ELA ARBITRATION AND ADR GROUP

Issues arising from Brussels I Recast and Rome I

Question 1

Arbitration and Brussels I Recast: Do we agree that that arbitration is outside Brussels I and that the Regulations wouldn't stand in the way of a foreign arbitration in the case of an England-domiciled employee? Would Article 23 thwart the use of arbitration clauses to sidestep the Samengo-Turner/Petter problem? Is there any authority or assistance from reviewing the analogous situation regarding consumers and the insureds, the other protected categories (with employees) under the Regs.?

The Samengo-Turner/Petter "problem"

1. The Brussels I Recast Regulation has applied since 10 January 2015. It seeks to facilitate 'access to justice, in particular through the principle of mutual recognition of judicial and extra judicial decisions in civil matters' and to ensure 'judicial cooperation in civil matters having cross border implications, particularly when necessary for the proper functioning of the internal market'[1].

2. It is of particular interest to employment law practitioners, as it contains specific provisions to protect employees (in particular, Section 5, Articles 20 – 23), as they are viewed as the 'weaker party' in any negotiation[2].

Where can employers be sued by their employees?

3. Employers may be sued in the Member State in which they are domiciled[3], or in the place where the employee normally works or worked (or, if the employee did not habitually work in any one country, in the place where the business which engaged the employee was situated)[4].

4. If an employer is not domiciled in a Member State, but has a branch, agency or establishment in a Member State, it will be deemed to be domiciled in that Member State if a dispute relates to the operations of that branch, agency or establishment[5].

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[1] Recital 3, Brussels I Recast
[2] Recital 18, Brussels 1 Recast
[3] Article 21(1)(a), Brussels 1 Recast
[4] Article 21(1)(b)
[5] Article 20(2)

Where can employees be sued by their employers?

5. In contrast to the rules relating to employers, employees may only be sued in the courts of the Member State in which they are domiciled – irrespective of where the employer is domiciled, or where the employee worked (unless they are counterclaiming against the employee, in which case the employer may sue in the same court as the original claim).[6]

Can the parties derogate from this?

6. If Section 5 is engaged (see below), the parties can only contract out of it if the agreement is entered into after the dispute has arisen, or which gives the *employee* an additional choice of venue[7].

What happens if an employer does not comply with these provisions?

7. If an employer seeks to sue an employee in the 'wrong' Member State, that Member State should decline jurisdiction.

8. However, if the employer seeks to sue an employee in a non Member State, the position is less clear.

9. In *Samengo-Tuner & others v J&H Marsh & McLennan (Services) Ltd and others*[8], the claimants had been employed by the Marsh & McLennan group in the UK. They were sued in New York by a member of their employer's group in relation to a bonus agreement. The New York court accepted jurisdiction. The claimants asked the court in England to grant an anti suit injunction, on the basis that they should, being employees, only be sued in the country in which they were domiciled. The Court of Appeal accepted that the bonus agreement fell within a wide definition of their contracts of employment (as with *Alfa-Laval Tumba AB v Separator Spares International Limited*[9]), and the group company seeking to enforce the agreement also counted as their employer for these purposes. Lord Justice Tuckey recognised that under normal circumstances, New York would have had jurisdiction due to the exclusive New York jurisdiction clause in the agreements. However, he went on to say:

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[6] Article 22
[7] Article 23
[8] [2007] EWCA Civ 723
[9] [2012] EWCA Civ 1569

"…But, as it is, our law says that we cannot give effect to it. The claimants can only be sued here. What shall we do? The only choice it seems to me is between an anti-suit injunction or nothing…

Doing nothing is not an option in my judgment. The New York court cannot give effect to the Regulation… The only way to give effect to the English claimants' statutory right is to restrain those proceedings. "[10]

10. This decision was followed in the more recent case of *Petter v (1) EMC Europe Limited (2) EMC Corporation*[11], which was decided after Brussels 1 Recast was in effect. The judges in this case felt bound to follow *Samengo-Turner*, albeit with some reluctance. However, as Sales LJ said, "*if the public policy and the rules are to be taken seriously, as presumably they are, and the means to do that are available, then there is strong reason to employ those means*".[12]

11. EMC has been given leave to appeal to the Supreme Court, so it is possible that the position will change.

An alternative?

12. In the meantime, however, Article 1(d) of Brussels 1 Recast provides a possible alternative to those employers seeking to escape the jurisdiction of the courts of England and Wales. It expressly states that the Regulation does not apply to arbitration.

13. The original Brussels Regulation contained a similar provision. However, *West Tankers Inc v Allianz SpA*[13] diluted the effectiveness of the provision, as the ECJ not only prevented the English court from granting an anti-suit injunction, it also held that matters ancillary to the agreement (such as, in that case, the validity of the agreement) fell within the scope of the Regulation. This led to counterparties in commercial cases launching the so-called "Italian torpedo" in order to delay proceedings and deter litigation, but equally the effect of *West Tankers* meant that employment cases were brought back into the gravitational pull of the courts of the Member States, irrespective of the arbitration agreement's choice of jurisdiction, if the counterparty could query an aspect of the application of the agreement.

14. In order to restore the effectiveness of the arbitration exclusion, Recital 12 confirms that there is an absolute exclusion of arbitration from the scope of the Regulation.

