



Service out: the gateways rebuilt

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From 1 October 2022, the ‘gateways’ for service out of the jurisdiction in CPR Part 6 and Practice Direction 6B (PD 6B) will undergo significant change. The Civil Procedure (Amendment No. 2) Rules 2022 (SI 2022/783) (the “SI”) and 149th Practice Direction Update (the “Update”) will add several entirely new gateways and amend the wording of existing ones. The full text of the amendments to paragraph 3.1 of Practice Direction 6B is at the end of this article.

In this bulletin we look specifically at three important changes to the gateways for commercial practitioners. In addition to the three changes considered below, the Update also adds a new Gateway 25 for service out of the jurisdiction for (among other relief) *Norwich Pharmacal* Orders. That amendment will be covered in a subsequent bulletin by Paul Lowenstein KC and Sam Goodman, who had a significant role in its adoption.

New Gateway 1A for claims concerning the operations of a branch, agency or other establishment

A new Gateway 1A is inserted by the Update, which allows service out where:

“A claim is made against a person in respect of a dispute arising out of the operations of a branch, agency or other establishment of that person within the jurisdiction, but only if proceedings cannot be served on the branch, agency or establishment”.

Elements of this wording closely resemble a ground of ‘special jurisdiction’ contained within Article 7(5) of the Brussels I (Recast) Regulation¹ (BIR), which provides that:

“A person domiciled in a Member State may be sued in another Member State ... as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated”.

The Court of Justice of the European Union had held that the concept of branch, agency or other establishment in that Article “implies a place of business which has the appearance of permanency, such as the extension

of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension”: *Case 33/78 Somafer SA v Saar-Ferengas AG* [1978] ECR 2183, at [12].

Article 7(5) - like the rest of BIR - ceased to apply² to all claims issued after 31 December 2020 following the end of the Brexit transition/implementation period. Gateway 1A therefore appears to be an example of effective (re-)enactment of EU legislation not specifically ‘saved’ by the original transitional legislation.

New Gateway 8A specifically for unlawful interference

The Update also adds a new Gateway 8A, permitting service out for:

“A claim for unlawfully causing or assisting in:

¹ Namely, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

² By virtue of Regulation 89 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479).

(a) a breach of a contract where the contract falls within one of paragraphs (6)(a) to (6)(c) above or within Rule 6.33(2B); or

(b) a breach of contract falling within paragraph (7) above”.

New gateways 15A, 15C and 23 have also been added, respectively, for: (i) unlawfully causing or assisting in a breach of trust; (ii) unlawfully causing or assisting in a breach of fiduciary duty; and (iii) unlawfully causing or assisting in a breach of confidence or misuse of private information.

The Minutes of the Civil Procedure Rule Committee dated 13 May 2022 (the “Minutes”) accept that the category of proposals relating to unlawful interference “may be seen as a significant extension of the letter and spirit of the current gateways” (at [63]) but recorded that they were “welcomed by the Queen’s Bench Masters as practical proposals”: at [65].

Amendment to CPR 6.33(2B)

CPR 6.33(2B) was added following the end of the Brexit transition/ implementation period and provided (in place of the previous PD 6B, para. 3.1(6)(d)) that:

“The claimant may serve the claim form on a defendant outside 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; or

(b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim”.

The SI adds a further sub-paragraph (c), namely: “[T]he claim is in respect of a contract falling within sub-paragraph (b)”: SI, [7(4)]. This reflects the wording of the original PD 6B, para. 3.1(6)(d) and the Civil Procedure Rule Committee recorded its intention as follows: “[T]he revised wording does not naturally lend itself to the case where the claimant does not contend that the defendant is party to the contract, and the injunction is sought on the basis that if the defendant wishes to assert it is, it must comply with the English jurisdiction clause” (Minutes, [62]). Claims for such anti-suit relief will now accordingly fall within CPR 6.33(2B).³

Future (further) reform?

The Minutes noted that “[s]ome ... are calling for a more radical approach ... which the Sub-Committee felt was beyond their current scope”: at [59]. Specifically, the Committee discussed whether a new gateway especially for crypto claims should be introduced but concluded that any such reform ought to await the Law Commission’s recently launched project on “Conflict of laws and emerging technology”: Minutes, [68]. Although wide-ranging, the SI and the Update may accordingly not be the last word on the scope of the English Court’s jurisdiction over foreign Defendants.

³ In respect of which, as well as other issues, the Civil Procedure Rule Committee expressed its thanks to Thomas Raphael KC: Minutes, at [58].

This article does not constitute, and should not be relied upon as, legal advice. The views and opinions expressed in this article are those of the authors and do not necessarily reflect the position of other members of Twenty Essex.



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PRACTICE DIRECTION 3D – MESOTHELIOMA CLAIMS

- 1) Omit Practice Direction 3D.

PRACTICE DIRECTION 4 – FORMS

- 1) Omit Practice Direction 4 – Forms.

PRACTICE DIRECTION 5B – COMMUNICATION AND FILING OF DOCUMENTS BY E-MAIL

- 1) In paragraph 1(2)(b), for “7E” substitute “7C”.

PRACTICE DIRECTION 6B – SERVICE OUT OF THE JURISDICTION

Paragraph 3.1 of Practice Direction 6B is amended as follows.

