MACFARLANES

BANKING AND FINANCE DISPUTE RESOLUTION
LITIGATION, ARBITRATION, INVESTIGATIONS AND FINANCIAL CRIME

WHERE IN THE WORLD…?
A GUIDE TO JURISDICTION DISPUTES

Parties to disputes typically seek to gain a significant advantage by ensuring that a case is heard in the jurisdiction that is most favourable to them. Whether or not a jurisdiction is favourable will depend on a number of factors, such as:

- **Procedural rules:** different countries apply different procedural rules, which can have an important influence on the outcome of a case.
- **The substantive law:** the law of a certain country (and that country's approach to choice-of-law) may be favourable to a party's interests.
- **Speed of legal proceedings:** the amount of time that it takes for a case to reach trial can vary from country to country.
- **Witness location:** it is beneficial to ensure that a trial takes place where a party's witnesses are located.
- **Asset location:** the defendant's assets may be spread over a number of jurisdictions and the ease with which a successful claimant can enforce a judgment may depend on the nationality of the court that heard the dispute.
- **Fair trial:** there are still some jurisdictions where a party cannot be certain that it will receive a fair hearing.

THE DIFFERENT REGIMES

There are two main sets of rules which apply to jurisdiction disputes before the English Court:

1. The European regime: a number of different instruments apply to what might loosely be described as "European" disputes. Of these, the most important is the Recast Brussels Regulation (EU 1215/2012) (the Recast Regulation), which came into effect on 10 January 2015 and applies across the EU (although it is yet to be implemented in Denmark). The "old" Brussels Regulation (EU 44/2201) (the 2001 Brussels Regulation) still applies to proceedings commenced before 10 January 2015. The 2007 Lugano Convention was signed between the EU member states, Iceland, Norway and Switzerland in October 2007.
2. The English common law rules.

The European regime is mandatory and relatively inflexible. The rules are intended to provide certainty and uniformity of outcome in the various Member States. By contrast, the common law is more flexible (and therefore less predictable) in that it leaves more to the discretion of the Court.

The common law rules apply where the European regime does not. As is explained in greater detail below, the domicile of the Defendant, an applicable jurisdiction agreement, the location of the subject matter of the dispute or a submission to the jurisdiction of the court of a Member State can all bring the Recast Regulation into play. Similar rules apply under the 2001 Brussels Regulation and the Lugano Convention (which are materially the same as each other). This note focuses on the Recast Regulation and also identifies the most important differences between it and the 2001 Brussels Regulation.

THE RECAST REGULATION – THE KEY FEATURES

The European regime only applies to civil and commercial disputes. It does not apply to public law matters. Certain types of dispute are expressly excluded, including revenue, administrative, succession/probate and arbitration disputes.[1]

Domicile of the defendant

The starting point (under Article 4) is that persons domiciled in a Member State are to be sued in that Member State. However, there are a number of exceptions to this general rule which may mean that a Claimant is required to issue proceedings in another state or that the Claimant can choose between two or more states.

Jurisdiction agreements

Where parties have agreed in writing to confer jurisdiction on the Court of a Member State, effect must be given to that agreement (Article 25). This rule applies irrespective of where the parties to the jurisdiction agreement are domiciled. This is a change from the rules under the 2001 Brussels Regulation, which only applies where one or more of the contracting parties is domiciled in a Member State. As a result of this change, it is no longer necessary to obtain permission from the English Court to serve proceedings on a non-EU Defendant where jurisdiction is founded upon an exclusive jurisdiction agreement.

Exclusive Jurisdiction under Article 24

Article 24 provides for certain types of dispute (broadly disputes about immoveable property, company law issues, public registers, registered IP rights and actions for the enforcement of judgments) to be tried in the local court (i.e. where the relevant asset, entity or register is located).

[1] The Recast Regulation clarifies the scope of the arbitration exception, but this is outside the scope of this note. Please contact us if you would like more information on this.

The Recast Regulation makes it clear that this rule applies even if the Defendant is domiciled outside the EU (there was some doubt about this under the 2001 Brussels Regulation).

