FOCUS

JURISDICTION AND ENFORCEMENT

The UK landscape beyond Brexit

While the post-Brexit legislative framework for jurisdiction and the enforcement of judgments is now clear, perhaps even familiar, to practitioners, there are still questions around the practical application of that framework and the extent to which potential uncertainties about life after Brexit have come to pass. Three years on from the UK's departure from the EU, these issues are beginning to be reflected in the case law, while some questions still remain.

Which rules apply when?

On its face, the position is straightforward: for proceedings instituted before the end of the Brexit transition period on 31 December 2020, the European regime continues to apply and for proceedings instituted following the end of the Brexit transition period, either The Hague Convention on Choice of Court Agreements 2005 (2005 Hague Convention) or the English common law rules apply (*see Focus "International commercial litigation after Brexit: uncertainty in a new world", www.practicallaw.com/w-029-7767*). However, nuances in the application of these rules mean that the European regime could play a role for some time.

Simon v Taché and others concerned post-Brexit proceedings that related to proceedings which were commenced before the end of the transition period (*[2022] EWHC 1674 (Comm)*). Article 67(1) of the EU-UK Withdrawal Agreement (Article 67(1)) provides that the recast Brussels Regulation (*1215/2012/EU*) provisions on jurisdiction will apply in respect of legal proceedings that are instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings.

In interpreting Article 67(1), the High Court confirmed that the recast Brussels Regulation applies to:

- Post-Brexit proceedings if they are related to pre-Brexit proceedings.
- New claims added or new defendants that are joined, following Brexit, to proceedings that were commenced pre-Brexit.

However, following *Simon*, it is uncertain whether the substantive jurisdiction of the court in the post-Brexit proceedings should be determined by reference to the recast Brussels Regulation jurisdiction regime rather than the common law rules, or whether Article 67(1) means that the recast Brussels Regulation is relevant only for determining which proceedings should be stayed.

Scope of jurisdiction

The post-Brexit landscape has seen a return to forum non conveniens arguments as well as an expansion of the circumstances in which permission is required to serve proceedings on European defendants.

Forum non conveniens. The return to English common law rules brought with it forum non conveniens arguments, which were not available under the European regime.

These principles were front and centre in *The Public Institution for Social Security v Ruimy and another,* known as *PIFSS* (*[2023] EWHC 177 (Comm)*). The defendants challenged the English court's jurisdiction and applied to stay or set aside two sets of English proceedings in favour of proceedings in Switzerland.

One of the English claims was commenced following Brexit and so the position was considered under the English common law rules and, in particular, the principles in *Spiliada Maritime Corporation v Cansulex Limited* (*[1987] 1 AC 460*). The court ultimately rejected the defendants' application and concluded that the English court was the appropriate forum, despite various factors pointing towards Switzerland. It held that the desirability of avoiding fragmentation and inconsistent judgments may result in proceedings being commenced or continued in England, despite substantial links with another jurisdiction.

The other English claim was commenced before the Brexit transition period ended and it was common ground that if the forum non conveniens arguments failed, there was no basis for the court to exercise the discretion to stay the claim under Article 34 of the recast Brussels Regulation.

One concern raised by commentators before the UK's departure from the EU was the extent to which there would be an increase in defendants raising forum non conveniens arguments that were not available to them before Brexit, in order to escape English jurisdiction and make proceedings more complex. *PIFSS* is a good illustration that, while such arguments may be raised, forum non conveniens also allows the court the appropriate flexibility to take a robust approach and continue proceedings in England if that is more appropriate, including in order to prioritise avoiding fragmentation and the risk of irreconcilable judgments.

Permission to serve out. Following Brexit, the circumstances in which permission is required to serve proceedings on European defendants have expanded. Previously, where jurisdiction was founded on the European regime, permission was not required. In response, there have been some important developments regarding the scope of the English court's jurisdiction.

A new provision in the Civil Procedure Rules (CPR), which became effective from 6 April 2021, dispenses with the requirement for claimants to obtain permission to serve claim forms out of the jurisdiction where there is an English jurisdiction agreement, exclusive or otherwise, between the parties that relates to the relevant claim or in respect of which the relevant claim is brought (*CPR 6.33(2B)(b) and (c)*). This amendment benefits claimants

that have a jurisdiction agreement with a counterparty anywhere in the world. If there is no agreed service clause or service agent, the claimant will still have to effect service in the foreign jurisdiction but will avoid the additional burden of a substantive permission application that would include a duty of full and frank disclosure.

New jurisdictional gateways were introduced, and certain existing ones were amended, with effect from 1 October 2022 (*see News brief "Upcoming CPR amendments: significant changes for litigators", www.practicallaw.com/w-037-0382*). These include gateways for:

- Claims in respect of disputes arising from the operations of a branch, agency or other establishment within the jurisdiction.
- Claims for breach of fiduciary duty.
- Claims or applications seeking third-party information orders.

