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How are the jurisdiction issues “Bedding Down” in the English Courts post-Brexit?

Sara Masters KC

Barrister

How are jurisdiction issues “Bedding Down” post-Brexit

- Brussels Recast Regulation (“BIR”) v common law rules.
- Impact of Hague Convention 2005 on choice of Courts.
- Rome I and Rome II Regulations on choice of law.
- Renaissance of the anti-suit injunction in the EU space.
- Recognition and enforcement of judgments/awards.

BIR v Common Law Rules

- Continued application of BIR to court proceedings commenced before 1.1.21
 - *Benkel v East-West German Real Estate Holding* [2021] EWHC 188 (Ch).
- BIR advantages and disadvantages:
 - Harmonized rules – supposed level playing field.
 - Reciprocity.
 - Certainty and predictability.
 - But at the price of flexibility – very limited room for the exercise of discretion.



BIR v Common Law Rules

- Common law rules:
 - Flexibility – principle of forum non conveniens will now have substantially more impact.

BIR v Common Law Rules

- New gateways introduced to improve flexibility and increase scope:
 - New gateway 1A - claims concerning the operations of a branch, agency or other establishment.
 - New gateway 8A - unlawful interference in breach of contract
 - New gateway 15B - claims for breach of fiduciary duty where (i) breach within the jurisdiction, (ii) duty arose in jurisdiction, (iii) duty governed by English law.
 - New gateway 15D – claim no fiduciary duty has arisen where if it had would fall within 15B.

BIR v Common Law Rules

- New gateways introduced to improve flexibility and increase scope:
 - New gateways 15A, 15C and 23 - unlawfully causing or assisting in a (i) breach of trust; (ii) breach of fiduciary duty; and breach of confidence or misuse of private information.
 - Rule 6.33(2B) – Where C does not contend that D is party to the contract, but if D wishes to assert it is, it must comply with the jurisdiction clause – *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros* [2022] EWHC 2062 (Comm) at [22].

Hague Convention 2005

- Parties – EU, Singapore, Montenegro and, since Brexit, UK.
- Only applies to exclusive jurisdiction clauses providing for jurisdiction of a contracting state (includes EU and UK)).
- Significant exclusions:
 - Asymmetric jurisdiction clauses (possibly? See *Etihad Airways v Flöther* [2020] EWCA Civ 1707
 - Carriages of goods and passengers by sea, land or air.
 - Marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage (**NB** - many other marine matters, such as shipbuilding, ship mortgages and ordinary towage, are not excluded).

Rome I and Rome II regulations

- Rome I Regulation (EU) – law applicable to contractual obligations.
- Rome II Regulation (EU) – law applicable to non-contractual obligations.
- Not dependent upon reciprocity – Post Brexit have been adopted as part of UK domestic legislation and continue to apply.
- NB Effect of Rome I and Rome II Regulations domestically may diverge from EU over time as UK cannot make a preliminary reference to the CJEU and not bound by any decisions of the CJEU given as a result of preliminary references from other EU member states.

Renaissance of the ant-suit injunction in the EU space

- Anti-suit injunction to enforce English arbitration/jurisdiction clause by restraining proceedings in another EU state outlawed by *West Tankers*.
- In *West Tankers*, CJEU ruled that an ASI was both an interference upon a foreign EU State court's right to determine its own jurisdiction by reference to the Brussels regime rules and a breach of the principle of mutual trust by which each EU State was obliged to trust each other to apply the relevant Brussels regime rules.

Renaissance of the ant-suit injunction in the EU space

- Such a rationale fell away post-Brexit, particularly given EU Commission decision to block UK from acceding to Lugano Convention regime effect of which would have been broadly similar to Brussels' regime.
- November 2022 – English Court grants interim anti-suit injunction restraining proceedings in Belgian: *Ebury Partners Belgium SA v Technical Touch BV* [2022] EWHC 2927 (Comm).

Recognition and enforcement post-Brexit

- Continued application of BIR rules on recognition and enforcement to judgments given in BIR proceedings commenced before 1.1.21.
- Hague Convention 2005 – Judgments given by contracting state court designated in an exclusive jurisdiction agreement (NB includes EU).

Recognition and enforcement post-Brexit

- Administration of Justice Act, 1920 (mainly commonwealth countries) and Foreign Judgments (Reciprocal Enforcement) Act 1933 (now includes Norway – uncertainty whether applies to judgments from certain other EU States who were parties to bilateral enforcement treaties with UK before UK joined the (then) EEC) – Final and conclusive money judgments only.
- Common law – Final and conclusive money judgments only. Action on judgment and application for summary judgment under CPR Part 24.
- Arbitration awards – Unaffected by Brexit – 1958 New York Convention continues to apply.



TWENTY
ESSEX

LONDON

20 EssexStreet
London WC2R 3AL

T +44 (0)20 7842 1200

F +44 (0)207842 1270

E enquiries@twentyessex.com

W twentyessex.com

SINGAPORE

Maxwell ChambersSuites
#02-03

28 Maxwell Road
Singapore069120

T +65 62257230

F +65 62249462

E singapore@twentyessex.com

W twentyessex.com