[10] Paras 39 & 43
[11] [2015] EWCA Civ 828
[12] Para 60
[13] Case C-185-07; [2009] AC 1138

15. Brussels I Recast also confirms that it does not affect the application of the 1958 New York Convention governing arbitration[14]. It expressly states in Recital 12 that the New York Convention should take precedence over the Regulation, and "this should be without prejudice to the competence of the courts of the Member States to decide on recognition and enforcement of arbitral awards". Given that Recital 12 (at paragraph 2) also prevents rogue decisions about the effectiveness of an arbitration agreement from becoming binding precedent, this appears to give Member States the ability to recognise and enforce an arbitral award, even where another Member State has already ruled on the matter and concluded that it is not valid.

16. On the face of it, therefore, it would appear that an arbitration agreement would trump the provisions of the Regulation and the *Samengo-Turner / Petter* issue would be avoided.

17. There is a possible argument against this. Employees are given protected status under the Regulation. According to Article 23, no attempt to oust the effect of the Regulation on their choice of jurisdiction will be valid unless it is agreed after the dispute has arisen (or it operates to their advantage). If the arbitration clause is contained in the contract of employment, it will not have been entered into after the dispute has arisen. As such, it may be considered invalid.

18. Against this, Recital 12 and Article 1(d) are of general application, and do not carve out Section 5 in any way. The presence of the arbitration clause could, in effect, be seen to disapply the Regulation as soon as any claim is brought - and before Article 23 is engaged.

19. There is no judicial authority on the point, so it remains to be seen if arbitration can be used to avoid Brussels I Recast.

[14] Article 73(2)

Question 2

Arbitration and Rome I: Do we think that arbitration ousts the public policy trump card in Rome I? Can arbitration be used to get around Duarte –v- Black and Decker?

The *Duarte v Black & Decker*[15] "problem"

1. Employees working for multinational businesses often participate in a share incentive or cash bonus scheme. These agreements will often require the employee to refrain from competing with the employer's business. They are often subject to a foreign governing law, as they will be often issued by the holding company.

2. Rome I governs the way in which conflicts of law should be resolved. It recognises that the parties' freedom to choose the applicable law should be 'one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations'.[16] It also recognises that 'weaker… parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules'[17]. To that end:

> "*Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.*
>
> …
>
> *Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.*"[18]

3. Article 8 deals with employment contracts in particular. It states that employment contracts will be governed by the law chosen by the parties, providing it does not deprive the employee of the protection of laws which he or she could not contract out of in the country in which he or she normally works.

[15] [2007] EWHC 2720 (QB)
[16] Recital 11
[17] Recital 23
[18] Recitals 35 & 37

4. Article 9 states that overriding mandatory provisions which are crucial for safeguarding the country's public interest (such as its political, social or economic organisation) will be unaffected by the provisions of Rome I.

5. Mr Duarte was a senior executive who participated in Black & Decker's Long Term Incentive Plan (LTIP). The LTIP contained restrictive covenants, which purported to prevent him from joining a competitor or poaching employees for a two year period. It was governed by the laws of Maryland.

6. When he apparently breached the restrictive covenants by joining a competitor shortly after his employment terminated, Mr Duarte sought a declaration in the High Court that the restrictions were unenforceable in England.

7. While *Duarte* predated Rome I, the basic principles were contained in the Rome Convention.

8. As with *Alfa-Laval*, *Samengo-Turner* and *Petter*, the agreement was held to be an employment contract.

9. In *Duarte*, the covenants were held to have been unenforceable in Maryland in any event. While Mr Justice Field held that he did not think that the doctrine of restraint of trade was a mandatory provision from which the parties could derogate by agreement (unlike, in his view, the Employment Rights Act 1996), he did decide that if the provisions had been valid and enforceable in Maryland, they would have offended against public policy in England, and so would be invalid and unenforceable in England.

10. It should be noted that Duarte was a first instance decision, which dealt with parties with a strong connection with England. It is possible that the European concept of public policy may be different from the gloss given to the phrase by English lawyers. Further, the application of the chosen law under the Rome Convention needed to be manifestly incompatible with public policy to be invalid – it is not clear whether the judge considered that there was any difference between "manifestly incompatible" and "incompatible". However, on the other hand the judge may have been wrong to conclude that restraint of trade was not a mandatory provision – in Germany, for example, rules concerning non compete clauses are seen as being mandatory laws.[19]

[19] LAG Frankfurt 14 August 2000, IPRspr. 2000 No. 40

How might arbitration get round the Duarte problem?

11. The public policy trump card identified in Duarte would appear to apply to any attempt to enforce an arbitral award.

12. However, there may nonetheless be an advantage in entering into an arbitration agreement. Under English law, the "blue pencil" test operates to strike out any offending language. The court will not redraft the agreement to give effect to its intention. As such, if the restriction is invalid, it will not be improved by the court. Other jurisdictions, however, have different approaches to the issue. In New York, for example, the court's (and, indeed, an arbitrator's) discretion to amend is much wider. They can redraft and limit the restriction in such a way as to make it enforceable in that jurisdiction – which may also make it more likely to be enforceable in England.

13. It may take time to appoint an arbitrator and agree on the mechanisms of the arbitration, if these have not been agreed in advance. This may prejudice the employer's position. In these circumstances, it may be possible to apply to the English court for a very short term injunction to preserve the parties' position until the application for an injunction in the 'friendlier' jurisdiction could be heard. Such an application to the High Court may have a better chance of success, given that the judge would be looking more to give effect to the arbitration process, rather than focusing on the enforceability of the restriction.

14. In the event that the 'friendly' arbitrator grants interim relief by way of an injunction, the employer could then seek to register it with the English court for enforcement here – and the court may be more sympathetic to the way in which the covenant is framed after it has (potentially) been amended by the arbitrator.

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