law
- ❖ Technology and construction disputes
- ❖ Travel litigation

Additional services

Our practice groups regularly publish articles and provide talks and seminars on all areas of relevance to business and commercial lawyers. Please contact Mika Thom, our Marketing Manager in this regard at mikathom@3harecourt.com or 020 7415 7911.

You may also care to visit our website at www.3harecourt.com, which is regularly updated with news, cases in which members of chambers have appeared and published articles.

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TRAVEL LAW PRACTICE GROUP

Our travel law practice group is well established, and continues to be rated in the top legal directories for expertise in this field.

We have extensive experience of working with Claimant and Defendant solicitors and companies involved with international travel and leisure claims.

Our clients include:

- Insurers
- Tour operators and Travel agents
- Foreign claimants and defendants
- Ship owners
- Airlines
- Foreign suppliers of tourist services

Claims frequently deal with areas that include jurisdictional issues and conflicts of laws. Members of the group have been instructed in cases in the following areas:

- Jurisdiction disputes and anti-suit injunctions
- Applicable law conflicts
- Group actions including illness claims
- Package Travel claims and advisory work
- Road accidents including direct insurer claims and MIB claims
- Aviation claims, including Montreal and Warsaw Conventions
- Fatal accidents
- Shipping and Athens Convention claims
- Excursion claims including winter sports and water sports
- Employees injured abroad

Our travel law practice group regularly publishes articles and provides talks and seminars on all areas of relevance to travel lawyers.

Many members of Chambers are happy to receive instructions in languages other than English.

Please do contact our clerks for further information on any aspect of the wide range of services we offer.

SPEAKER PROFILE (1 of 2)

SARAH CROWTHER

Year of call: 1999

Main Practice Areas

Commercial and Business Law, Employment, Personal Injury, Sports Law, Professional Negligence/Indemnity, Travel Litigation

Sarah is particularly experienced in handling cases with an international element and regularly deals with matters involving jurisdiction and applicable law issues in both the commercial and personal injury fields. She accepts instructions in German and was an Inns of Court scholar to Berlin in 2002, during which time she spent a period in the employment law department of a commercial firm.

Her practice encompasses all areas of travel work, including Convention claims and Package Travel. Sarah undertakes non-contentious work in this area, advising commercial clients on their terms and conditions and other regulatory requirements for tour operators. Sarah also undertakes employment tribunal and professional disciplinary work. Her practice includes unfair dismissal and equal opportunities claims, including disability discrimination and stress at work. She also is experienced in restrictive covenant disputes, injunctions and search and freezing orders.

Sarah has a general common law practice and has appeared in the Privy Council acting for appellants and respondents in a range of civil and constitutional appeals.

Chambers and Partners (2010): Sarah Crowther is a promising junior who is regularly sought out due to her understanding of the Athens and Montreal Conventions. Clients beat a path to her door as she is considered "wonderfully attentive, thoroughly likeable and a real terrier once she gets her teeth into a case."

Publications and Lectures: Sarah writes for Solicitors Journal and edits Chambers' employment law bulletin. She lectures for local law societies and has acted as an advocacy group co-ordinator for the Employment Law Association.

Memberships

ELBA, PIBA, COMBAR, LCLCBA, British German Jurists Association, Association de Juristes Franco- Britanniques.

Qualifications

MA (Law with German), St John's College, Cambridge; University of Regensburg, Germany

Languages

German; French



SPEAKER PROFILE (2 of 2)

PIERRE JANUSZ
Year of call: 1979



Main Practice Areas

Professional Discipline, Commercial and Business Law, Appellate Work (including Privy Council), Property (including Landlord and Tenant), Travel Litigation

Pierre Janusz's practice comprises general commercial and common law litigation, with a strong emphasis on real property and landlord and tenant work, and associated professional negligence claims. He has substantial experience of handling cases with an international element, with expertise in matters involving jurisdiction and applicable law issues in relation to accidents abroad.

He has experience of acting as a legal assessor to a professional body.

Chambers and Partners: "a startlingly clever, unflappable and charming advocate" who impresses solicitors and clients with his "encyclopaedic knowledge of private international law." This "unsung hero knows the complexities of Rome II backwards."

Publications and Lectures: Pierre Janusz contributes to Chambers Personal Injury, Travel and Property bulletins.

