

# Courting favour

*Ian Smith explores the application of English law in cross-border commercial disputes*



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**'In jurisdiction matters, whether the English court applies either its traditional law or the European regulations is determined by the European regulations. The traditional laws apply only if the European laws do not.'**

**W**hen can a client sue in England and Wales? What can it do to avoid a lawsuit in this jurisdiction? This article answers these questions, by way of an introduction to the relevant principles in play in contract disputes.

English conflict of laws comprises a mixture of traditional common law and European Union regulations (Council Regulation (EC) 44/2001), and the similar Lugano Convention, not the focus of this article. Not surprisingly, the result is a set of principles that do not always sit together easily and are not always clear.

In jurisdiction matters, whether the English court applies either its traditional law or the European regulations is determined by the European regulations. The traditional laws apply only if the European regulations do not. When the European regulations apply, the English court has no jurisdiction to disapply them and must follow the interpretations of the European Court of Justice (ECJ).

As a rule of thumb, one can be fairly sure that if a target defendant is domiciled within an EU member state (see Article 60 of the Regulation and s41 of the Civil Jurisdiction and Judgments Act 1982) then the European regulations will have effect. If a defendant is outside the EU the European rules may apply, and only if and to the extent that they do not apply do the traditional rules then take effect. What then is the European scheme for determining jurisdiction?

## **The European Regulations as applied by the English courts**

Where a claimant considers that the English court has jurisdiction

under the European regulations, it simply certifies this to be the case and serves its claim on the defendant(s) (CPR 6.32-6.34). Although the onus is then on a defendant to dispute the court's jurisdiction, the burden remains on the claimant to show that it has a 'good arguable case' that the English court has jurisdiction.

The European scheme is hierarchical. Some cases – known as exclusive jurisdiction cases – must be heard in the courts local to an issue, whatever the wishes of the parties (for example, land, company formation and dissolution disputes). Next, the scheme accords jurisdiction wherever both parties submit to the jurisdiction of the English court (Article 24). The court will then examine any prior agreements of contracting parties (not necessarily the litigants) where one of those parties was, at the time of contracting, domiciled in an EU state. When considering whether parties have chosen a forum, the court must apply strict criteria (Article 23). Next, if not yet afforded jurisdiction, the English court will have jurisdiction if the defendant is domiciled in England and Wales (Article 2). Lastly, by way of derogation from the principle that a defendant should be sued where they are domiciled, the European scheme provides that defendants may be sued in England if certain criteria are met, depending on the cause(s) of action alleged by the claimant. These are known as 'special alternatives' and exist for contract cases as well as other types of claims. These alternatives to the defendant's domicile often offer choices of forum to claimants.

**Special alternatives to suing where the defendant is domiciled**

In contract matters a claimant may sue in England if that is the ‘place of performance’ of the ‘obligation in question’ (Article 5(1)). What then is the obligation in question in a case, and where is its place of performance?

The ‘obligation in question’ is the obligation on which the claim is based. So if non-payment is alleged the obligation in question is the duty of payment; if non-delivery, the obligation to deliver; and so on. Where the claim is based on more than one obligation, the ‘obligation in question’ is the principal obligation rather than an accessory obligation. But where the defendant is in breach of two or more obligations of equal significance, jurisdiction must be allocated for each of the obligations accordingly. At this point EU law imposes certain presumptions. If the ‘obligation in question’ relates to the sale of goods or provision of services, then the ‘place of performance’ is presumed to be the place where the goods or services were (or should have been) sold or provided (Article 5(1)(b)). In order to use the contract case ‘special alternative’, a single place of performance must be determined, and the Regulation will not confer such alternative jurisdiction where the obligation in question was or is to be performed in a number of places. To the extent that the presumptions do not apply, ‘the place of performance’ is determined by applying the law that governs the contract. This can be crucial if, for example, the claim is for payment by the defendant: English law provides that the place of performance of such an obligation is the location of the creditor (in contrast with the laws of some other states in Europe).

The fact that one defendant is domiciled in England may ground jurisdiction against co-defendants (Article 6(1)). This is widely known as the ‘anchoring’ provision in the European scheme, avoiding the need for claimants to bring proceedings against different defendants in different jurisdictions. However, a claimant must be able to show that claims against the different defendants are:

... so closely connected that it is expedient to hear and determine them together to avoid irreconcilable judgments resulting from separate proceedings.

According to the English court in *Gascoigne v Pyrah* [1994]:

... courts must look at the substance of the claims against the different defendants and assess the risk giving

prohibit the use of the provision, but the English court doubts that this is the case and in at least one case (*Andrew Weir Shipping Ltd v Wartsila UK Ltd* [2004]) has allowed the provision to be used.

