From recast Brussels I to the Civil Procedure Rules: jurisdiction in cross-border employers' liability cases before and after Brexit

A Presentation for PEOPIL

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"*Memories*
Light the corners of my mind
Misty watercolor memories
Of the way we were ..."
(with apologies to Hamlisch, Bergman & Bergman and, of course, to Barbra).

Introduction

1. In recent years, English lawyers attending PEOPIL conferences have had the same lament. Things were different before Brexit we (collectively) sigh. Indeed, cross-border employers' liability claims in the English Courts really *were* different and, in an EU context at least, were certainly much easier before Brexit. However, it remains possible – in this jurisdictional field – to offer at least some tepid comfort to those contemplating an action against a European employer in England. Even in the post-31 December 2020 world, it is a *little* easier to pursue an EL claim in the English Courts. Accordingly, this presentation aims to offer some cold crumbs of comfort to the weary practitioner – to light the proverbial candle, instead of just cursing the post-Brexit darkness – and to illustrate the ways in which European EL claims are a little easier. In order to do this, it is necessary first to consider the pre-Brexit position.
2. In deference to the fact that we now (like it or lump it) live in a different jurisdictional world, this paper deals briefly (first) with the pre-Brexit position. It then deals in a little more detail with the *status quo*. It does not deal with the world yet to come: Lugano accession anyone?

Before Η Καταστροφή

3. Before Brexit, *domicile* was the jurisdictional key (in EL claims, as in so many other species of claim).
4. As to claims on the employment contract, while the Brussels Convention 1968 made no specific provision for such disputes (instead, lumping such claims in with the general provisions on jurisdiction in contract), section 5 of recast Brussels I (No 1215/2012) contains dedicated rules for employment contracts and, prior to Brexit, was the starting point for an employee looking to sue their European employer in England/Wales. The following provisions were of relevance:
    a. By Article 21 a menu of potentially appealing jurisdictional options was provided to the employee: "*1. An employer domiciled in a Member State may be sued: (a) in the courts of the Member State in which he is domiciled; or (b) in another Member State: (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated. 2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1*."
    b. By Article 20(2), there was a useful deeming provision as to "*domicile*" for these purposes: "*2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State*."
    c. By Article 23, the scope for opting out of section 5 of the Regulation was limited: "*The provisions of this Section may be departed from only by an agreement: (1) which is entered into after the dispute has arisen; or (2) which allows the employee to bring proceedings in courts other than those indicated in this Section.*"
5. What about *personal injury claims* where there is an underlying individual contract of employment? This was considered in ***Shannon v Global Tunneling Experts UK Ltd*** [2015] EWHC 1267 (QB) where Jay J said this (at paras 54 – 55 of his judgment):

"*In the absence of authority from the ECJ, the point is not easy to resolve, not least because the policy and objects of Section 5 of the Brussels Regulation are not altogether clear. It seems obvious that a special regime should apply to employment disputes, but less patent that the same regime should apply to personal injury claims, particularly in circumstances where the application of Articles 18-20 to such claims renders reliance on Article 6(1) impossible. I see the partial force of the argument that employees need to be protected (see Article 20), but in this particular context there will be only rare situations in which employers will be suing their employees in relation to personal injuries, or anything analogous. … I am just about persuaded by the weight of academic opinion which Mr Caplin has brought to bear in support of his submissions. Not without a measure of hesitation, I conclude that Articles 18-20 of the Brussels Regulation apply to claims for damages in personal injuries where a relevant contract of employment exists*."

6. There has been considerable judicial activity (at CJEU level) about the meaning of "*the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so"* (Article 21(1)(b)(i)) and "*the courts for the place where the business which engaged the employee is or was situated*" (Article 21(1)(b)(ii)) (which are of interest in their own right, but properly lie outside the scope of a 30 minute presentation), but the jurisprudence in this regard emphasises the point about the scope and generosity of the pre-Brexit jurisdictional options: English lawyers were able to argue before the CJEU (a door now closed to English lawyers) about the *breadth* of the recast Brussels I provisions (they were not lamenting the absence of these jurisdictional options altogether).
7. It is usual to sue the employer in tort as well as contract (in case there is a problem with the employment contract). For such claims, Article 7(2) might or might not be of assistance. We also joined the employer's insurer as well as or instead of the employer itself (deploying section 3 of the recast Regulation and the CJEU's teleology in ***FBTO Schadeverzekeringen NV v Odenbreit*** C-463/06).
8. In either case (contract or tort), we did not have to concern ourselves with *forum conveniens* considerations: ***Owusu v Jackson*** C-281/02 provides a particularly stark illustration of the rigour and legal certainty (or, if you prefer, dogmatic inflexibility) of the recast Brussels I approach to the jurisdictional gateways that it contains.