The new gateway relating to information orders was used for the first time in *LMN v Bitflyer Holdings Inc and others* (*[2022] EWHC 2954 (Comm)*). The High Court granted permission for service of a Bankers Trust application on certain cryptocurrency exchange defendants out of the jurisdiction. The permission application was determined without notice, but several of the defendants subsequently reserved their position as to whether they would challenge the court's jurisdiction under CPR Part 11, and there may well be argument on this point in due course.

In one of the early post-Brexit cases, the Supreme Court took a broad approach to determining whether a case meets the criteria for a jurisdictional gateway (*FS Cairo (Nile Plaza) LLC v Brownlie [2021] UKSC 45; www.practicallaw.com/w-033-4560*). By a majority, the court interpreted broadly the tort gateway under paragraph 3.1(9)(a) of CPR Practice Direction 6B, which requires damage to be, or have been, sustained within the jurisdiction. The court:

- Did not accept that only damage sufficient to complete a cause of action in tort was material to the gateway. This would be unduly restrictive where the court is concerned with the scope of a jurisdictional rule rather than the completion of a cause of action in tort.
- Rejected an analogy with the concept of special jurisdiction for a harmful event under the recast Brussels Regulation, which would limit the scope to direct damage and exclude indirect or consequential damage.
- Rejected arguments that an analogy with economic tort cases supported a narrow reading.

While the new and expanded gateways, combined with the court's broad approach, will likely assist claimants that seek to sue defendants based outside of the jurisdiction in England, it has been suggested, and the court in *Brownlie* pointed out, that the common law jurisdiction rules incorporate a degree of discretion, and forum non conveniens arguments provide an important check and balance here.

Anti-suit injunctions and EU proceedings

Another anticipated consequence of Brexit was the return of anti-suit injunctions in respect of EU proceedings. Except in limited circumstances, anti-suit injunctions are prohibited under the recast Brussels Regulation in accordance with the *West Tankers* principle (*Allianz SpA v West Tankers Inc C-185/07; www.practicallaw.com/2-385-1001*).

In *QBE Europe SA/NV and another v Generali España de Seguros Y Reaseguros*, the High Court granted a quasi-contractual anti-suit injunction in relation to Spanish direct action proceedings brought against an insurer in circumstances where the underlying policy contained a London arbitration agreement (*[2022] EWHC 2062 (Comm)*). A further anti-suit injunction was granted on a precautionary basis to prevent the claimant issuing further proceedings in Spain against the defendant's successor entity.

This case was followed by *Ebury Partners Belgium SA/NV v Technical Touch BV and another* in which the High Court granted an anti-suit injunction in respect of Belgian proceedings brought in breach of exclusive jurisdiction clauses in two contracts (*[2022] EWHC 2927 (Comm)*). The court rejected several arguments advanced by the defendants, including that the parties and facts were closely connected with Belgium, and evidence and witnesses were located there, since these were all factors that were

2019 Hague Convention

In December 2022, the government consulted on the UK's possible accession to the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (*www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019*).

Bodies such as the Law Society have expressed strong support for accession as soon as possible, emphasising the potential for increased certainty and predictability, as well as shorter timeframes for the cross-border enforcement of judgments and the added bonus of increasing the attractiveness of English courts (*www.lawsociety.org.uk/campaigns/consultation-responses/joining-the-hague-convention-2019*).

In the consultation, the government also maintains that it is participating fully in the development of a possible future convention on jurisdiction rules in civil and commercial matters, but whether this comes to fruition remains to be seen.

foreseeable at the time of contracting and therefore encompassed by the parties' contractual agreement, following *Louis Dreyfus Company Suisse SA v International Bank of St Petersburg* (*[2021] EWHC 1039 (Comm)*).

These cases demonstrate the English court's willingness, in appropriate circumstances, to issue anti-suit injunctions restraining proceedings in the EU. The anti-suit injunctions granted in these cases may not have been available before Brexit. Following Brexit and in the absence of a comprehensive regime governing the pursuance of parallel proceedings in the English and the EU courts, anti-suit injunctions represent a useful and necessary tool. This will be a welcome development for contracting parties and arguably an improvement on the pre-Brexit position, giving greater weight and effectiveness to exclusive jurisdiction clauses.

The future

The indications from recent cases are that the English courts are using the tools available to them in the post-Brexit framework to administer a robust but also flexible approach to jurisdiction, alongside deliberate changes to counter concerns around post-Brexit uncertainty for London as a dispute resolution centre. The authors have not yet seen disputes regarding the enforcement of EU judgments arising in the case law, which may be an indication that post-Brexit enforcement difficulties are less of an issue than some feared.

That said, with the EU having blocked the UK's accession to the 2007 Lugano Convention, and the 2005 Hague Convention being limited to exclusive jurisdiction clauses, there remains no comprehensive multilateral framework to address jurisdiction and the recognition and enforcement of civil judgments as between the UK and the EU that is akin to the pre-Brexit regime. There is also uncertainty about the date from which EU member state courts will regard the 2005 Hague Convention as applying to the UK following Brexit.

The 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters could help to fill the gap as far as recognition and enforcement are concerned (*see box "2019 Hague Convention"*).

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