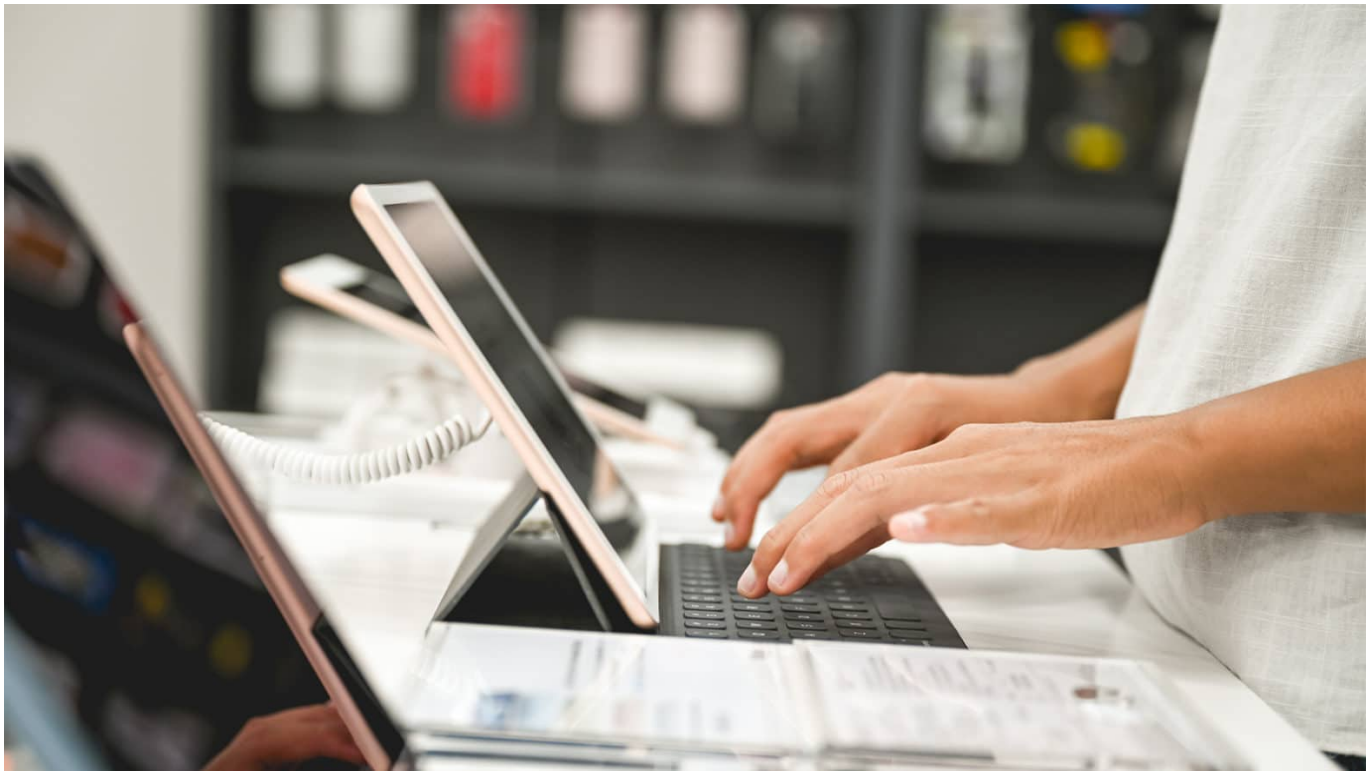
Service of a claim outside the jurisdiction



Following the withdrawal of the UK from the EU, the post-Brexit legal landscape includes a number of substantive and practical changes with how international claims are initiated, managed, and eventually enforced.

On commencement of proceedings in England and Wales, valid service of the claim form (as issued by the court) is crucial to the claim itself getting off the ground. If proceedings are not properly served, a defendant can challenge the jurisdiction of the court and ask for the proceedings to be 'struck-out'. If a jurisdictional challenge is successful, the court will not deal with any of the substantive issues relevant to the dispute itself. A successful challenge to the jurisdiction of a claim is therefore a very powerful strategy for a defendant to employ and can defeat a claim before it begins.