9. As to the service of such proceedings, we had the considerable benefit of the following:
    a. No need to obtain the permission of the English Court to serve outside the jurisdiction where the English Court had power (as it did) to determine a dispute as a result of the recast Brussels I Regulation: Civil Procedure Rules, rule 6.33 (as long as there were no proceedings between the same parties pending in the Courts of any other part of the UK or in any other EU Member State);
    b. The means by which service could be effected outside the jurisdiction (without the need for the English Court's permission) were streamlined by the Service Regulation (No 1393/2007, recast No 1784/2020) of late, and much-lamented memory.
10. (Almost) nothing could be easier!

<u>After Η Καταστροφή</u>

Who are we suing – the Defendant(s)?

11. The early need to identify the relevant Defendant or Defendants (particularly in a case where – as a matter of the applicable law – the employment status of the Claimant is unclear) was a feature of pre-Brexit case planning and is no less important post-Brexit. Indeed, the narrowed jurisdictional options in the period since 31 December 2020 mean that early (and accurate) identification of the likeliest Defendant(s) is even more important now.
12. It has been traditional in English law to analyse the jurisdictional and applicable law issues in a case separately (confronting the jurisdictional issues first). The traditional approach may now be less appropriate:
    a. The applicable law will be relevant to the selection of Defendant(s) which, in turn, is relevant to the jurisdictional options;
    b. The applicable law is relevant to post-Brexit jurisdictional gateways in contract (CPR Part 6, PD 6B, para 3.1(6)(c)) and to *forum conveniens* (on which, see below).

What is the applicable law in a. contract; and, b. tort/delict?

13. A detailed consideration of applicable law (as distinct from jurisdiction) is beyond the scope of this half hour presentation (and, therefore, this paper), but it is one of the many

ironies of the Brexit settlement that – as we lose seats on the CJEU and power/influence in the wider EU and its institutions – English Judges continue to use the apparatus of the EU to determine disputes about the applicable law (as relevant to disputes about employment contracts or arising out of employer/employee relationships):

a. Contract. (especially) Articles 3, 8 and 12 of Regulation No 593/2008 ("*Rome I*").
b. Tort/delict. Article 4 of Regulation No 864/2007 ("*Rome II*").

Which foreign law cause(s) of action will the Claimant pursue against the selected Defendant(s) and what are the governing principles?

14. As indicated above, typically, the Claimant employee will rely on causes of action against an EU employer – pleaded in the alternative – in Contract and Tort/delict. It may be necessary to consider whether – as a matter of the applicable law – it is possible to rely on both contract and tort (in the alternative) (see, for example, the French law doctrine of *non-cumul).*

In the light of the cause of action against the selected Defendant, what are the prospects of establishing jurisdiction and what are the governing principles?

15. The new starting point is the Civil Procedure Rules, rule 6.33 which deals with "*Service of the claim form where the permission of the court is not required—out of the United Kingdom*". This provides as follows (with relevant emphasis added):

> "*(1) [Omitted]*
> *(2) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under sections 15A to 15E of the 1982 Act and—*
> *(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom; and*
> *(b)*
> *(i) [Omitted]*
> *(ii) the defendant is not a consumer, but is a party to a consumer contract within section 15B(1) of the 1982 Act; or*

(iii) the defendant is an employer and a party to a contract of employment within section 15C(1) of the 1982 Act;

(iv) [Omitted]

(v) [Omitted]

(2A) [Omitted]

(2B) The claimant may serve the claim form on the defendant outside of 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).

(3) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine other than under the 2005 Hague Convention, or notwithstanding that—

(a) the person against whom the claim is made is not within the jurisdiction; or

(b) the facts giving rise to the claim did not occur within the jurisdiction."

16. The relevant corresponding provisions in the Civil Jurisdiction and Judgments Act 1982 provide:

"***15A.— Scope of sections 15B to 15E***

(1) Sections 15B to 15E make provision about the jurisdiction of courts in the United Kingdom—

(a) in matters relating to consumer contracts where the consumer is domiciled in the United Kingdom;

(b) in matters relating to individual contracts of employment.

*(2) Sections 15B and 15C apply only if the subject-matter of the proceedings and the nature of the proceedings are within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation would have had effect before [*IP completion day*] in relation to the proceedings). ...*

15C.— Jurisdiction in relation to individual contracts of employment

(1) This section applies in relation to proceedings whose subject-matter is a matter relating to an individual contract of employment.

