Service of a Claim Form Out of the Jurisdiction in an EU Member State—Is Permission Required?

8 April 2021

Overview

The rules for serving a claim form on an entity in an EU Member State (an "EU Party") in civil proceedings before the Courts of England and Wales changed after the Brexit implementation period ended on 31 December 2020. The key change from 1 January 2021 is that permission to serve English proceedings outside of the jurisdiction on an EU Party is now required, except where the parties have an exclusive choice of court agreement in relation to the claim, which falls within the requirements of the Hague Convention on Choice of Court Agreements (the "Hague Convention") and which provides for the jurisdiction of the Courts of England and Wales. This is because Regulation (EU) 1215/2012 (the "Recast Brussels Regulation") no longer applies.

The rules now shift again as a result of changes to Part 6 of the Civil Procedure Rules on service out of the jurisdiction, which came into force on 6 April 2021. The amendments remove the need to obtain permission to serve where there is any contractual jurisdiction agreement between the parties in relation to the claim that is in favour of the Courts of England and Wales. However, the need for claimants to apply to the Court for permission to serve on an EU Party will still arise more frequently than it did before 1 January 2021. Further, even if permission is not required, the process for effecting service on an EU Party may well have become more cumbersome as a result of the post-31 December 2020 procedural developments on service out of the jurisdiction.

Background to the Procedural Changes

Prior to 1 January 2021, EU law applied in the UK. The key EU legislative provisions that gave the Court jurisdiction in specified circumstances if a defendant was outside of England and Wales were found in Articles 7 to 26 in Chapter II of the Recast Brussels Regulation. Title II of the 2007 Lugano Convention (the "Lugano Convention") also

included a jurisdiction regime under which the Court had jurisdiction in respect of defendants outside its territorial sphere.

Both of these regimes stopped applying in the UK following the end of the Brexit implementation period on 31 December 2020. For further detail see our update on post-Brexit jurisdiction and conflict of laws, published on 11 November 2020 (our "November 2020 Update").

CPR 6.33, which provided that the Court's permission was not required under certain circumstances where the relevant regime applied, was amended by the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019, SI 2019/521, which came into force on 31 December 2020 at 11pm. That amendment removed most of the scenarios in which a claimant could serve out in an EU Member State without the Court's permission. This is subject to a "saving" provision in The Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020, SI 2020/1493, reg 9(3), which covers claims issued before the end of the implementation period on 31 December 2020, but not yet served by that date. In such a scenario, permission to serve on an EU Party is not required. The position outlined below therefore applies only to claims that were neither issued nor served on or before 31 December 2020.

Scenarios Where Permission to Serve an EU Party Is Not Required

CPR 6.33 and the 2005 Hague Convention on Choice of Court Agreements

Following these changes to CPR 6.33, if a party wants to issue proceedings and serve an EU Party after 31 December 2020, then it will need to apply for the Court's permission, unless the 2005 Hague Convention on Choice of Court Agreements (the "Hague Convention") applies.

The Hague Convention is currently the only international convention on jurisdiction to which both the UK and the EU Member States are contracting parties, and so it is the only regime under which service in an EU Member State may be effected without the Court's permission (see our November 2020 Update for further detail). CPR 6.33(2B) preserves the exception from the requirement of permission to serve out where the Hague Convention applies.

For the Hague Convention to apply, the claimant and the defendant need to have an exclusive jurisdiction agreement within Article 3 of the Hague Convention. It must be concluded or documented in writing, or by other means of communication which makes the information accessible for future reference. A choice of court agreement is deemed to be exclusive unless the parties have expressly provided otherwise. The

jurisdiction of all other courts must be excluded, but it is not clear whether the Convention applies to clauses where one party is obliged to bring proceedings in the designated court, but the other is not (known as an asymmetric or unilateral jurisdiction clause).[1] The choice of court agreement must also have been concluded after the date the Hague Convention "entered into force" for the state of the court designated in the choice of court agreement (see Article 16 of the Hague Convention).

As noted in our November 2020 Update, the EU Commission has stated that it considers the "entry into force" date for the UK to be 1 January 2021, because that is when the UK acceded in its own right. However, the UK's Private International Law (Implementation of Agreements) Act 2020, paragraph 7 of Schedule 5 (which received royal assent on 14 December 2020) states 1 October 2015 as the date of "entry into force" for the UK.

