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Jurisdiction Challenges

Inside

Introduction

Where a claim is litigated can be very important.

This inbrief provides you with a guide on how to challenge the jurisdiction of the English courts if a claim is started here. We also highlight the steps that can be taken in England if a claim is commenced elsewhere, even though you believe it should be litigated or arbitrated in England.

The importance of jurisdiction

The location of the court which determines a dispute can make a great deal of difference. At the very least it may be inconvenient to instruct lawyers in an unfamiliar jurisdiction and for you and all of your witnesses to attend trial in another country. Parties may also be concerned about the time it will take a court to make a decision, the likely costs of litigating in a particular jurisdiction (including whether or not those costs are recoverable), whether the procedural rules will end up favouring one party over another (for example, what are the rules on disclosing documents?) or the ease with which a judgment from a particular court can be enforced in other jurisdictions. In addition, the remedies (including the level and type of damages you may be awarded) available in one jurisdiction may be unavailable in another. In extreme cases parties may even be concerned about corruption or the quality of judicial decision making.

It is therefore worthwhile knowing what options are open to you if a claim is commenced against you in the "wrong" jurisdiction, and better still, what you can do to avoid this happening in the first place.

Challenging the jurisdiction of the English courts

What should you do if you are served with proceedings which have been commenced in the English courts and you wish to challenge the jurisdiction of the English courts?

Do not do anything to submit to the jurisdiction

Firstly, you must be very careful not to do anything which could be construed as submitting to the jurisdiction of the English courts. This means that you should avoid taking any substantive steps in the proceedings other than contesting the jurisdiction of the court. If, for example, you enter a defence, apply to have the claim struck out, make a counterclaim or where you are a party outside the jurisdiction you resist an application for an injunction, you will be taken to have submitted to the jurisdiction.

In advance of proceedings being served you should be careful not to agree anything in writing which could be interpreted as an agreement to have any disputes heard in the English courts, nor should you authorise anyone to accept service of proceedings.

Make an application to contest the jurisdiction of the Court

If you wish to contest the jurisdiction of the English courts you must (a) file an "acknowledgment of service" ticking the box to state that you intend to contest jurisdiction, and (b) within 14 days (or 28 days in Commercial Court or Circuit Commercial Court cases) of filing the acknowledgment make an application to contest jurisdiction.

If you file an acknowledgment but do not make an application within the specified period, you will be taken to have submitted to the jurisdiction. The position if you make no response to the claim form at all depends upon whether or not you are domiciled in an EU member state (please see further below regarding the impact of Brexit). If you are, the court will have to satisfy itself that it has jurisdiction over the claim before entering default judgment against you, if you are not, the court can proceed directly to entering default judgment. Once default judgment has been entered it is too late to contest jurisdiction (unless it can be shown that service was never effected on you).

If your application is successful, the English court will grant an order containing a declaration that the English courts have no jurisdiction or will not exercise its jurisdiction, and in addition may also make orders: setting aside the claim form; setting aside service of the claim form; and staying the proceedings.

Grounds for challenging jurisdiction

Irregular service

Firstly, a defendant may wish to challenge the court's jurisdiction on the basis that there was a technical defect in the service of the claim form. For example, on the basis that the necessary forms were filled out incorrectly or were incomplete, or that local rules regarding service were not adhered to. Ultimately, this may only serve to buy you more time, as the court may make an order declaring the original service valid, or the claimant may simply just remedy the defect in service by serving the claim documentation correctly. However, if the claimant is up against a limitation period, this could be an effective way of dealing with a claim.

Application for a declaration that the English courts have no jurisdiction in respect of the claim

If service was effected in accordance with the relevant rules, you may argue that the court does not have, or should declare that it does not have, jurisdiction over you in respect of the claim. When hearing such an application the English courts will apply either the rules contained in EU Regulation 1215/2012 ("the Recast Brussels Regulation"), The Hague Convention on Choice of Court Agreements ("the Hague Convention") or the common law rules (please see further below regarding the impact of Brexit).