"Special jurisdiction"
Article 7 of the Recast Regulation specifies a number of situations in which a Defendant may be sued in a Member State other than that of his/her domicile. Those most often arising in practice are the following:

- Contract: Article 7(1): In "matters relating to a contract", the courts of the place of performance of the obligation in question have special jurisdiction.

- Tort: Article 7(3): Where proceedings relate to tort, delict or quasi-delict, the courts of the place where the damage occurred or where the harmful event which gave rise to the damage occurred have jurisdiction in addition to the courts of the defendant's domicile.

- Branches and agencies: Article 7(5): In the case of a dispute involving the operation of the branch or agency of a foreign company, the courts of the place in which the branch or agency is situated have jurisdiction to hear the dispute.

- Trusts: Article 7(6): Disputes between beneficiaries, settlors and trustees under an express trust (but not a will), whether established under statute or by some other means, may be litigated in the courts of the domicile of the trust in addition to the courts of the domicile of the defendant(s).

Multiple defendants
In a claim brought against multiple defendants, Article 8(1) allows them all to be joined in one action if it is brought where one of them is domiciled and it is necessary to join the claims against the other defendants so as to avoid the risk of irreconcilable judgments resulting from separate trials.

***"Lis alibi pendens"* – identical and related actions brought in another Member State**
Under Article 29, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first "seised" must stay its own proceedings. The purpose of this rule is to prevent the same dispute from being litigated in a number of different states and to avoid the risk of conflicting judgments being delivered by different courts.

Article 32 provides that a court is deemed seised (1) when the document instituting the proceedings is lodged with the court (provided that the Claimant has not subsequently failed to take the steps required to have service effected on the Defendant), or (2) if it requires service before lodging with the court, when it is received by the agency or authority responsible for service (provided that the Claimant has not subsequently failed to take the steps required to have the document lodged with the Court). This means that the English Court will be "seised" upon the issue of a claim form, although it is necessary to promptly effect service.

Importantly, the Recast Regulation (unlike the 2001 Brussels Regulation) limits the effect of this rule where there is an exclusive jurisdiction agreement in favour of the court of another Member State and proceedings are issued in that court. In that situation, the court which is not the court the parties agreed upon, must stay its proceedings, irrespective of where proceedings were first issued.

This is intended to avoid the problem, which arose under the 2001 Brussels Regulation, of "torpedo actions", namely where a party issued proceedings in a state other than the one which the parties had agreed would have jurisdiction to determine a dispute (i.e. in an exclusive jurisdiction agreement). Typically, these proceedings would be issued in a state which had a slow, expensive or unpredictable system for determining jurisdictional disputes (Italy being the classic example). In this situation, the contractually agreed state would have no choice but to stay its own proceedings while the other state determined whether or not it had jurisdiction. The delay and added expense caused by this tactic could have the effect of delaying, or even stifling, perfectly valid claims.

This problem should not arise under the Recast Regulation, because the rules require the first seised court to stay its own proceedings, in favour of the court chosen by the parties in an exclusive jurisdiction agreement, and the contractually agreed court is free to continue its own proceedings notwithstanding the fact that it is second seised.

Related actions
In addition to the requirement that Member State courts must stay their own proceedings if the same dispute is before the court of another Member State, there is also a discretion, under Article 30, to stay "related" actions. Actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together, to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Proceedings in non-Member States

It was not clear under the 2001 Brussels Regulation whether the above rules on identical and related actions should be applied, by analogy, where proceedings were brought in a non-EU state. For example, could or should a Member State court stay its proceedings if an identical claim was brought in the US?

Articles 33 and 34 of the Recast Regulation attempt to resolve this problem by providing that Member State courts may stay their own proceedings where identical or related actions are brought in the court of a non-Member State, but only in certain circumstances. For example, the non-EU state court must be first seised and its judgment must be capable of recognition and enforcement in the relevant Member State.

