Disputed Contracts and Service Out of the Jurisdiction

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Introduction. In the decision of *Pantheon International Advisors Limited v Co-Diagnostics Inc* [2023] EWHC 1984 (KB), the High Court has provided guidance in respect of new Civil Procedure Rule ("CPR") 6.33(2B)(b) on service outside the jurisdiction in circumstances where there is a non-exclusive jurisdiction clause in a disputed contract.

The decision is an important reminder of the need to carefully identify the proper gateways for service in mixed claims (i.e. where a case involves multiple causes of action where permission may be required for some claims, but not others).

Pre-Brexit Position. The general rule is that a party needs permission from the court to serve a claim form and particulars of claim out of the jurisdiction. Before Brexit, there were a number of exceptions to this rule provided for in the Recast Brussels Regulation and Lugano Convention which meant that claims falling within the scope of either of those conventions (i.e. where the Defendant was in the EU or another contracting state) could be served out of the jurisdiction without permission. At the end of the Brexit transition period on 31 December 2020, the exceptions found in these instruments fell away.

April 2021 Amendment. In April 2021, the CPRs on service out of the jurisdiction were amended to deal with some of the effects of Brexit. CPR 6.33(2B)(b) was introduced and provides that:

"*The claimant may serve the claim form on the defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form … a contract contains a term to the effect that the court shall have jurisdiction to determine that claim.*"

Permission is not required for service outside of the jurisdiction in respect of these claims. There are three notable features to the new rule 6.33(2B)(b) which broadens the rule beyond the position pre-Brexit:

- *First*, the rule applies to **any** contracts with an English jurisdiction clause, and is not limited geographically (and is thus broader in scope than the previous regime which generally concerned defendants based in the EU);

- *Second*, the contract must contain an English jurisdiction clause, but there is no requirement that the jurisdiction clause be exclusive; and

- *Third*, there is no restriction (as with the Hague Convention) that the rule only applies to commercial contracts and could therefore also apply to consumer contracts.

The new changes introduced to Part 6 of the CPRs on service out of the jurisdiction have previously been summarised in a Debevoise In Depth here.

***Pantheon International Advisors Limited v Co-Diagnostics Inc* [2023] EWHC 1984.** The decision of *Pantheon International Advisors Limited v Co-Diagnostics Inc* is one of the first cases to examine the application of CPR 6.33(2B)(b) since its introduction.

The case concerned unpaid fees due under an unsigned written contract said to have concluded in 2018. The Claimant brought proceedings for breach of contract, and alternatively by way of claim for quantum meruit (i.e., a claim for a reasonable sum in respect of the services provided). The Claimant served the Defendant in the United States, relying on CPR 6.33(2B)(b).

The Defendant challenged the validity of service on the basis that:

- There was no legally binding agreement;

- If there was such agreement, the contract did not contain a valid and effective jurisdiction agreement in favour of the English Courts that was binding on the Defendant; and

- The quantum meruit claim did not fall within the scope of that jurisdiction agreement and was thus outside the scope of CPR 6.33(2B)(b).

In the alternative, the Defendant submitted that the Court should stay the proceedings and give effect to a mandatory ADR process.

Master Stevens provided a detailed judgment on the proper interpretation and approach to CPR 6.33(2B)(b). The Master accepted that the burden was on the Claimant to establish that there is a good arguable case that the contract being sued upon contains a term to the effect that the court shall have jurisdiction to determine the claim in respect

of the contract (*Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, and *Kaefer Aislamientos v AMS Drilling Mexico* [2019] EWCA Civ 10). The Court noted at [20] that it is not a burden on the balance of probabilities as the court cannot weigh the evidence in its totality as at trial. In doing so, the Master referred to the standard articulated by Lord Justice Green in *Kaefer* of the "*burden of persuasion*" resting with the Claimant.

The Master held that the Claimant had the better argument that there is a "*plausible evidential basis*" for finding that the alleged 2018 contract is legally binding such that it satisfies the contractual gateway requirement of CPR 6.33(2B)(b). The Master also accepted that the Claimant had a "*good arguable case, backed by plausible evidence*" that the contract has an appropriate jurisdiction clause and that the dispute seeking damages for losses said to be caused by breaches of the terms of contract fall within the scope of that clause. The Master then accepted the Defendant's alterative case that the contract contains a mandatory ADR process which should be followed and ordered a stay.

In light of the findings on the contract claim, it was not strictly necessary for Master Stevens to consider the position in respect of the quantum meruit claim. Nevertheless, she addressed that claim in a number of in obiter remarks. The Master accepted that the quantum meruit claim is not a "contract claim", and therefore did not fall within CPR 6.33(2B)(b). The Claimant ought therefore to have applied for permission to serve out that aspect of the claim. However the Master noted at [65] that the "*perceived lacuna*" in the rules has now been addressed with the introduction of new CPR 6.33(2B)(c) which expands the jurisdictional gateway of 6.33(2B) to include where "*the claim is in respect of a contract falling within sub-paragraph (b)*" (emphasis added). That broader formulation would capture a claim in quantum meruit where the underlying contract was not completed, signed, or was otherwise unenforceable.

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