Memberships

COMBAR; LCLCBA; PIBA; Pan-European Organisation of Personal Injury Lawyers; British German Jurists Association.

Qualifications

BA (German and Dutch) Bedford College, University of London; read for the Bar at City University and the Inns of Court School of Law.

Languages

German; Dutch.

SERVICE OUT OF THE JURISDICTION

1. Do you need permission or not to serve outside the jurisdiction?

Providing the English Court has jurisdiction, pursuant to CPR 6.32 and 6.33 no permission to serve out of the jurisdiction is required for:

- 1) EU countries – Council Regulation (EC) No.44/2001 (“the Judgments Regulation”) – applying to all relevant claims brought after 1 March 2002, irrespective of the date on which the action arose.
- 2) Scotland and Northern Ireland – Schedule 4 Civil Jurisdiction and Judgments Act 1982
- 3) Iceland, Norway and Switzerland – Lugano Convention (as revised)

However, permission of the English Court is required for all other countries or if the claim does not come within the scope of the Judgments Regulation, Schedule 4 or the Lugano Convention.

2. What do you need in order to get permission?

CPR 6.36 and paragraph 3.1 of Practice Direction (“PD”) B to CPR Pt 6 set out the circumstances in which the English court has discretion to grant permission in advance for service outside the jurisdiction.

The burden is on the claimant seeking permission to show in respect of each claim:

- 1) there is a good arguable case that it falls within a relevant subsection of CPR 6 PD B paragraph 3.1 (*Seaconsar Far East Ltd v Bank Markazi Jomhouri Islam Iran 1 [1994] 1 AC 438.*); and
- 2) There is a serious issue to be tried. This has been equated to the prospects of success needed to resist an application under CPR 24 for summary judgment (*De Molestina v Ponton [2002] 1 All ER (Comm) 587*). Lord Hobhouse's dicta in *Three*

Rivers DC v Bank of England (No 3) [2001] UKHL 16 that the criterion the judge should apply in a Part 24 application is not probability but 'an absence of reality' may assist in this regard.

In addition:

3) Forum Conveniens: The court must be satisfied that the English court is the proper place in which to bring the claim – CPR 6.37(3). The test for *forum conveniens* is set out in *Spiliada Maritime Corpn v Cansulex Ltd; The Spiliada* [1987] AC 460:

- The burden is on the claimant to persuade the Court that the English court is the appropriate forum for the determination of the dispute.
- The appropriate forum is where the case may most suitably be tried for the interests of all the parties and the ends of justice.
- The Court must consider the natural forum i.e. the place where the dispute has its most real and substantial connection. This may involve availability of witnesses, the applicable law, the place where the parties reside and carry on business, convenience, expense and so on. In these days of video evidence, it may be rather easier for a claimant to minimise the inconvenience and expense of bringing the claim in England than used to be the case.
- English procedural provisions such as interest may be irrelevant, as are English limitation periods. However it is quite possible that other English procedural advantages such as costs and availability of funding under conditional fee agreements may be of real relevance to the interests of the parties and the ends of justice. If a claimant can afford, thanks to a CFA and after-the-event insurance, to bring his claim in England, but could not do so in the foreign country where the accident happened, it is hard to see why that should not be weighed in the balance.
- If there is another forum which is apparently as suitable or more suitable than England, it will normally refuse permission.

- If a party wishes to rely on a factor in persuading the court to exercise its discretion one way or another, the evidential burden is on that party to prove it.

Of the numerous possibilities, three are likely to prove particularly useful to personal injury practitioners faced with a defendant domiciled overseas.

1) Under CPR 6 PD B paragraph 3.1(3) a court can exercise its discretion to grant permission to serve outside the jurisdiction if the following requirements are met:

- The claim form includes a claim against a person on whom the claim form has or will be served. (Service on the ‘anchor’ Defendant may be in England as of right or abroad as of right, but not it would seem, as a result of permission pursuant to PD 6B paragraph 3.1).
- The claim involves a **real issue between the claimant and that person which it is reasonable for the court to try**. Apparently, in contradistinction to claims to which Article 6(1) of the Judgments Regulation applies, the claim against the defendant domiciled within the jurisdiction must be plausible and not brought in bad faith.
- The additional defendant is not within the jurisdiction but is a **necessary or proper party** to the claim. The test is whether both would have been proper parties to the proceedings if both had been in England.