(2) The employer may be sued by the employee—

(a) where the employer is domiciled in the United Kingdom, in the courts for the part of the United Kingdom in which the employer is domiciled,

(b) in the courts for the place in the United Kingdom where or from where the employee habitually carries out the employee's work or last did so (regardless of the domicile of the employer), or

(c) if the employee does not or did not habitually carry out the employee's work in any one part of the United Kingdom [or any one overseas country*], in the courts for the place in the United Kingdom where the business which engaged the employee is* [or was] *situated (regardless of the domicile of the employer).*

(3) If the employee is domiciled in the United Kingdom, the employer may only sue the employee in the part of the United Kingdom in which the employee is domiciled (regardless of the domicile of the employer).

(4) Subsections (2) and (3) are subject to rule 11 of Schedule 4 (and rule 14 of Schedule 4 has effect accordingly).

(5) Subsections (2) and (3) do not affect—

(a) the right (under rule 5(c) of Schedule 4 or otherwise) to bring a counterclaim in the court in which, in accordance with subsection (2) or (3), the original claim is pending,

(b) the operation of rule 3(e) of Schedule 4,

(c) the operation of rule 5(a) of Schedule 4 so far as it permits an employer to be sued by an employee, or

(d) the operation of any other rule of law which permits a person not domiciled in the United Kingdom to be sued in the courts of a part of the United Kingdom.

(6) Subsections (2) and (3) may be departed from only by an agreement which—

(a) is entered into after the dispute has arisen, or

(b) allows the employee to bring proceedings in courts other than those indicated in this section.

(7) For the purposes of this section, where an employee enters into an individual contract of employment with an employer who is not domiciled in the United Kingdom, the employer is deemed to be domiciled in the relevant part of

the United Kingdom if the employer has a branch, agency or other establishment in that part of the United Kingdom and the dispute arose from the operation of that branch, agency or establishment.

15D.— Further provision as to jurisdiction

(1) Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of section 15B(6) or 15C(6).

(2) Even if it would not otherwise have jurisdiction under section 15B or 15C, a court of a part of the United Kingdom before which a defendant enters an appearance has jurisdiction in those proceedings.

(3) Subsection (2) does not apply where —

(a) appearance was entered to contest the jurisdiction, or

(b) another court in the United Kingdom has exclusive jurisdiction by virtue of rule 11 of Schedule 4.

(4) Subsection (2) does not apply if the defendant is the consumer or employee in relation to the subject-matter of the proceedings, unless the defendant is informed by the court of—

(a) the defendant's right to contest the jurisdiction, and

(b) the consequences of entering or not entering an appearance.

(5) Subsection (6) applies where—

(a) a defendant domiciled in the United Kingdom is sued in a court of a part of the United Kingdom other than the part in which the defendant is domiciled and does not enter an appearance, and

(b) the subject-matter of the proceedings is a matter in relation to which section 15B or 15C applies.

(6) The court must—

(a) declare of its own motion that it has no jurisdiction, unless it has jurisdiction by virtue of section 15B or 15C or a rule referred to in section 15B(4) or (5) or 15C(4) or (5);

(b) stay the proceedings so long as it is not shown that—

(i) the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable the defendant to arrange for the defendant's defence, or

(ii) all necessary steps have been taken to this end.

(7) Application may be made to the courts of a part of the United Kingdom for such provisional, including protective, measures as may be available under the law of that part, even if, by virtue of section 15B or 15C or this section, the courts of another part of the United Kingdom have jurisdiction as to the substance of the matter.

15E.— Interpretation

(1) In sections 15A to 15D and this section—

...

"defendant" includes defender.

(2) In determining any question as to the meaning or effect of any provision contained in sections 15A to 15D and this section—

(a) regard is to be had to any relevant principles laid down before [IP completion day] *by the European Court in connection with Title II of the 1968 Convention or Chapter 2 of the Regulation and to any relevant decision of that court before* [IP completion day] *as to the meaning or effect of any provision of that Title or Chapter, and*

(b) without prejudice to the generality of paragraph (a), the expert reports relating to the 1968 Convention may be considered and are, so far as relevant, to be given such weight as is appropriate in the circumstances."

