Clients&FriendsMemo

Recent Amendments to English Civil Procedure Help Simplify the Issuance of Contractual Claims Against Foreign Defendants—Service of Process Pursuant to CPR 6.33(2B)

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On 6 April 2021, an amendment was introduced to the Civil Procedure Rules 1998 (S.I. 1998/3132) (the "**CPR**") at Part 6 concerning service out of the jurisdiction. The change is of interest where at least one or more international businesses/foreign parties (whether EU or non-EU), otherwise unconnected with the UK, incorporate a choice of court agreement (or "**COCA**") in favour of the courts of England & Wales as a means to resolve their contractual disputes. CPR 6.33(2B)(b) now provides that permission of the court is not required to serve out of the jurisdiction a claim where jurisdiction is based on any COCA in favour of the courts of England and Wales. In many cases, this will simplify the procedure for service of international contractual claims on foreign domiciled defendants, by eliminating a preliminary step (i.e. the need to seek permission of the court), which adds cost and delay.

The amendment arises from proposals of the Lord Chancellor's Advisory Committee on Private International Law to reduce unnecessary procedural hurdles after the UK's exit from the EU, in circumstances where the 2005 Hague Choice of Court Convention[1] does not apply (and absent the UK's re-accession to the Lugano Convention).[2] Though aimed at covering-off the UK's withdrawal from the EU (in respect of which, under the prior regime, it was not necessary to seek the court's permission to serve process on EU domiciled defendants), CPR 6.33(2B)(b) expands the court's automatic jurisdictional reach to include all jurisdictions, regardless of location or affiliation. As such, there is no longer any distinction to be drawn between effecting service upon

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1 The Convention of 30 June 2005 on Choice of Court Agreements (the "**2005 Hague Choice of Court Convention**"). The current contracting states are the EU, UK, Mexico, Denmark (which has an "opt-out" of justice and home affairs under relevant EU treaties, but is a separate contracting party to the Convention), Montenegro and Singapore.

2 The UK applied to re-join the Lugano Convention in April 2020, but requires the approval of the existing contracting parties. Norway, Iceland and Switzerland have all approved, but no approval is thus far forthcoming from the EU and Denmark (which is a contracting party in its own right). In a Communication to the European Parliament on 4 May 2021, the European Commission indicated that it does not support the UK's accession to the Lugano Convention. It is now for the Council of the EU to make a final call by way of qualified majority vote of the EU member states (that is 55% of EU member states representing 65% of the EU's total population).

EU and non-EU domiciled defendants where there is a COCA in favour of the courts of England & Wales.[3]

It remains possible, however, for such defendants to challenge the court's jurisdiction at a later stage in the proceedings, for example by disputing the existence of a valid COCA. Such might be the case where there is a question about the existence of the contract in respect of which the claim is made, for instance, if it is alleged that the agreement in question was executed without actual or ostensible authority. In this regard, the case law previously decided under the (now obsolete) head of jurisdiction at para.3.1(6)(d) of Practice Direction 6B will likely remain relevant.[4] Namely, a good arguable case must be made out that the contract existed.[5] It is not sufficient to show that, if there is a contract (or a serious issue that there is a contract), it would arguably contain a law and jurisdiction clause.

That case law also established that the impact of a COCA in favour of the courts of England & Wales on claims brought by or against non-contracting third parties is always a matter of contractual interpretation.[6] The starting position in considering whether such disputes might come within the scope of the clause is that, absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit, nor prejudice, non-contracting third parties.[7] A COCA covering all disputes 'arising out of the contract' will, however, tend to include a tort claim against the non-party in order to prevent forum-fragmentation in claims involving essentially the same issues.[8]

Where the court has power to determine the claim under the 2005 Hague Choice of Court Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Choice of Court Convention, proceedings should be served pursuant to CPR 6.33(2B)(a)—in respect of which,

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3 Under the prior CPR regime, service of a contractual claim outside of the EU did require the court's permission. This introduced delay and expense, occasionally significant, to the service of process: a without-notice application and a witness statement addressing all relevant issues was required. The Claimant-Applicant had to make full and frank disclosure of all material facts, including those adverse to its case, and ought to have been aware that the duty was particularly acute where the grant of permission to serve out of the jurisdiction was being considered (see *Mousavi-Khalkali v Abrishamchi and another* [2019] EWHC 2364 (Ch)). Even then, even if all procedural requirements were fulfilled, the Court still would not give permission unless it was satisfied that England & Wales was the proper place in which to bring the claim.

4 Before 6 April 2020, Practice Direction 6B contained an additional head of jurisdiction, at para.3.1(6)(d), which provided that the claimant could serve a Claim Form out of the jurisdiction with the permission of the court under CPR 6.36 where a claim was made in respect of a contract which contained a term to the effect that the court "shall have jurisdiction to determine any claim in respect of the contract".

5 *Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd* (The "MV Jin Man") [2009] EWHC 2941 (Comm), per David Steel J at [23] and at [26] ("*The Claimants must satisfy me that they have much the better of the argument on the material available*").

