

14:15: Maximising recovery in cross-border claims



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Maximising recovery in cross-border claims: where to litigate?

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Choice of forum considerations to maximise recovery

- ❑ **The determination of where to litigate may be fundamental to prospects of maximising recovery. Important considerations in cross-border cases may include:**
 - ❑ **Prospects of establishing jurisdiction;**
 - ❑ **Convenience;**
 - ❑ **Expense;**
 - ❑ **Duration (and quality) of proceedings;**
 - ❑ **Disclosure;**
 - ❑ **Interim relief available;**
 - ❑ **Procedural rules;**
 - ❑ **Applicable law;**
 - ❑ **Costs regime;**
 - ❑ **Location of defendant(s);**
 - ❑ **Location of defendant's assets;**
 - ❑ **Enforcement of resulting judgment and post-judgment relief;**
 - ❑ **Risk of parallel proceedings and/or inconsistent judgments.**



Litigating cross-border claims in England post-Brexit

- ❑ Prior position in the UK
- ❑ Recast Judgments Regulation (EU) No. 1215/2012 contains harmonised rules of jurisdiction and recognition and enforcement of judgments in civil and commercial matters (“Brussels I Recast”).
- ❑ Lugano Convention 2007 applies in EU (including Denmark separately), along with Iceland, Norway, and Switzerland (“Lugano”).
- ❑ UK was a party to the Hague Choice of Court Convention 2005 by virtue of EU ratification; along with Denmark (separately), Mexico, Montenegro and Singapore (“Hague Choice of Court Convention”). It has since also entered into force in Ukraine (on 1 August 2023).
- ❑ Common law applied residually (principally to defendants domiciled outside the EU).
- ❑ Post- transition period (from 1 January 2021)
- ❑ **The transition period ended at 11pm GMT on 31 December 2020. Brussels I Recast and Lugano were revoked in the UK by Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019.**
- ❑ **In most cases (and subject to the application of the Hague Choice of Court Convention 2005), the common law rules of jurisdiction, and on the recognition and enforcement of judgments, now apply in England to defendants, irrespective of domicile.**



Post-Brexit protection for English exclusive jurisdiction clauses: Hague Choice of Court Convention 2005

- ❑ Where there is an English jurisdiction clause falling within the scope of the Hague Choice of Convention 2005, the English court must normally take jurisdiction to the exclusion of the courts of other Contracting States; and may not decline jurisdiction on the basis of *forum non conveniens*.
- ❑ The resulting judgment will be enforceable in the other Contracting States (which include all the EU Member States and Singapore). This increases the prospects of effective recovery where the Convention applies.
- ❑ The Hague Choice of Court Convention originally came into force in the UK on 1 October 2015 (by virtue of the EU's ratification on behalf of Member States). UK has acceded in its own right to Hague Convention on Choice of Court Agreements, with effect from 1 January 2021.
- ❑ By Article 3 of the Hague Choice of Court Convention, **only exclusive jurisdiction clauses** fall within its scope. Clause must be in writing; or by any other means of communication which renders information accessible so as to be usable for subsequent reference
- ❑ By Article 16, the Convention only applies to choice of court agreements in favour of Contracting States concluded after its entry into force for that chosen State's courts. There is a question mark over which date will apply to the UK - 1 October 2015 (when the UK was first bound via its membership of the EU) or 1 January 2021 (when it re-acceded as a separate Contracting State). The UK has **unilaterally** taken a position in Private International Law (Implementation of Agreements) Act 2020 that it is the earlier 2015 date.
- ❑ There are also subject matter exclusions contained in Article 2 e.g. consumer contracts and carriage of goods. The UK (like the EU) has also largely excluded insurance (but not reinsurance) contracts.



Enhanced post-Brexit protection for English jurisdiction clauses: no permission needed to serve out of jurisdiction

- ❑ After the end of the transition period, Civil Procedure Rules, para 6.33(2B) (as amended) abolished the requirement for permission to serve out of the jurisdiction where there is an English jurisdiction clause (even in cases falling outside the ambit of the Hague Choice of Court Convention 2005):
 - ❑ *“The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form—*
 - ❑ *(a) the court has power to determine that claim under the 2005 Hague 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 Convention;*
 - ❑ *(b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim;*
or
 - ❑ *(c) the claim is in respect of a contract falling within sub-paragraph (b).”*
- ❑ Whilst this makes it easier to pursue a claim in England, there is no guarantee where the Hague Choice of Court Convention is inapplicable that there will not be parallel proceedings in another Contracting State (or elsewhere); and recognition and enforcement of any English judgment will depend on the relevant national law, on which local advice is required.