- Claims covered by the Recast Brussels Regulation

  In the case of defendants which are domiciled in the EU, the relevant rules are contained in the Recast Brussels Regulation. Under the Recast Brussels Regulation, the default position is that a defendant should be sued in his, her or its country of domicile. This default position can be varied by a written agreement between the parties as to which courts shall have jurisdiction. In matters relating to contract, a defendant can be sued in the courts for the place of performance of the obligation in question (being the country where goods were to be delivered or services provided), whilst in matters relating to tort, a defendant can be sued in the courts for the place where the harmful event occurred or may occur. If a claim is brought in breach of any of these rules, an English court should rule that it does not have jurisdiction. Note that the Recast Brussels Regulation does not apply to tax matters, liability of the state, matrimonial, bankruptcy, insolvency and arbitration claims. (See below for further information on arbitration).

  The Recast Brussels Regulation (in an amendment to the original Brussels Regulation) now also applies to cases, regardless of where the parties are domiciled, where there is a written jurisdiction clause specifying that the courts of a Member State shall have jurisdiction. Article 31(2) of the Recast Brussels Regulation provides that it will be for the courts of the Member State specified in the clause to rule on their own jurisdiction.

- Claims covered by The Hague Convention

  The Hague Convention came into force in 2015. Members of the EU are bound by this agreement which gives effect to an exclusive choice of court agreement as well as assisting with the enforcement of judgments. It does not contain rules for allocating jurisdiction if there is no exclusive jurisdiction clause. The contracting parties to the Hague Convention currently include the EU, Denmark, Mexico, Montenegro and Singapore. It is likely that more countries will follow with the US, China and Ukraine having signed the initial agreement indicating a political wish to conclude their agreement in due course. It works in a similar way to, and is subject to similar limitations to, the Recast Brussels Regulation, i.e. it gives effect to exclusive choice of court agreements that give jurisdiction to the courts of another contracting state regardless of the domicile of the parties and has no application to clauses giving jurisdiction to non-contracting states.

- Claims subject to the common law rules

  In a case not covered by the Recast Brussels Regulation or the Hague Convention, the claimant would have had to obtain the English courts' permission to serve out of the jurisdiction before serving the claim form. In such a case, the defendant must argue that that permission should not have been granted, that it should now be rescinded and that service should be set aside.

  A defendant wishing to challenge the English courts' jurisdiction must show that one or more of the following requirements for being granted permission to serve out of the jurisdiction were not satisfied:

  – there is a serious issue to be tried on the merits (this means that the claim has a real as opposed to a fanciful prospect of success);

  – there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given set out in paragraph 3.1 of Practice Direction 6B to the Civil Procedure Rules. These classes of case include: claims in respect of contracts where the contract was made in England, the breach of contract occurred in England, the contract is governed by English law or has a clause granting the English courts jurisdiction; and claims made in tort where the damage was sustained, or caused by an act committed, in England.

  – that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. This will involve considerations of convenience and expense, the governing law and whether the claimant could obtain justice in another jurisdiction.

- Other grounds

  A defendant may also seek to set aside jurisdiction on the grounds that the subject matter of the claim is not within the court's jurisdiction (e.g. because it relates to title to foreign land, or a foreign patent), or because of state or diplomatic immunity.

Claims made in another jurisdiction

What can you do if you are sued in a foreign jurisdiction and you think that the case should be heard in England? Aside from challenging the jurisdiction of the foreign court in the court itself, is there anything that you can do in England?

Claims made in the courts of EU member states

Pursuant to Article 31(2) of the Recast Brussels Regulation, if a claim is brought in another Member State in breach of a jurisdiction agreement granting jurisdiction to the English courts, the defendant in those proceedings can bring a claim in the courts of England and require the court first seized to stay its proceedings.

