

Jurisdiction clauses and service out post-Brexit: a welcome rule change

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The [Civil Procedure Rule Committee](#) (CPRC) has, in principle, agreed an amendment to the rules governing [service out](#) of the jurisdiction after the end of the [Brexit transition period](#).

The amendment will remove the need for the court's permission to serve out where the claim falls within a choice of court agreement in favour of the English courts. This will significantly streamline the procedure for serving out of the jurisdiction in circumstances where the defendant has agreed that the English court should have [jurisdiction](#) to determine disputes that arise under a contract. It is therefore welcome, particularly in circumstances where the English courts are facing increased competition for international business in a post-Brexit world.

The amendment was proposed by the Lord Chancellor's Advisory Committee on Private International Law, which is co-chaired by Lord Mance (and of which I am a member). It was agreed at the 9 October 2020 meeting of the CPRC, the [minutes](#) for which were made publicly available on 10 November 2020. The minutes record that the purpose of the change is to reassure the legal profession and wider business community, and give businesses the confidence to continue to choose the jurisdiction of the English courts, by eliminating a preliminary step which adds cost and delay.

The current rules

At the moment, in broad summary, [Civil Procedure Rule \(CPR\) 6.33](#) provides that a claimant can serve proceedings on a defendant outside the UK, without needing to obtain the court's permission, where the English court has jurisdiction under the Recast Brussels Regulation (Regulation (EU) 1215/2012), the Brussels or Lugano Conventions, or the 2005 Hague Convention on Choice of Court Agreements (2005 Convention), as well as in a limited range of other circumstances. Where there is a jurisdiction clause in favour of the English courts, the Recast Brussels Regulation will almost

invariably apply, and so the claim can ordinarily be served out without the court's permission.

Aside from these scenarios, a claimant may be able to obtain the court's permission to serve proceedings out of the jurisdiction under CPR 6.36. To do so, the claimant must be able to show:

- A good arguable case that the claim falls within one of the common law "gateways" for service out (at [paragraph 3.1](#) of [Practice Direction \(PD\) 6B](#)).
- That there is a serious issue to be tried on the merits.
- That England is clearly or distinctly the appropriate forum for the trial of the action and the court should exercise its discretion to permit service out.

Once the Brexit transition period ends

For proceedings brought after the end of the Brexit transition period, from 1 January 2021, the Recast Brussels Regulation and the Brussels and Lugano Conventions will no longer apply. Accordingly, all of these bases for serving out without the court's permission will be removed from CPR 6.33 (unless the UK is able to re-accede to the Lugano Convention, as discussed below).

So if there is no further amendment to CPR 6.33, a claimant will need the court's permission to serve proceedings out of the jurisdiction even where the parties have agreed that the English court should have jurisdiction over any dispute, unless the agreement falls within the 2005 Hague Convention. The 2005 Convention only applies where the choice of court agreement is exclusive, which (according to the explanatory report to the 2005 Convention) does not include an asymmetric or unilateral jurisdiction clause; that is, where one party must bring proceedings in the designated court but the other party has a choice of where to sue. And, self-evidently, it does not include a mutually non-exclusive clause.

Further, for the 2005 Convention to apply, the choice of court agreement must have been concluded after its entry into force for the state of the chosen court, which for the UK is 1 October 2015. There is some uncertainty as to whether EU member states will treat this as the relevant date, for example in considering whether to enforce an English judgment pursuant to the 2005 Convention. The European Commission has expressed the view, in its [Notice to Stakeholders dated 27 August 2020](#), that the 2005 Convention will apply to exclusive English jurisdiction clauses only if they are concluded after the UK re-accedes on 1 January 2021. However, that is irrelevant for present purposes. The [Private International Law \(Implementation of Agreements\) Bill](#), which is currently working its way through Parliament, provides (at paragraph 7 of Schedule 5) that, for the purposes of the 2005 Convention as it has the force of law in the UK, the date of entry into force for the UK is 1 October 2015.

The upshot is that, without a rule change, claimants would need the court's permission to serve proceedings on a defendant out of the jurisdiction, despite that defendant having agreed that the English court should have jurisdiction, unless the choice of court agreement falls within the relatively narrow confines of the 2005 Convention (namely, an exclusive choice of court agreement concluded on or after 1 October 2015).

The agreed amendment

The CPRC minutes record that the amendment will introduce a new rule 6.33(2C), which will allow service out without the court's permission where the contract contains a jurisdiction clause in favour of the English court.

The amendment was agreed subject to final drafting, so the precise wording of the new rule is not yet available, but the minutes states that the existing common law gateway for contract claims which fall within such a clause (at paragraph 3.1(6) (d) of PD 6B) will at the same time be removed. This gateway is of long standing, but has been largely redundant since the introduction of the Recast Brussels Regulation in January 2015, which applies to choice of court agreements in favour of the English court regardless of whether there is any EU-domiciled party. In contrast, choice of court agreements fell within the scope of the predecessor Brussels I Regulation (Regulation (EC) 44/2001) only if there was at least one EU-domiciled party, and there is a similar requirement under the Lugano Convention for a party domiciled in a contracting state.

Streamlining the process

As noted above, even where none of the bases for serving a claim form out of the jurisdiction without permission apply, the claimant can still seek the court's permission to serve out in certain circumstances. Without the new rule, permission would very likely be granted where there is a jurisdiction clause in favour of the English courts, assuming the claimant can meet the hurdle of establishing a serious issue to be tried on the merits. It is well established that, where parties have bound themselves by an exclusive jurisdiction clause, the English court will normally give effect to it unless there are strong reasons to the contrary. So, if a claimant would be likely to obtain permission anyway, does the rule change really matter?

In a word, yes. An application for permission to serve out is a procedural hurdle which involves additional time and cost, even where a favourable result to the application may confidently be predicted. Importantly, since the application is invariably made without notice to the defendant, at the initial stage, the claimant is under a duty of "full and frank" disclosure of any factors which might reasonably be thought to weigh against the application being granted. That requires careful consideration.

Removing this hurdle is therefore a significant benefit to a claimant, and it is difficult to see any prejudice to a defendant in circumstances where the jurisdiction of the English courts has already been agreed. As the CPRC minutes make clear, and as you would expect, the defendant will still be able to challenge the court's jurisdiction after the proceedings are served, for instance if it wishes to argue that there is no valid jurisdiction agreement. Equally, the defendant can apply to strike out the claim, or for reverse summary judgment, if it considers that the claimant has no real prospect of success. Overall, therefore, the rule change is welcome.

What if the UK rejoins Lugano?

The UK submitted its application to re-accede to the Lugano Convention in April this year. The non-EU contracting states (Iceland, Norway and Switzerland) have expressed their support, but so far the EU's consent has not been forthcoming. It is hoped by many that, if a post-Brexit trade deal is agreed between the UK and the EU, then agreement on Lugano will also fall into place. But that cannot be guaranteed.

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If the UK does rejoin Lugano, then jurisdiction clauses in favour of the English court will fall within that Convention where there is at least one party domiciled in a Lugano contracting state. In those circumstances, there would be no need for

permission to serve out, with or without the further rule change. But the new rule will remain relevant, and welcome, where the contracting parties are domiciled elsewhere, and where the case falls outside the 2005 Convention.

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