17. As to the standard to be applied in testing the jurisdictional position (see, Lord Sumption in ***Goldman Sachs case*** [2018] 1 WLR 3683 (SC) building on ***Brownlie Mark I*** on "*better of the argument*" test etc).
18. Section 15C is the point of departure (by contrast to any private contractual provision as to jurisdiction which may/may not be in the employment contract) because it "*may only be departed from*" by agreement where the conditions of section 15C(6) are met and they are only rarely met.
19. A Claimant will not need the permission of the Court to commence proceedings pursuant to CPR 6.33(2)(b)(iii) (but a statement of grounds for not needing permission is required under CPR 6.34).
20. For completeness, in re permission to serve out of the jurisdiction (with the attendant delay and expense), there may be a common law contract gateway option pursuant to

CPR 6.36, CPR 6.37 and CPR Part 6, PD 6B, paragraph 3.1(6)(a) (contracts made within the jurisdiction etc).

What is the relevant date for determining jurisdiction?

21. s. 15C. If this is a restatement (without any extension) of section 5 of recast Brussels I No 1215/2012 (see, ***Soleymani*** [2022] EWCA Civ 1297) then domicile (for purposes of jurisdiction) will likely be determined at date of issue of proceedings (*per* ***Canada Trust Co v Stoltenberg (No 2)*** [2002] 1 AC 1; ***Pangaki v Apostolopoulos*** [2015] EWHC 2700 (QB)).

Is jurisdiction against a selected Defendant in re contract under s. 15C affected by potential forum non conveniens ("FNC") considerations?

22. As the Court of Appeal said in ***Soleymani*** [2022] EWCA Civ 1297, [2023] 1 WLR 436 (CA) (albeit, in a different context) ss. 15A - 15E restated, but did not extend the scope of recast Brussels I in re employers and employment contracts.
23. s. 15C (and the consumer contracts carve-out in s. 15B) is wide as to scope (in re the nature and subject-matter of the index proceedings (see, s. 15A(2)) and, where proceedings fall within such wide scope, "*may only be departed from by agreement ... etc.*" (on which, see s. 15C(6)).
24. However, FNC is only excluded from recast Brussels I cases where it derogates (as it did in ***Owusu v Jackson***) from the mandatory provisions of recast Brussels I: see, ***Kennedy v National Trust*** [2020] 2 WLR 275 (CA). By analogy, if the application of FNC principles does not derogate from what is mandatory in s. 15C, then FNC principles can still have application.
25. In any event, and more importantly, Parliament decided to retain the employment contracts section of recast Brussels I within the Civil Jurisdiction and Judgments Act 1982 ("*the CJJA*") and the CJJA (at s. 49) preserves what ***Dicey, Morris & Collins*** (the authors of the leading textbook) refer to (#12-006) as the, "*inherent jurisdiction reinforced by statute*" of the English Court to stay or strike out proceedings on - among other things - *forum non conveniens* grounds.
26. section 49 is emphatic in its wording (I had originally wondered whether it was only applicable intra-UK as *per* ***Cook v Virgin Media*** [2016] 1 WLR 1672 (CA), but it does not appear that it is) and if it had been intended that section 15C etc were to be exempted

from the clear/obvious scope of section 49 then such exemption would have been included at the time.

27. Section 49 of the CJJA is clear: as in ***Cook v Virgin***: "*by making express provision in s.49 for the preservation of the power to stay, strike out and dismiss proceedings on the ground of forum non conveniens, Parliament plainly intended that this important power should remain in being. If it had intended to exclude the power from both international and domestic jurisdiction, Parliament would surely have so provided expressly. It would not have sought to achieve this by expressly preserving the power, but then, in effect, removing it ... .*"

Where are we now?

"Δώδεκα και μισή. Πώς πέρασεν η ώρα. Δώδεκα και μισή. Πώς πέρασαν τα χρόνια."

("*Half past twelve. How the time has passed./Half past twelve. How the years have passed*." (CP Cavafy, "*Since Nine O'Clock*"))

28. It seems extraordinary that we are now approaching three years since the end of the Brexit implementation period: how the years have passed!
29. The obvious (and polite) answer to the question – where are we now – is that claims by employees in the English Court which are contemplated against EU employers:
    a. Will need – absent nomination of a solicitor within the jurisdiction – to be served without the assistance of the Service Regulation (good luck with the Foreign Process Section instead!)
    b. Face the jurisdictional hurdle of FNC; and,
    c. May ultimately struggle against enforcement machinery in the relevant foreign jurisdiction.
30. The crumb of comfort is CPR 6.33(2)(b)(iii): claims against a Defendant employer which is a party to an employment contract do not need the permission of the Court for service outside the jurisdiction (but if you add a tort claim to your claim then that may very well require permission). Perhaps not much comfort there, but, these days, English lawyers will take any comfort they can get.

Matthew Chapman KC

Deka Chambers, June 2023