Damages for breach of an agreement on jurisdiction

If proceedings were brought in breach of a jurisdiction agreement granting jurisdiction to the English courts, the defendant could claim damages in England for losses flowing from

that breach of contract. Damages for breach of such a clause may be difficult to quantify, but the threat of such proceedings could make a party think twice about starting proceedings in the wrong jurisdiction. It may also be possible to sue the lawyers acting for the party or parties that commenced proceedings in breach of a jurisdiction clause for the tort of inducing a breach of contract.

Anti-suit injunctions

If a claim has been commenced in a court outside of the EU, the defendant in those proceedings may seek an order addressed to the party or parties who commenced them directing them to discontinue the proceedings (such an injunction is not available in respect of claims brought in the courts of EU Member States following the European Court of Justice's ruling in *Turner v Grovit*).

Pre-emptive strike

If a party is concerned about proceedings being commenced in another jurisdiction, it can make a pre-emptive strike and issue proceedings in England. This option is also open to parties which might naturally be the defendant in proceedings, by seeking a "negative declaration" confirming that they are, for example, not in breach of contract.

Proceedings brought in breach of an arbitration clause

If proceedings are commenced in the English courts in breach of an arbitration clause, the other party to those proceedings can apply under section 9 of the Arbitration Act 1996 for an order staying those proceedings. As with applications to contest jurisdiction, you must bring such an application after acknowledging the legal proceedings, but before making any step in those proceedings to answer the substantive claim.

Where proceedings are brought in a foreign court in breach of an arbitration agreement, the English court may order an anti-suit injunction where those proceedings are commenced in the courts of a non-EU Member State. Where proceedings are commenced in an EU Member State, such an injunction is not available following the European Court of Justice's ruling in *Alliance SpA v West Tankers*. It had been thought that the position may change following the coming into effect of the Recast Brussels Regulation on 10 January 2015 (which provides that a Member State's court's ruling as to whether or not an arbitration agreement is enforceable will not be capable of recognition in other Member States, but makes no specific reference to anti-suit injunctions). However in a 2018 decision, the English Commercial Court concluded that there was nothing in the Recast Brussels Regulation to cast doubt on the validity of the decision in *West Tankers*.

The value of a jurisdiction clause

In order to avoid potentially expensive jurisdictional battles, parties should seek, where possible, to enter into agreements regarding the courts which are to hear any disputes between them. Such agreements may of course be breached, but the English courts' recognition that damages can be awarded for the breach of such agreements, the possibility of obtaining an anti-suit injunction, and the Recast Brussels Regulation, do offer real protection.

The impact of Brexit

For as long as the UK remains an EU Member State, the Recast Brussels Regulation will apply to it, and so the position as set out above will remain unchanged until the UK leaves the EU.

If the UK leaves the EU with a deal, the current proposals provide that the Recast Brussels Regulation will continue to apply where proceedings are commenced before the end of the transition period (currently proposed as 31 December 2020). In its paper of August 2017 the UK government indicated that it would enter into a new agreement with the EU similar to the current agreement under the Recast Brussels Regulation as well as seek to join the Lugano Convention (to which Denmark, Iceland, Norway and Switzerland are parties and which is in substantially the same terms as the old Brussels Regulation). However all these proposals are subject to negotiation and no final agreement has yet been reached.

In the event of a 'no deal' Brexit, the government has stated that it intends to sign up to the Hague Convention (which does not require the consent of the EU). However, recent guidance issued by the European Commission suggests that the EU considers that the Hague Convention may only apply to exclsuive choice of court agreements concluded after entry into force for the UK in its own right (i.e. it would not cover the period when the UK was a party to the Hague Convention by virtue of its membership of the EU). Parties may therefore wish to consider using arbitration or checking in advance whether an English judgment will be enforced under the domestic law of any relevant jurisdiction.

For further information on this subject please contact:

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