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Change to Rules of Service Out of the United Kingdom Following the Recast Brussels Regulation

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Introduction

Regulation 44/2001 (the “**Original Brussels Regulation**”), which aimed to harmonise the approach to jurisdiction and the recognition and enforcement of judgments across European Union Member States’ courts, has been revised extensively by Regulation 1215/2012 (the “**Recast Brussels Regulation**”). The Recast Brussels Regulation applies to proceedings instituted on or after 10 January 2015, and the Original Brussels Regulation continues to apply to prior proceedings (per Article 66(1) and (2) of the Recast Brussels Regulation).

One of the changes in the Recast Brussels Regulation alters the approach to jurisdiction selection clauses and, as a result, impacts on the service of documents in English court proceedings on defendants domiciled outside the EU.

Article 25 of the Recast Brussels Regulation

The Original Brussels Regulation allowed parties to submit to the jurisdiction of a particular EU Member State’s courts, provided that one or more of the parties was domiciled in an EU Member State (Article 23).

The domicile requirement has been removed from the Recast Brussels Regulation. Article 25 of the Recast Brussels Regulation now provides in relevant part that:

“If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.” (Emphasis added)

As a result, all the parties to a jurisdiction selection clause can be domiciled outside the EU, so long as they have agreed that an EU Member State court has jurisdiction. This major change to the Brussels Regulation regime means that many more jurisdiction selection clauses fall within the scope of the Recast Brussels Regulation. (Note: such agreements still must be in writing, or evidenced in

writing, or meet the other criteria for forum selection clauses set out in the Recast Brussels Regulation).

Amended Civil Procedure Rules to reflect Article 25

Service of a claim form and other documents in proceedings taking place in England and Wales is governed by Part 6 of the Civil Procedure Rules (the “CPR”), with additional guidance provided in Practice Directions 6A and 6B. The general rule requires that English courts must approve service out of the United Kingdom.¹ There are exceptions to the general rule, such as if the defendant is domiciled in an EU Member State (CPR6.33(2)(b)(i)).

However, the CPR has been amended to implement the Recast Brussels Regulation.² The 76th update expressly incorporates Article 25 among the exceptions to the general rule that required permission to serve out of the jurisdiction. Accordingly, CPR 6.33(2) provides in relevant part that:

“Service of the claim form where the permission of the court is not required – out of the United Kingdom

6.33(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 the [Recast Brussels] Regulation and – [...]

(b)(v) the defendant is a party to an agreement conferring jurisdiction within article 25 of the [Recast Brussels] Regulation. (Emphasis added.)

The amendment effectively allows a claimant to serve a claim form in proceedings taking place in England and Wales on a defendant domiciled outside the EU without the English court’s permission — so long as the defendant has accepted the jurisdiction of the English court.

Service issues in practice

A jurisdiction selection agreement within Article 25 need not give **exclusive jurisdiction** to an EU Member State court. However, if the jurisdiction conferred by the jurisdiction selection agreement is not exclusive, the claimant must check to ensure no proceedings between the same parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Member State (CPR 6.33(2)(a) and 6.33(2A)).

A company looking to commence proceedings also needs to bear in mind the requirements of the service **process**. These requirements are independent of the question of whether the English court must approve service out of United Kingdom. The method of service turns on whether the defendant is domiciled inside or outside the EU. If inside, Service Regulation 1393/2007 dated 13 November 2008 (the “**Service Regulation**”) applies. If outside, the service process is likely governed by the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters dated 15 November 1965 (the “**Hague Service Convention**”). Additional service conventions between the UK and the country of the defendant’s domicile may also apply. The process can be complicated and different countries may have different requirements for what counts as proper service.

The following may simplify the service process:

- **Contractually agree upon method and place of service:** the parties may agree in their contract how and where a claim form and other documents may be served (CPR 6.11). However, the Rule does not specify whether such an agreement must comply with the Service Regulation, the Hague Service Convention or other relevant regimes. The practical solution may be to ask each

counterparty to confirm — prior to signing — that the notice clause meets the requirements for service in their country of domicile.

- **Appoint a process agent:** parties may each wish to appoint an agent for the service of process (also known as a service agent or process agent) in England, in which case documents are served *within* the jurisdiction, provided the parties are willing to bear the additional cost of this service. However, the Foreign Process Section of the Royal Courts of Justice advises that not every jurisdiction accepts that proceedings can be validly commenced by serving on a process agent. The parties may therefore ask one another to confirm that each party's place of domicile permits this approach.

¹ "Jurisdiction" means "unless the context requires otherwise, England and Wales and any part of the territorial waters of the United Kingdom adjoining England and Wales" (CPR 2.3(1)). CPR 6.32, 6.38(3) and Practice Direction 6A treat "jurisdiction" as including Scotland and Northern Ireland.

² <https://www.justice.gov.uk/courts/procedure-rules/civil>