Whatever the basis of jurisdiction, once it is founded under the European regulations, other courts of the EU are prevented from trying the same cause of action between the same parties (Article 27). Jurisdiction is therefore

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due weight to the possibility of conflicting determinations of factual and other issues common to each of the claims

The relevant risk of irreconcilable judgements extends to findings of law as well as fact. There is uncertainty about whether this anchoring provision may be used by a claimant suing different defendants using different causes of action, for example suing one defendant in contract and another in tort: European law may

taken on a ‘first come, first served’ principle, and parallel proceedings in different EU member states are barred. The prohibition applies wherever judgments in multiple jurisdictions would threaten to overlap, as described in Article 6(1).

This applies even if one of the parties begins proceedings in another EU state in bad faith. A court that is second-seised of such parallel proceedings must stay its proceedings unless and until the first court declines

**Key points**

- Defendants can be sued in this jurisdiction if domiciled here. Mere presence in a jurisdiction will provide a starting point for jurisdiction when the traditional rules apply.
- A contractual agreement to submit disputes to the jurisdiction will usually be decisive.
- The European regime accords jurisdiction on a first come, first served basis for claimants (claiming) and defendants (seeking declarations of non-liability).
- The European scheme permits a defendant to be sued away from its state of domicile if that is the ‘place of performance’ of the ‘obligation in question’, which in the case of contracts for the supply of goods or services will be the place where those goods or services were or should have been supplied.
- Jurisdiction under the traditional rules is much more flexible, offering jurisdiction in a number of situations, but is always subject to the overriding requirement that it is the most appropriate jurisdiction.
- No permission is required to serve out of the jurisdiction in the European regime, but permission to serve out is required under the traditional rules.

jurisdiction. This prohibition on parallel proceedings takes priority over a jurisdiction agreement (exclusive or non-exclusive). The first come, first served principle applies whether it is a victim who has brought a lawsuit claiming compensation or an alleged wrongdoer

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who has brought the suit to obtain a negative declaration of non-liability. The European scheme contains a more flexible approach in relation to 'related' proceedings (Article 28).

The first come, first served approach in the European scheme, available both to victims (bringing a typical claim) and wrongdoers (who may seek a declaration of non-liability), together with some flexibility in grounding jurisdiction and no need for initial court permission to serve proceedings, offers great scope for all parties to determine the forum for a case. Parties who fail to spot and use this to their advantage miss valuable opportunities. A party served with proceedings under the European scheme may of course challenge the court's jurisdiction, but unless and until this has successfully been done there is no opportunity to bring the case in another EU member state.

### The traditional rules

Before examining the traditional rules it is important to note that in two situations the European scheme predominates and applies even where a target defendant is domiciled outside the EU. The EU law will apply to exclusive jurisdiction cases and, secondly, where the parties have previously entered into a jurisdiction agreement in favour of courts of a member state (see above). In all other cases, the traditional rules apply wherever an intended defendant is domiciled outside the EU.

The traditional approach of the English rules is quite distinct from the European scheme. Firstly, a claimant wishing to serve a claim against a defendant overseas must obtain permission from the court for this course of action, on the basis of an *ex parte* finding by the

court that it has jurisdiction (although this is not necessary if the defendant is present in or submits to the jurisdiction). Secondly, the English court exercises discretion as to whether to exercise any jurisdiction it has. Thirdly, there is no first come, first served principle at play. Before exercising its discretion as to whether or not to exercise discretion, the English court first has to decide whether it has jurisdiction. What are the rules that determine this issue?

The traditional rules of the English court on jurisdiction are now largely codified in the Civil Procedure Rules. These set out the circumstances in which the English court will grant permission to a claimant to serve proceedings on a defendant overseas and not domiciled within the EU. The court's rules are split between general ones applicable to all cases and specific ones applicable to particular types of case, whether contract or tort, etc. In each case, the claimant must show that it has a 'good arguable case' that it can ground jurisdiction under the relevant rule, otherwise commonly referred to as a 'gateway'.

### Gateways to jurisdiction

The general rules of the English court provide that the court may exercise its discretion and permit service overseas where the claimant can satisfy one of the following 'gateways' (see CPR 6.36 and 6B PD 3.1):

- the defendant is domiciled (the same test as for the application of

the European Regulations – see above) within the jurisdiction;

- a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction; or
- a claim is made against someone on whom the claim form has been or will be served and the claimant wishes to serve the claim on another person who is a 'necessary or proper party' to that claim.

In contract matters (again see CPR 6.36 and practice direction 6B, 3.1) the English court may exercise jurisdiction over a case where the relevant contract:

- (a) was made in the jurisdiction;
- (b) was made by or through an agent of the defendant trading or residing in the jurisdiction;
- (c) is governed by English law; or
- (d) contains a jurisdiction clause in favour of the English court.