2) Under CPR 6 PD B paragraph 3.1(4) a court can exercise its discretion similarly for claims which are additional claims under CPR Part 20 and the person to be served is a necessary or proper party to the claim or additional claim

3) Under CPR 6 PD B paragraph 3.1(9)(a) a court can exercise its discretion similarly for claims made in tort where damage was sustained within the jurisdiction.

- What was meant by 'damage within the jurisdiction' was considered in *Cooley v Ramsey* [2008] EWHC 129. The claimant was left disabled after a collision with the defendant in New South Wales, Australia. The defendant was and remained domiciled in Australia. The High Court upheld an order giving the claimant permission to serve proceedings on the defendant. The claimant was suffering a continuing loss within the jurisdiction (the necessary 'damage') which the English court was better placed to determine. It was in the interests of justice that the claim be prepared and run with the close cooperation of the claimant's family. The court therefore accepted that England was the appropriate forum and exercised its discretion to permit service on the defendant out of the jurisdiction.
- Although the main bone of contention was the considerable difference between the value of damages the claimant would have been awarded in England compared to New South Wales, the court stressed that permission would not necessarily be granted simply to permit a claimant to claim more damages than would otherwise be the case. This decision has though made it easier for claimants seeking to sue defendants domiciled outside a member state.
- It is to be noted that this interpretation of this ground for permission to serve out of the jurisdiction is more generous to Claimants than Article 5(3) of the Judgments Regulation etc. The ECJ has consistently said that jurisdiction under this exception to the general rule is only available in respect of the courts for the place where (for our purposes) the physical damage occurred and not for the place where the consequences of that damage may later have been suffered: *Bier v. Mines de Potasse d'Alsace* [1978] QB 708, *Marinari v. Lloyds Bank plc* [1996] QB 217.

3. Methods of Service – CPR 6.40

Methods of service on a defendant domiciled outside the jurisdiction (other than in Scotland or Northern Ireland) are provided for by CPR 6.40(3). This provides that proceedings can be served outside the jurisdiction only:

- by any method provided for by Regulation 1393/2007 (the 'Service Regulation', which repealed Regulation 1348/2000), where applicable;
- by any method provided for by CPR 6.43 concerning service through foreign governments, judicial authorities or British Consular authorities;
- by any method provided for by CPR 6.44 concerning service of claim form or other document on a State;
- by any method provided for by a Civil Procedure Convention;
- by any other method permitted by the law of the country in which it is to be served.

In all cases, respect must be paid to the law of the country in which service is to be effected and nothing in the CPR authorises or requires anyone to do anything contrary to the law of that country (CPR 6.40(4)). Rules of service depend therefore in part on the country in which service is intended to be effected, as the table on the next page illustrates.

Country	Source	Court's permission required	Rules
All EU countries, including Denmark.	Regulation (EC) No. 1393/2007 ('the Service Regulation') (repealing Regulation 1348/2000).	No.	(1) Use of transmitting/receiving agents. (2) Use of any method permitted by the country.
All Hague Convention signatories (includes the USA, Turkey, Egypt, Israel etc).	Hague Convention.	Yes.	(1) Use of designated central authority. (2) Use of any method permitted by that country.
Signatories to other bilateral conventions.	Other bilateral procedural conventions.	Yes.	Use of any method permitted by that country.
All other countries.	None.	Yes.	Use of any method permitted by that country.

Use of transmitting and receiving agents

This means of effecting service became available with the entry into force of the 2000 Service Regulation. The aim was to simplify and speed up service within the EU. Each member state designates the public officers, authorities or other persons who are responsible for transmitting documents to another officer or officers designated the 'receiving agent' in the country in which service is to be effected. The receiving agent is then responsible for effecting service on the intended recipient.

Each member state has to post full details of its arrangements in the EU manual. Currently, member states have posted a wide variety of different entities responsible for transmitting and receiving documents for service (from the Foreign Process Office of the High Court for England and Wales to judicial officers, or huissiers, in other countries (all solicitors in Scotland), to local courts to the Ministry of Justice). The manual is reproduced on the EU website:

http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm.

