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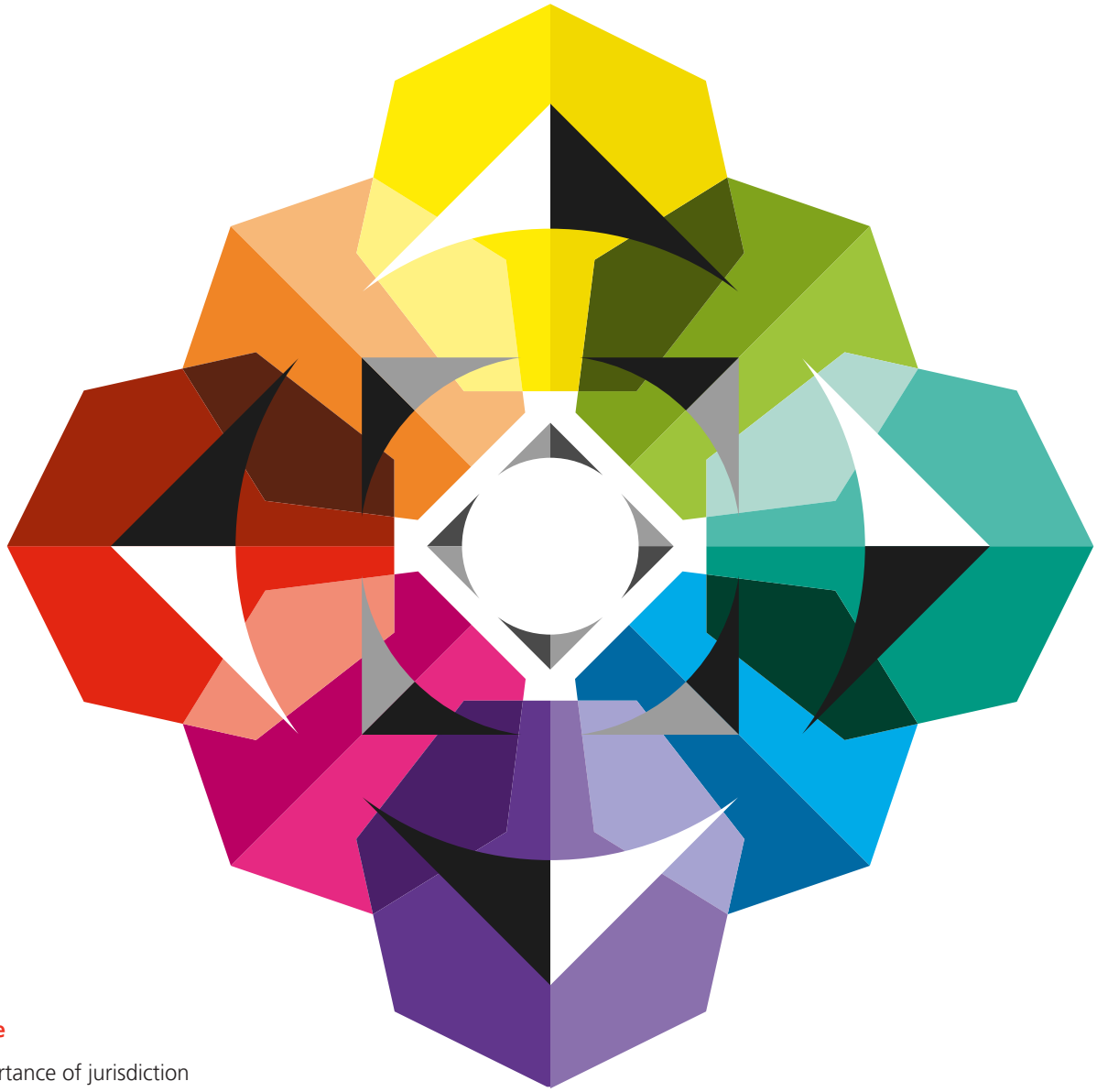
# Jurisdiction Challenges



**Inside**

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 available in one jurisdiction (including the level and type of damages you may be awarded) 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. Then, if you do not file a defence in time, 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.

## The impact of Brexit

Whilst the UK was a member of the EU, and during the UK-EU transition period that ended on 31 December 2020, the rules regarding jurisdictional matters contained in EU Regulation 1215/2012 ("the Recast Brussels Regulation") applied between the UK and the EU. Those rules will continue to apply to all cases instituted

in the UK prior to 31 December 2020. Absent a lengthy extension of time, the deadline for making an application to contest the English court's jurisdiction in respect of cases instituted prior to 31 December 2020 will have long since expired, therefore this note will not address the Recast Brussels Regulation.

In April 2020, the UK applied to re-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). In May 2021, the EU Commission rejected the UK's application for the time being. The UK is however, a party to the Hague Convention on Choice of Court Agreements (as to which see further below).

## 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 The Hague Convention on Choice of Court Agreements or the common law rules.

### Claims covered by The Hague Convention on Choice of Court Agreements ("the Convention")

The contracting parties to the Convention currently include the EU, Mexico, Montenegro and Singapore. It is likely that more countries will follow with the US, China, Israel, Ukraine and the Republic of North Macedonia having signed the initial agreement indicating a political wish to conclude their agreement in due course. The Convention only applies to exclusive jurisdiction clauses and its application is narrower than the Lugano Convention e.g. it does not apply to insolvency, consumer or employment disputes. If the parties have agreed that the courts of a contracting state will have exclusive jurisdiction, each contracting state should give effect to that choice of court, regardless of the domicile of the parties. However, the Convention has no application to an agreement giving jurisdiction to the courts of a non-contracting state or providing for a court to have non-exclusive jurisdiction.

It should be noted that there is a divergence in views over:

- When the UK is to be treated as becoming a party to the Convention. The UK's position is that it has been a member since 2015 when the EU (of which it was then a part) acceded to the Convention. The EU's position is that the UK only became a party on 1 January 2021 when it became a party in its own right. This matters as the Convention only applies to agreements giving exclusive jurisdiction to the courts of a contracting state entered into after the relevant state became a party to the Convention.
- Whether the Convention applies to "asymmetric" jurisdiction clauses (i.e. clauses which provide that Party A may only be sued in one jurisdiction, but Party B may be sued in any jurisdiction).

### Claims subject to the common law rules

In a case not covered by the Convention, the claimant would have had to obtain the English courts' permission to serve out of the jurisdiction before serving the claim form. (It should be noted that following Brexit the English courts amended their rules so that where a contract contains a term providing for the courts of England and Wales to determine the claim permission is not required). 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 (meaning that that one side has a much better argument than the other) that the claim falls within one or more classes of case in which permission to serve out may be given, as 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?

### 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 the courts of another country in breach of an agreement giving the English courts exclusive jurisdiction, the defendant in those proceedings may seek an order addressed to the party or parties who commenced those proceedings directing them to discontinue the proceedings. A failure to comply with an anti-suit injunction would mean that the relevant party was in contempt of court.

### 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 requiring the relevant party to discontinue those proceedings.

## 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. The new rule that the permission of the court is not required to serve proceedings out of the jurisdiction if there is a term in a contract providing for determination of that claim by the English courts will mean the service of the claim will require one less hurdle. Such agreements may of course be breached. However, real protection is provided by the Convention (if it applies), together with the English courts' recognition that damages may be awarded for their breach and the possibility of obtaining an anti-suit injunction.

## For more information please contact:

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