The English court will also have jurisdiction where:

- (e) the alleged breach of contract was committed in the jurisdiction; or
- (f) the claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with any of (a)-(d) set out above.

These contract-case gateways will usually require analysis not only of the facts of a case but also of the principles of contract law, for example to determine where a contract was formed, which in the case of acceptance by letter will be where the letter was posted and in the case of 'instantaneous' communications such as telephone, fax or e-mail, will be where the acceptance is received.

### Serious issue to be tried, and the court's discretion

Assuming that a claimant is able to satisfy the English court that it has a 'good arguable case' on one of the above traditional grounds of

jurisdiction, it must still satisfy the court of two other general matters. The claimant must firstly demonstrate that the case generally raises a ‘serious issue to be tried’, and secondly that England is the ‘proper place in which to bring the claim’ (*Seaconsar Far East Ltd v Bank Markazi Islam Iran* [1994]). The first of these issues – although wider than a jurisdictional gateway issue – is usually easily satisfied by a claimant. The second, now codified (CPR 6.37(3)), is the traditional requirement that the claimant bears the burden of persuading the court to exercise its jurisdiction over the defendant, a matter of discretion for the court.

Courts are required to exercise their discretion over jurisdiction based on a balancing of a number of factors, with the aim of ensuring that each case is brought and pursued by the claimant in the ‘natural forum’ for the dispute, whether that is in England or elsewhere. The ‘natural forum’ is that with which the case has ‘most real and substantial connection’, and connecting factors include convenience or expense (witness availability, etc), governing law, the places where the respective parties reside or carry on their business, the nature of the dispute and questions of local knowledge. See the leading case of *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987].

It is possible to argue, under English law, that even where the case’s most real and substantial connection is with a foreign jurisdiction, justice would not be done in the foreign forum and for this reason the English court should exercise its jurisdiction rather than stay the case. This principle has been successfully invoked by reference to the US legal system and costs, on the basis that the claimant’s inability to obtain costs before a US court prevented that party from obtaining ‘justice’.

What is the position if overseas proceedings are begun before or after the commencement of English proceedings? Unlike the European scheme, under the traditional rules there is no first come, first served prohibition on parallel proceedings. However, if genuine proceedings have already been commenced outside

England, the parties have already incurred expense and the non-English proceedings have already had some impact on the dispute between the parties (particularly if the impact will continue to have effect), then this will favour a stay of the English proceedings.

Contractual jurisdiction agreements (where present) will often play a decisive role in determining whether or not England is the ‘natural forum’. In the absence of a good reason to the

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contrary, the court will hold the parties to an agreement providing for an exclusive jurisdiction. Indeed, suing in another place contrary to an agreed exclusive jurisdiction would amount to a breach of contract. If parties have agreed to the exclusive jurisdiction of another forum the English court will stay the English action unless the claimant proves that it is ‘just and proper’ to allow the action to continue. The existence of a non-exclusive jurisdiction clause raises a presumption that England is an appropriate jurisdiction, indicating that at the time of agreement the parties to a contract have mutually accepted that the nominated place would be an appropriate place to determine disputes. However, it is a reflection of the facts as then known to the parties and does not preclude proceedings in another jurisdiction which the parties accept may also be appropriate. While the burden remains on the claimant to show that England is the appropriate jurisdiction and clearly so, a non-exclusive jurisdiction clause does at least create a strong *prima facie* case in favour of the chosen jurisdiction. To dislodge the agreement, the party seeking to avoid the jurisdiction agreement must point to some factor it could not have foreseen at the time the contract was concluded.

That there is no equivalent of the European scheme’s first come, first served principle means that obtaining and keeping jurisdiction in the English courts is a more nuanced affair under the traditional rules. As a result a defendant to English proceedings has greater opportunities to dispute jurisdiction. Not only can the defendant dispute the fact of jurisdiction but it can also challenge the court’s discretionary exercise of jurisdiction, and in each case the claimant will continue to

have the burden of showing that the English court has and should exercise jurisdiction.

### Concluding remarks

English conflict of laws is a fascinating subject, created by a mixture of European and domestic laws, full of unexpected twists and turns. This article has highlighted some of the main principles, by reference to jurisdictional issues in contract disputes. Naturally, there is much to say on jurisdiction in claims based on other heads of claim, for example those alleging torts or equitable wrongs. There is also a great body of English law (some of which is derived from Europe) to enable parties and courts to determine the law that must be applied to determine legal rights and wrongs. These are issues which would have to be explored in another feature. ■

*Andrew Weir Shipping Ltd v Wartsila UK Ltd* [2004] EWHC 1284 (Comm)

*Gascoigne v Pyrah* [1994] ILPr 82 (CA)

*Seaconsar Far East Ltd v Bank Markazi Islam Iran* [1994] 1 AC 438 (HL)

*Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] AC 460 (HL)