This is a discretion, not a requirement, and the Recast Regulation expressly states that the Member State court may continue its own proceedings if it considers that this is necessary "for the proper administration of justice," or if the foreign proceedings are unlikely to be concluded within a reasonable period of time.

THE COMMON LAW PRINCIPLES – KEY FEATURES

Under the common law, the jurisdiction of the English Court is founded upon service of process on the Defendant.

A foreign Defendant can be served, without the permission of the court, if he visits the jurisdiction. Applying this rule, jurisdiction was established in *Maharanee Seethaderi Gaekwar of Baroda v Wildenstein* [1972] 2 Q.B. 283 where the proceedings were served on the Defendant while on a temporary visit to this country to attend the Ascot Races. The rule does not apply where the Defendant has been lured into the jurisdiction under a false pretext by the Claimant: see *Watkins v North American Land and Timber Co* (1904) 20 TLR 534.

In *SSL International plc v TTK LIG* [2011] EWCA Civ 1170, it was held that directors of foreign companies may only be personally served on a visit to this jurisdiction if the company carries on business within the jurisdiction.

A foreign Defendant served with proceedings while in England can still apply for those proceedings to be stayed. The question of whether a stay will be granted will be decided by reference to broadly the same considerations as are relevant to an application to serve out (see below).

If the Defendant steers clear of these shores, it will be necessary to obtain permission to serve out of the jurisdiction.

A claimant seeking permission to serve out must persuade the court that:

1. He has a good arguable case that the court has jurisdiction within one of the jurisdictional gateways set out in CPR Practice Direction 6B. In very general terms the gateways serve to establish a connection between the claim and this jurisdiction. Examples include the following (which is by no means an exhaustive list):
   - a claim for an injunction restraining the Defendant from doing an act within the jurisdiction;
   - a claim in respect of a contract which was made in the jurisdiction or is governed by English law;
   - a claim in respect of a breach committed within the jurisdiction of a contract wherever made;
   - a claim in tort where (a) damage was sustained, or will be sustained, within the jurisdiction; or (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction;
   - a claim relating wholly or principally to property within the jurisdiction; or
   - a claim against a Co-Defendant who is a necessary or proper party to proceedings that have or will be served on another Defendant (sometimes referred to as an "anchor" Defendant).

   It is also worth noting that a number of new jurisdictional gateways were introduced on 1 October 2015. These include a gateway for claims for breach of confidence or misuse of private information, and a general gateway which will enable claims against a Defendant to be tried together in this jurisdiction where they arise out of the same or closely connected facts (although this will depend on which gateway has been relied on to establish jurisdiction over the main claim).

2. There is a serious issue to be tried or a reasonable prospect of succeeding on the merits of the underlying claim. This is a low threshold.

3. England is "clearly or distinctly the appropriate forum" and the court should exercise its discretion to give permission to serve proceedings out of the jurisdiction (this is the test as restated by Lord Collins of Mapesbury in giving the advice of the Privy Council in *AK Investment CJSC v Kyrgyz Mobile Tel Ltd)* [2011] UKPC 7) (i.e. *forum conveniens*).

Most common law jurisdiction disputes turn on the issue of *forum conveniens*. In *Erste Group Bank A.G. v JSC "VMZ Red October" and others* [2015] EWCA Civ 379 (in which Macfarlanes acted for the successful third defendant), the Court of Appeal held that, when considering this issue, the court should take a practical approach and identify the place where the "fundamental focus" of the litigation is to be found. Relevant factors may include: personal connections which the parties have with particular countries; where the events took place; the location of evidence and witnesses; the law which will govern the dispute; the possibility of lis pendens in another court; and the possibility that other parties may be joined and will affect the shape of the litigation. However, each case is fact-specific and the weight to be attached to each consideration will vary from case to case.

The risk of injustice in a competing foreign court may be relevant. However, in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*, Lord Collins said that *"Comity requires that the Court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required."* As demonstrated by the first instance decision in *Erste*, this will require the party alleging that justice will not be done in a foreign court to show that he will not receive a fair trial; generalised allegations that the foreign court is the subject of improper influence will not suffice.

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