Other material post-Brexit changes to litigation in England

Lis pendens and *forum non conveniens*

No longer any rule compelling the English court to decline jurisdiction where courts in an EU Member State or Lugano State are first seised.

Parallel proceedings are but one factor to consider in applying the doctrine of *forum non conveniens*.

Proceedings may be stayed in favour of courts of Member States on basis of *forum non conveniens* (Case C-281/02 *Owusu v Jackson* no longer applicable).

Anti-suit injunctions

Under Brussels I Recast: Case C-159/02 *Turner v Grovit*, CJEU held that an English court could not restrain the pursuit of proceedings in the courts of another Member State. No such restriction now exists.



Encouraging proceedings in England: revised gateways for permission to serve out of the jurisdiction

- ❑ Important amendments and extensions to the jurisdictional gateways for permission to serve out of the jurisdiction came into effect on 1 October 2022. These include the following provisions of Civil Procedure Rules, Practice Direction 6B, para 3.1 (amendments are shown in red).

- ❑ In each case, as well as establishing a jurisdictional gateway, it is also necessary for the claimant to establish (amongst other things) that England is the most appropriate forum.

- ❑ General grounds

- ❑ “(1) A claim is made for a remedy against a person domiciled within the jurisdiction within the meaning of sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982.
 - ❑ [i.e. the definition of domicile in the UK for individuals is that formally used under the recast Brussels I Recast and its predecessors.]

- ❑ (1A) A claim is made against a person in respect of a dispute arising out of the operations of a branch, agency or other establishment of that person within the jurisdiction, but only if proceedings cannot be served on the branch, agency or establishment...

- ❑ (4A) A claim is made against the defendant which—
 - ❑ (a) was served on the defendant within the jurisdiction without the need for the defendant’s agreement to accept such service;
 - ❑ (b) falls within CPR rule 6.33; or
 - ❑ (c) falls within one or more of paragraphs (1A), (2), (6) to (16A) or (19) to (23), and a further claim is made against the same defendant which arises out of the same or closely connected facts.”



Revised gateways for permission to serve out of the jurisdiction

- ❑ Claims in relation to contracts

- ❑ “(6) A claim is made in respect of a contract where the contract –
 - ❑ (a) was (i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction;
 - ❑ (b) was made by or through an agent trading or residing within the jurisdiction or
 - ❑ (c) is governed by the law of England and Wales.

- ❑ (7) A claim is made in respect of a breach of contract committed, or likely to be committed within the jurisdiction.

- ❑ (8) A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).

- ❑ (8A) A claim for unlawfully causing or assisting in:
 - ❑ (a) a breach of a contract where the contract falls within one of paragraphs (6)(a) to (6)(c) above or within Rule 6.33(2B); or
 - ❑ (b) a breach of contract falling within paragraph (7) above.”



Revised gateways for permission to serve out of the jurisdiction

Claims in tort

“(9) A claim is made in tort where –

- (a) damage was sustained, or will be sustained, within the jurisdiction;
- (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or
- (c) the claim is governed by the law of England and Wales.”

- In *FS Cairo (Nile Plaza) LLC v Christine Brownlie* (‘Brownlie 2’) [2021] UKSC 45, the Supreme Court determined (Lord Leggatt dissenting on this issue) that “damage“ under the tort gateway includes both direct and indirect harm.



Revised gateways for permission to serve out of the jurisdiction

- ❑ Declarations of non-liability

- ❑ “(16A) A claim is made for a declaration that the claimant is not liable where, if a claim were brought against the claimant seeking to establish that liability, that claim would fall within another paragraph of this Practice Direction (excluding paragraphs (1) to (5), (8), (12D), (15D), (17), (22) and (24) to (25)).”

- ❑ Gateways (21)-(23) extend and add new gateways relating to obligations of confidence, right to privacy and accessory liability.

- ❑ There is an important new gateway for information orders against non-parties:

- ❑ “(25) A claim or application is made for disclosure in order to obtain information— (a) regarding: (i) the true identity of a defendant or a potential defendant; and/or (ii) what has become of the property of a claimant or applicant; and (b) the claim or application is made for the purpose of proceedings already commenced or which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or pursuant to CPR rule 6.32, 6.33 or 6.36.”