The Court is, of course, bound to follow English law, and will therefore apply the Hague Convention to exclusive choice of court agreements concluded from 1 October 2015. It is not clear, though, in light of the comments of the EU Commission, how EU Member State courts will treat choice of court agreements that provide for the Courts of England and Wales dated between 1 October 2015 and 1 January 2021.

6 April 2021 Amendment to CPR 6.33(2B)

An amendment to CPR 6.33(2B) made by The Civil Procedure (Amendment) Rules 2021, SI 2021/117, which became effective on 6 April 2021, widens the scenarios in which the Court's permission will not be required to serve an EU Party. CPR 6.33(2B) previously read:

> *"The claimant may serve the claim form on the defendant out of the United Kingdom where each claim against the defendant to be served and included in the claim form is a claim which the court has power to determine 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."*

The amendment in SI 2021/117 substitutes this with:

> *"(2B) 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 –*

[1] See *obiter* comments in *Commerzbank Aktiengesellschaft v. Liquimar Tankers Management Inc and another* [2017] EWHC 161 (Comm), *Clearlake Shipping Pte Ltd v. Xiang da Marine Pte Ltd* [2019] EWHC 1536 (Comm) and *Etihad Airways PJSC v. Flother* [2020] EWCA Civ 1707.

(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; or

(b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim."

The new subsection (a) replicates the previous CPR 6.33(2B) Hague Convention provision.

The new subsection (b) means that a claimant will not need permission to serve a defendant out of the territorial jurisdiction of the Court where, for the claim being served, there is a contractual jurisdiction agreement between the parties in favour of the Courts of England and Wales. That choice of court agreement does not need to meet the requirements of the Hague Convention. This means: (i) it does not need to be exclusive; (ii) it does not need to have been concluded after the date of entry of the Hague Convention (1 October 2015); (iii) it may be possible to rely on a jurisdiction agreement entered into orally, though the agreement would likely need to be evidenced in writing; and (iv) the subject matter of the claim does not need to fall into the subject matter scope of the Hague Convention (see the subject matter exclusions in Article 2 of the Hague Convention).

Practical Consequences

Despite the amendment, there will now be situations where neither the Hague Convention nor the new CPR 6.33(2B)(b) will apply, so permission to serve out proceedings on a party in an EU Member State will still be required. These situations may arise in respect of contractual or non-contractual claims in relation to which no jurisdiction agreement in favour of the Courts of England Wales exists between the parties. Applying for permission to serve out is burdensome, and it increases the risk that permission will be denied at an early stage.[2] Care will need to be taken to ensure the application for permission is made properly, and advice should be sought accordingly.

Even if permission to serve out is not required, because there is a choice of court agreement that falls within either the requirements of the Hague Convention under CPR 6.33(2B)(a) or the wider scope of the new CPR 6.33(2B)(b), the process for

[2] For permission to be granted, the court must decide that: (i) there is a serious issue to be tried; (ii) there is a good arguable case that the court has jurisdiction (this includes the jurisdictional service gateways in CPR PD 6B, para 3.1); and (iii) England is clearly the appropriate forum to hear the dispute (*forum conveniens*).

effecting service may well differ from how it was prior to 1 January 2021. This is because the Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018, SI 2018/1257 revoked the application in the UK of the key EU regulation in this area, Regulation (EC) 1393/2007 (the "Service Regulation"), from 31 December 2020. For proceedings commenced on or after 1 January 2021, this means service from England into an EU Member State needs to be effected under the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention"). The requirements for service may differ depending on which of the EU Member States the claimant needs to effect service in, particularly since the Hague Service Convention permits contracting states to object to certain methods of service. For example, Article 10 provides for postal service and some states, such as France, have not objected to this method of service, whereas others, such as Germany, have made such an objection. Legal advice should therefore be sought promptly, to reduce the chances of the defendant successfully challenging service down the line.

If the parties want to confer jurisdiction on the English Courts where any of the parties is based in an EU Member State, an express choice of court agreement is advisable. Provided that the choice of court agreement is an exclusive (and not an asymmetric) choice of court clause, then the Hague Convention will most likely apply. Even if the choice of court agreement does not fall under the Hague Convention, it will likely be captured by the new CPR 6.33(2B)(b), in respect of there being a contractual agreement that the Courts of England and Wales should have jurisdiction over any dispute under the contract.

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