6 Ibid, at [22] to [25].

7 Ibid, at [22] citing *Cavendish Square Holding BV v Joseph Ghossoub* [2017] EWHC 2401 (Comm), at [69] to [84] (*per* Laurence Rabinowitz QC).

8 Ibid at [24].

permission of the court is also not required. This was the case under the previous regime, albeit that the 2005 Hague Choice of Court Convention is of limited and, in certain respects, untested scope.

First, there is the question of whether Article 3 excludes claims founded upon asymmetric jurisdiction clauses. Many common commercial contracts, including the standard forms published by ISDA and the LMA, include one-sided or asymmetric jurisdiction clauses. Whereas, the Commercial Court has twice observed that there are good arguments for asymmetric clauses being within the scope of the 2005 Hague Choice of Court Convention, the Court of Appeal's (obiter) view erred towards the opposite, that the convention's intention was to exclude asymmetric clauses.[9] That undecided distinction now appears inconsequential. CPR 6.33(2B)(b) applies to any COCA that contains a term to the effect that the courts of England & Wales shall have jurisdiction to determine the claim.

Second, there currently prevails, as between the UK and the EU, diametrically opposed views on the temporal application of 2005 Hague Choice of Court Convention. Whereas Sch. 5 para. 7 of the Private International Law (Implementation of Agreements) Act 2020 provides (conclusively for domestic purposes) that the date of its entry into force for the UK is 1 October 2015,[10] the European Commission has observed that the 2005 Hague Choice of Court Convention will only apply to COCAs concluded after the UK becomes a party in its own right—i.e., post 1 January 2021.[11] The discrepancy has the potential to become acute in enforcement proceedings upon an English judgment in a court of an EU member state, at least theoretically speaking and if the European Commission's view takes hold. There is no such (potential) temporal limitation to the application of CPR 6.33(2B)(b).

Where service of a claim form out of the jurisdiction is intended under CPR 6.33, the claimant must file and serve Form N510 (see CPR 6.34). In Form N510 (as updated following Brexit), the various grounds for service out of the jurisdiction are set out in separate 'boxes', each accompanied by an appropriate statement of facts, and there is a signed statement of truth. No express provision has been made for the consequences of a failure to endorse Form N510 with the requisite statement of grounds, albeit that the Admiralty and Commercial Courts Guide (at Appendix 9, para. 1(b)) emphasises that it is very important that the statement as to the grounds

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9 *Etihad Airways PJSC v Lucas Flother* [2020] EWCA Civ 1707. The Court did not conclusively decide the point, as it was not asked to do so. See also the 2007 "Explanatory Report on the Hague Convention on Choice of Court Agreements" by Professors Hartley and Dogauchi, which favours the view held by the Court of Appeal (paragraphs 105 – 106).

10 The UK was initially party to the 2005 Hague Choice of Court Convention by virtue of its EU membership, and during the implementation period the UK continued to be treated as an EU member state for this purpose. Provisions in the 2005 Hague Choice of Court Convention operate so that recognition and enforcement of judgments as between the EU member states will always be under the Brussels I Regulation, which means that it was previously of limited use as between the UK and EU. On 28 September 2020, the UK acceded in its own right to the 2005 Hague Convention bringing it into effect for the UK on 1 January 2021.

11 European Commission, Notice to Stakeholders Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law, 27 August 2020, available at https://ec.europa.eu/info/sites/default/files/brexit_files/info_site/civil_justice_en.pdf.

upon which the claimant is entitled to serve the claim form out of the jurisdiction is accurate and made with care.

In light of the above discussion concerning the scope of the 2005 Hague Choice of Court Convention, what happens if (ultimately) the wrong 'box' is ticked? In line with the approach of the court in *BDI-BioEnergy International AG v. Argent Energy Limited* (unreported, 19 December 2017, 2017 WL 06519516), the critical question is not whether the correct box has been completed on Form N510, but substantively whether the case is an appropriate one for service without permission or not.[12] Thus, if, hypothetically speaking, CPR 6.33(2B)(a) is incorrectly selected where CPR 6.33(2B)(b) otherwise applies (or vice versa), it should arguably be viewed as a defect or minor, formal irregularity which, provided it causes no prejudice, does not (by itself) invalidate the service effected.

In summary, the recent amendment to the rules concerning service of process should be of great interest to those seeking to bring foreign defendants before the English courts. The new regulations have, at least partially, managed to circumvent barriers brought up by Brexit and, to an extent, have simplified the process for claims against a larger pool of defendants.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Melis Acuner	+44 (0) 20 7170 8575	melis.acuner@cwt.com
Emma Farrow	+44 (0) 20 7170 8582	emma.farrow@cwt.com
Gareth Rund	+44 (0) 20 7170 8593	gareth.rund@cwt.com

[12] Per Judge Hacon at para [19]. This approach was endorsed by the court in *Philip Stephen Wallace (as Liquidator of Carna Meats (UK) Limited) v George Wallace* [2019] EWHC 2503 (Ch) (at [26] per Adam Johnson QC). Contrast, however, the facts of *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm) (per Gloster J).