Use of any method permitted by that country

It will usually be necessary, if attempting to serve by a method permitted by that country, to check with local sources as to how this ought best to be attempted. Some countries, for example, may not permit service of the claim form by post, others might require service by post to be by way of registered post and so on. The website above should contain this information (which *may* be, and in practice often is, accepted by a court as good evidence without the need for it to be proved by a competent local source).

The alternative to making one's own arrangements is to arrange for service through foreign governments, judicial authorities and British Consular authorities. This involves filing a request for service under CPR 6.42 with a copy of the claim form and other necessary documents, including translations if required. The court will send them to the Senior Master who will, if asked to do so, then forward them to the Foreign and Commonwealth Office or designated authority who will decide the best

method of service. However, claimants cannot by this method divest themselves of responsibility for ensuring that service is in fact valid by the local law (*Olafsson v Gissurarson* [2008] EWCA Civ 152,).

Where the defendant does not receive actual notice, the onus is on the claimant to show that the method of service was adequate and in compliance with local rules (*Arros Invest Ltd v Rafik Nishanov* [2004] EWHC 576 (Ch))

It seems to be the case that service by this method is service by the claimant and not by the court – potentially of relevance if for some reason retrospective extension of time is required. (*Chare v Fairclough* [2003] EWHC 180)

Use of designated central authority

This is the basic scheme of the Hague Convention and ensures that each contracting state designates a central authority that undertakes to receive requests for service from overseas claimants. The authority then serves the documents itself or has them served by an appropriate agency.

For claimants based in this country, the documents must be filed at court together with a request under CPR 6.26. The court will then send them to the Senior Master, who in turn sends them to the central authority.

4. The Practicalities of Serving Abroad

If the defendant is to be served out of the jurisdiction and the court's permission is not required under CPR 6.32 or CPR 6.33, the claimant must file with the claim form a notice containing a statement of the grounds on which he claims to be entitled to serve outside the jurisdiction (see CPR 6.34). A copy of this notice must be served with the claim form. Practice Form N510 is the appropriate court form. Claimants must take care to ensure that the correct box is ticked and the relevant parts included and crossed out as applicable.

CPR 6.34(2) provides that where the claimant fails to file the relevant notice, the claim form may only be served once the claimant does file the notice, or if the court gives permission.

The period for the Defendant to respond to the claim form is calculated with reference to the table annexed to CPR 6 PD B. Most European countries are given 21 days with Defendants in more far flung destinations afforded a maximum of 31 days, with the exception of the Cocos (Keeling) Islands (41 days) and the New Zealand Island Territories (50).

5. What to do if it goes wrong? Will service still be effective?

The options are limited to avoid the proceedings being defective and re-service being necessary.

CPR 3.10 and CPR 6.16 (previously CPR 6.9)

CPR 3.10(b) allows the Court the power to rectify matters where there has been an error of procedure. CPR 3.10(a) clarifies that a procedural error “does not invalidate any step taken in the proceedings unless the court so orders.”

CPR 6.16 can then be used for the court to dispense with the service of the claim form – an application for such an order may be made without notice but must be supported by evidence.

However, the authorities make clear that the Court will only exercise its discretion under CPR 3.10 and CPR 6.16 in exceptional circumstances to both retrospective and prospective orders dispensing with service. In *Phillips v Symes [2008] UKHL 1* errors were made by court clerks in England and Switzerland, and by the Swiss Post Office, as a result of which one defendant was served without an English translation of the claim form and another defendant did not receive any of the claim form documents posted to it. The House of Lords held, on these facts, that the English Court could use its power under CPR 3.10(b) to retrospectively order that the defendants be regarded as properly served even though, before any such order, the Defendants had issued proceedings in the same matter between the same parties; the English courts remained first seised.

In *Olafsson v Gissurarson [2008] EWCA Civ 152* the Court of Appeal found exceptional circumstances where justice required an order dispensing with service

to ensure a domestic time bar would not defeat the claim. The relevant documents were given to the Defendant in Iceland but not served in accordance with Icelandic law because the Defendant was not asked to and did not sign a declaration confirming receipt. The claimant had taken appropriate steps to have the claim form served in Iceland and the Master had given judgment on the basis of a certificate from the British Embassy in Reykjavik stating that the relevant documents had been served on the Defendant. The instant case was of the kind in which the claimant made an ineffective attempt in time to serve a claim form by a method allowed by the rules (*Anderton v Clwyd CC* [2002] EWCA Civ 933).