- 1) In paragraph (1), at the end insert “within the meaning of sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982”.
- 2) After paragraph (1) insert—
“(1A) A claim is made against a person in respect of a dispute arising out of the operations of a branch, agency or other establishment of that person within the jurisdiction, but only if proceedings cannot be served on the branch, agency or establishment.”
- 3) For paragraph (4A) substitute—
“(4A) A claim is made against the defendant which—
(a) was served on the defendant within the jurisdiction without the need for the defendant’s agreement to accept such service;
(b) falls within CPR rule 6.33; or
(c) falls within one or more of paragraphs (1A), (2), (6) to (16A) or (19) to (22A),
and a further claim is made against the same defendant which arises out of the same or closely connected facts.”
- 4) In paragraph (6)—
(a) in sub-paragraph (a), for “made within the jurisdiction” substitute “(i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction”;

(b) in sub-paragraph (c), for “English law” substitute “the law of England and Wales”.

- 5) In paragraph (7), after “committed” insert “, or likely to be committed”.
- 6) After paragraph (8) insert—

“(8A) A claim for unlawfully causing or assisting in:
(a) a breach of a contract where the contract falls within one of paragraphs (6)(a) to (6)(c) above or within Rule 6.33(2B); or
(b) a breach of contract falling within paragraph (7) above.”
- 7) In paragraph (9)—

(a) at the end of sub-paragraph (a), omit “or”;
(b) for the full stop at the end of sub-paragraph (b) substitute “; or”; and
(c) after sub-paragraph (b) insert—
“(c) the claim is governed by the law of England and Wales.”.
- 8) After paragraph (12A) insert—

“(12B) A claim is made in respect of a trust which is created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, and which expressly or impliedly designates England and Wales as the principal place of administration.

(12C) A claim is made in respect of a trust created in the jurisdiction.

(12D) A claim is made for a declaration that no trust has arisen where, if the trust was found to have arisen, it would comply with one of the conditions set out in paragraph (12), (12A), (12B) or (12C).

(12E) A claim is made for a breach of trust where the breach is committed or likely to be within the jurisdiction.”
- 9) For paragraph (15) substitute—

“(15) A claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim—
(a) arises out of acts committed or events occurring within the jurisdiction;
(b) relates to assets within the jurisdiction; or
(c) is governed by the law of England and Wales.

(15A) A claim for unlawfully causing or assisting in—
(a) a breach of a trust where the trust falls within one of paragraphs (12) to (12C) above;
(b) a breach of trust falling within paragraph (12E) above; or
(c) a breach of a constructive or resulting trust where the trustee’s liability would fall within paragraph (15) above.

(15B) A claim is made for breach of fiduciary duty, where—
(a) the breach is committed, or likely to be committed, within the jurisdiction;
(b) the fiduciary duty arose in the jurisdiction; or

(c) the fiduciary duty is governed by the law of England and Wales.

(15C) A claim for unlawfully causing or assisting in—

- (a) a breach of fiduciary duty where the fiduciary duty falls within one of paragraph (15B)(b) or (c) above;
- (b) a breach of fiduciary duty falling within paragraph (15A)(a) above.

(15D) A claim is made for a declaration that no fiduciary duty has arisen where, if the fiduciary duty was found to have arisen, it would comply with one of the conditions set out in paragraph (15B)(b) or (c)."

10) After paragraph (16) insert—

"Declarations of non-liability

(16A) A claim is made for a declaration that the claimant is not liable where, if a claim were brought against the claimant seeking to establish that liability, that claim would fall within another paragraph of this Practice Direction (excluding paragraphs (1) to (5), (8), (12D), (15D), (17), (22) and (24) to (25))."

11) In paragraph (17), at the end insert "within the meaning of sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982".

12) In paragraph (21)—

- (a) at the end of sub-paragraph (b), for the full stop substitute a semi-colon; and
- (b) after sub-paragraph (b) insert—

"(c) the obligation of confidence or right to privacy arose in the jurisdiction; or
(d) the obligation of confidence or right to privacy is governed by the law of England and Wales."

13) After paragraph (21) insert—

"(22) A claim is made for a declaration that no duty of confidentiality or right to privacy has arisen where, if the duty or right was found to have arisen, it would comply with one of the conditions set out in paragraph (21)(c) or (d).

(23) A claim is made for unlawfully causing or assisting in—

- (a) a breach of confidence or misuse of private information where the obligation or right in question falls within paragraph (21)(c) or (d) above; or
- (b) a breach of confidence or misuse of private information falling within paragraph (21)(a) or (b) above".

Contempt applications

(24) A contempt application is made, whether or not, apart from this paragraph, a claim form or application notice containing such an application can be served out of the jurisdiction.

Information orders against non-parties

(25) A claim or application is made for disclosure in order to obtain information—

(a) regarding:

- (i) the true identity of a defendant or a potential defendant; and/or
- (ii) what has become of the property of a claimant or applicant; and

(b) the claim or application is made for the purpose of proceedings already commenced or which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or pursuant to CPR rule 6.32, 6.33 or 6.36.”

PRACTICE DIRECTION 7A – HOW TO START PROCEEDINGS – THE CLAIM FORM

- 1) For Practice Direction 7A substitute Practice Direction 7A as set out in Schedule 1 to this update.

PRACTICE DIRECTION 7B – CONSUMER CREDIT ACT 2006 – UNFAIR RELATIONSHIPS

- 1) Omit Practice Direction 7B.

PRACTICE DIRECTION 7C – PRODUCTION CENTRE

- 1) Practice Direction 7C is renumbered as Practice Direction 7B.

PRACTICE DIRECTION 7D – CLAIMS FOR THE RECOVERY OF TAXES AND DUTIES

- 1) Omit Practice Direction 7D.

PRACTICE DIRECTION 7E – MONEY CLAIMS ONLINE

- 1) Practice Direction 7E is renumbered as Practice Direction 7C.

PRACTICE DIRECTION 8A – ALTERNATIVE PROCEDURE FOR CLAIMS

- 1) Omit Practice Direction 8A.