When serving a claim 'outside the jurisdiction', i.e. on a defendant located in any other country than England and Wales a claimant will require the permission of the court unless one of the permitted exceptions set out in the Civil Procedure Rules (CPR) 6.32 – 6.33 applies. Following Brexit, and the withdrawal from EU legislation, including the EU Service Regulation (EU 1393/2007), CPR 6.33 (2B) was amended in April 2021, and again in October 2022, to extend the claimant's ability to serve on a defendant out of the jurisdiction, without requiring the permission of the court. These circumstances apply where:

- The court has power to determine that claim under the Hague Convention (CPR6.33(2B)(a));
- A contract contains terms to the effect that the court shall have jurisdiction to determine that claim (CPR 6.33(2B)(b)); or
- The claim is respect of a contract which states the jurisdiction of the court (CPR 6.33(2B)(c)).

In addition, if should permission of the court be required, it is important for the claimant to satisfy the court that one of the "gateways", set out at paragraph 3.1 of CPR PD 6B is engaged. The gateways have also been expanded

in the post-Brexit era to encompass contracts which stipulate England within a choice of jurisdiction clause (see PD 6B (3.1)(4A).

Pantheon International Advisors v Co-Diagnostics (2023) EWHC 1953

The recent case of *Pantheon International Advisors v Co-Diagnostics (2023) EWHC 1953* considered the operation of the new jurisdictional gateway under CPR 6.33(2B)(b) for the first time, and the detailed judgment given by Master Stevens provides helpful guidance as to how it will be interpreted.

In summary, the claimant (Pantheon) was an English registered company which entered into a written contract with the defendant (Co-Diagnostics), a US (Utah) registered company in 2016 for raising capital in the UK markets. Pantheon alleged that it had not received payment for services provided under the 2016 contract, as a result of which a second, unsigned, contract was entered into in 2018. Both contracts included an English choice of law clause and an exclusive jurisdiction agreement in favour of the English courts.

In June 2021, Pantheon issued a claim against Co-Diagnostics, which was multi-faceted and included contractual claims for unpaid service fees, unjust enrichment and quantum meruit claims. Relying on the exclusive jurisdiction clause, Pantheon served proceedings without seeking permission of the Court –pursuant to CPR 6.33(2B)(b). In response, Co-Diagnostics challenged the jurisdiction of the English courts, asserting that no legally binding agreement was ever signed or entered into between the parties and there was therefore no enforceable English jurisdiction clause upon which Pantheon could rely.

Master Stevens considered the proper construction and scope of CPR 6.33(2B)(b) and concluded that the burden remained on the claimant to satisfy the threshold test for a good, arguable case, i.e.

i) that the contract existed and was legally binding;
ii) that the contract contained a valid and binding jurisdiction clause; and
iii) that the dispute fell within the scope of that jurisdiction agreement.

On the facts, Master Stevens determined that Pantheon had a good arguable case, supported by plausible evidence, that the terms of the 2018 contract were agreed, that the parties had intended to be bound by those terms including the jurisdiction agreement, and that the dispute was covered by the jurisdiction agreement, by way of the parties' respective conduct (despite Co-Diagnostics not having signed the later written contract).

It is of note that this matter dealt with 'mixed claims' and whilst Master Stevens did find that the contractual claims could benefit from being served without the permission of the court, the claim for quantum meruit (which was in the event conceded by the claimant, the dicta in this regard therefore remaining strictly obiter) was outside the scope of Rule 6.33(2B)(b) and had this not been conceded, and order for retrospective permission to serve out would have been required. The lacuna created by the service of 'mixed claim' has been addressed by the more recent 1 October 2022 amendments to the CPR which introduced Rule 6.33(2B)(9) and provides that where claims are 'related to a contract' that contains an express jurisdiction clause, these claims can also be served without requiring the permission of the court.

The judgment provides helpful guidance on the matters to consider when deciding whether proceedings can be served outside the jurisdiction without permission of the court and in accordance with CPR 6.33(2B)(b). In practice, however, commencing and serving claims in the English court against parties located in alternate jurisdictions remains a highly technical area which must be carefully considered before deciding on a course of action.

How we can help

For further advice and information in relation to service out of the jurisdiction and connected applications or claim, please get in touch with our expert commercial dispute resolution team.

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