While the court had sympathy for the claimants in these cases, it made clear that these were exceptional cases and that “the experience of the case should lead claimant’s solicitors in future to ensure that service is in fact valid by the relevant law.” (*per* Sir Anthony Clarke MR, para.28 in *Olafsson*)

CPR 7.6 - Extension of Time

CPR 7.6 gives the court power to extend the period for serving the claim form. CPR 7.6(3) provides for the case where the application is made after the time for serving the claim form has expired, whether the time was specified under CPR 7.5 or under an order made under CPR 7.6. By CPR 7.6(3), the court only has jurisdiction to extend time in such a case if: (a) the court has been unable to serve the claim form; or (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and (c) in either case, the claimant has acted promptly in making the application.

CPR 6.15 Alternative Service

Alternative service of a claim form out of the jurisdiction is a difficult area, and there are conflicting authorities on the source of the jurisdiction to make such an order. However, the case of *Knauf UK GmbH v British Gypsum Ltd* [2001] 1 WLR and the recent case of *Bacon v Automattic Inc and others* [2011] EWHC 1072 show the Court allowing CPR 6.15 to apply to service outside of the jurisdiction.

The court can permit service by an alternative method or an alternative place where there is "good reason" to authorise service by a method or at a place other than the methods expressly permitted under CPR 6. Furthermore:

- The court may grant permission in advance of service, or retrospectively.
- An application is required; it may be made without notice.
- Evidence in support is required (PD 6A 9.1).

The court order will specify the method of service, date of deemed service and period for response.

PIERRE JANUSZ

SARAH CROWTHER

10 NOVEMBER 2011

The speakers would like to acknowledge the assistance provided by Joseph England, pupil at 3 Hare Court, in the preparation of these materials.

END

Feedback forms

We would be grateful for your feedback, please fill in the attached questionnaire, and kindly return to one of the speakers at the end of the talk.

Many thanks
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E: mikathom@3harecourt.com

INSERT:

1. HAGUE SERVICE CONVENTION

2. SERVICE REGULATION



Seminar Evaluation Form: Service out of the Jurisdiction

Thank you for participating in our seminar. We hope you found it valuable. We would appreciate it if you could take a few minutes of to complete this form and return it to us.

1.1 Speakers' names: Sarah Crowther & Pierre Janusz

1.2 How would you rate the seminar in terms of the following:

	Poor	Fair	Good	Very Good	Excellent
Overall	<input type="checkbox"/>				
The speakers	<input type="checkbox"/>				
The presentation hand-outs	<input type="checkbox"/>				

1.3 How relevant was the topic to you/ your practice/ your firm?

<input type="checkbox"/>	Very important
<input type="checkbox"/>	Somewhat important
<input type="checkbox"/>	Neither important nor unimportant
<input type="checkbox"/>	Somewhat unimportant
<input type="checkbox"/>	Very unimportant

1.4 How difficult was the presentation to understand?

Much too hard	Somewhat hard	Just right	Somewhat easy	Much too easy
<input type="checkbox"/>				

1.5 Would you recommend this seminar to another firm or colleague?

Definitely	Probably	Might or might not	Probably not	Definitely not
<input type="checkbox"/>				

1.6 Do you have any comments or suggestions about this seminar?

--

1.7 Please indicate the level of agreement that most accurately reflects your opinion of the speaker.

	Strongly agree	Agree	Agree nor disagree	Disagree	Strongly disagree
Very knowledgeable about the subject	<input type="checkbox"/>				
Well-prepared for this talk	<input type="checkbox"/>				
Motivated me to learn the subject	<input type="checkbox"/>				
Helped me a lot	<input type="checkbox"/>				

2.1 Your contact information
(Optional)

Name	
Title	
Company	
Address	
Email	
Phone	

2.2. Would you be interested in receiving mailings in the form of bulletins or legal updates relevant to your line of work and/ or the topic of this seminar?

Topics relevant to your line of work	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
The topic of this seminar	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>

Thank you for your time, we appreciate your feedback.
Please return this form to the speaker.