Revised gateways for permission to serve out of the jurisdiction: trusts claims

- ❑ There are also new gateways making it easier to establish jurisdiction in relation to trusts:
 - ❑ (12) *A claim is made in respect of a trust which is created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, and which is governed by the law of England and Wales.*
 - ❑ (12A) *A claim is made in respect of a trust which is created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, and which provides that jurisdiction in respect of such a claim shall be conferred upon the courts of England and Wales.*
 - ❑ *(12B) A claim is made in respect of a trust which is created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, and which expressly or impliedly designates England and Wales as the principal place of administration.*
 - ❑ *(12C) A claim is made in respect of a trust created in the jurisdiction.*
 - ❑ *(12D) A claim is made for a declaration that no trust has arisen where, if the trust was found to have arisen, it would comply with one of the conditions set out in paragraph (12), (12A), (12B) or (12C).*
 - ❑ *(12E) A claim is made for a breach of trust where the breach is committed or likely to be within the jurisdiction.*

- ❑ There are also extended gateways in respect of constructive and resulting trusts (gateway (15)).

- ❑ There are new gateways for: assisting in a breach of trust (gateway (15A)); breach of fiduciary duty (gateway (15B)); assisting in breach of fiduciary duty (gateway (15C)); and declarations that no fiduciary duty arises (gateway (15D)).



Maximising recovery: interim relief in support of foreign proceedings

- ❑ Availability of interim relief to secure assets pending trial may differ considerably between jurisdictions and directly affect prospects of maximising recovery.

- ❑ English courts enjoy broad jurisdiction to grant interim relief in support of foreign proceedings:
 - ❑ Section 25(1) of the Civil Jurisdiction and Judgments Act 1982, as amended, confers such a power where the courts of another Contracting State have, or will have, jurisdiction under the Hague Choice of Court Convention 2005.
 - ❑ Section 25(3) of the 1982 Act (and SI 1997/302) confer a power to grant relief in support of any other proceedings brought overseas.
 - ❑ In both cases, section 25(2) states that:
 - ❑ *“the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it.”*



Maximising recovery: interim relief in support of foreign proceedings

- ❑ Relevant factors for granting interim relief in support of foreign proceedings include (per *Motorola Credit Corp v Uzan* (No.2) [2003] EWCA Civ 752, [2004] 1 W.L.R. 113):
 - ❑ 1. whether the making of the order would interfere with the management of the case in the primary court;
 - ❑ 2. whether it was the policy of the court in the primary jurisdiction not itself to make worldwide freezing/disclosure orders;
 - ❑ 3. whether there is a danger that the orders made would give rise to disharmony or confusion and/or the risk of conflicting, inconsistent or overlapping orders in other jurisdictions, in particular the courts of the State where the person to be enjoined resided or where the assets affected were located;
 - ❑ 4. whether at the time the order was sought there was likely to be a potential conflict as to jurisdiction making it inappropriate and inexpedient to make a worldwide order;
 - ❑ 5. whether, in a case where jurisdiction was resisted and disobedience was to be expected, the court would be making an order which it could not enforce.

- ❑ A sufficient connection to England is also needed, frequently provided in the case law by one or more of the following: presence of the defendant in England; property in the jurisdiction; and the restraint of fraud.

US Assistance to Foreign and International Tribunals and to Litigants before such Tribunals

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28 U.S. Code § 1782- Assistance to Foreign and International Tribunals and to Litigants before such Tribunals

- ❑ *“(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.*

- ❑ *“(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.”*

Maximising recovery: enforcement of judgments overseas

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Enforcing foreign judgments in England: common law rules

- ❑ Unless the Hague Choice of Court Convention 2005 applies (or there is a specific bilateral agreement), most judgments from across the world (including EU Member States and Lugano Convention Contracting States) will now be recognised and enforced in England under the more restrictive common law rules.
 - ❑ This means that if the defendant has most of its assets in England, it may be preferable to consider litigating in the English courts, rather than litigating overseas and then seeking to enforce a foreign judgment in England.
- ❑ *Dicey, Morris and Collins, The Conflict of Laws* (16th edition, 2022) sets out the principal Rule for recognition of foreign judgments at common law:
 - ❑ *“RULE 47—... a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:*
 - ❑ *First Case—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country. For a natural person this requires physical presence in the territory, and for a legal person it requires a fixed place of business in the territory.*
 - ❑ *Second Case—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.*
 - ❑ *Third Case—If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.*
 - ❑ *Fourth Case—...if the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.”*
- ❑ Note that unlike under the Brussels I Recast and Lugano Convention, it is a defence to recognition and enforcement at common law under s.32 Civil Jurisdiction and Judgments Act 1982 that a foreign judgment was obtained in breach of a jurisdiction clause.



Hague Judgments Convention 2019

- ❑ **The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 entered into force between the EU countries (other than Denmark) and Ukraine on 1 September 2023.** It will enter into force in Uruguay on 1 October 2024. It has been signed (but not ratified) by the United States.

- ❑ **The UK Ministry of Justice has formally consulted on whether the UK should ratify the 2019 Convention. The consultation closed on 9 February 2023. Responses were strongly in favour of ratification.**

- ❑ **If the UK decides to ratify the 2019 Convention (as seems likely), this will provide a broad basis for mutual recognition of judgments between the United Kingdom and EU Member States and be of considerable importance in assisting cross-border recovery.**
 - ❑ The 2019 Convention contains more exclusions and more grounds for refusal of recognition and enforcement than the Brussels I Regulation and Lugano Convention.

 - ❑ Unlike Brussels I and Lugano, it does not contain harmonised rules of jurisdiction.

 - ❑ 2019 Convention excludes interim protection measures (Art 1(b)).

 - ❑ 2019 Convention only applies to proceedings commenced after Convention enters into force for both state of origin and state where enforcement sought (Art.16).



Hague Judgments Convention 2019: enforcement of trusts judgments

- The 2019 Convention would also provide a specific basis for enforcing English trusts judgments in the EU and other Contracting States under Article 5(1) where:
 - *“(k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –*
 - *(i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or*
 - *(ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.*
 - *This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship.”*



Enforcing trusts judgments offshore; breaching firewalls

- ❑ **The question whether “firewall” trusts legislation exists offshore and whether it will preclude recovery pursuant to a foreign judgment may be of great importance, both to the questions as to where to litigate in the first place, and where to seek enforcement of a judgment.**

- ❑ **Firewall trusts legislation typically provides for the application of the law of the forum to local law trusts (with only limited derogations); and precludes enforcement of foreign judgments that are inconsistent with those choice of law rules.**

- ❑ **Examples of firewall provisions:**
 - Cayman: Cayman Trusts Act (as amended), Sections 89-93;
 - Bermuda: Trusts (Special Provisions) Act 1989, Section 10, as amended by Trusts (Special Provisions) Amendment Act 2020;
 - Jersey: Trusts (Jersey) Law 1984 (as amended), Article 9;
 - Guernsey: Trusts (Guernsey) Law 2007(as amended), Section 14;
 - Gibraltar: Trusts (Private International Law) Act 2015;
 - IOM: Isle of Man Trusts Act 1995 (as amended);
 - Bahamas: Trusts (Choice of Governing Law) Act 1989 (as amended);
 - BVI: BVI Trustee Act 1961 (as amended), Section 83A;
 - Cyprus: The International Trusts Act 1992 (as amended)
 - DIFC Trusts Law 2018, Part 2



Enforcing trusts judgments offshore; breaching firewalls

- In order to maximise recovery, it may be important to consider how, if at all, a firewall can be breached or circumvented. Relevant factors may include:
 - **Can the firewall be circumvented by bringing proceedings in a jurisdiction other than that whose law governs the trust?**
 - Firewalls typically only protect trusts governed by the local law in proceedings in the forum; and do not have extraterritorial effect.
 - Where are the trust assets?
 - Where is the trustee or any other party against whom enforcement may be sought?
 - Importance of whether the trustee submitted to the foreign court or is to be regarded as a privy of a party who did so (see e.g. *JSC Mezhdunarodniy Promyshlenniy Bank v Lenux Group Ltd* [2021] ECSC J0119-3).
 - **If proceedings need to be brought in a state where firewall legislation applies, or enforcement of a foreign judgment sought in a firewall jurisdiction, it may be important to consider e.g.:**
 - Offshore jurisdictions may have varying levels of protection depending on whether the claimant's rights arose prior to or after disposition to a trust.
 - Extent of derogation to foreign laws differs in offshore jurisdictions.
 - Does the firewall also preclude enforcement of financial awards made against a spouse directly who is the beneficiary of a trust?
 - To what extent does the firewall apply in respect of corporate structures?
 - Offshore courts may have differing approaches as to whether, even if a foreign judgment is unenforceable, they will direct the trustee to act in the same manner as ordered by a foreign court.