JURISDICTION AND CHOICE OF LAW IN EMPLOYMENT DISPUTES

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Contents

A. Introduction

1. The rules on choice of law and jurisdiction in virtually every field have been revolutionised in recent times by a number of landmark EU provisions and decisions. Employment law is no exception.

2. The result is that choice of law and jurisdiction in employment law is now subject to a complex, overlapping network of EU and domestic provisions and decisions. These, to a large extent, remove the old discretion of the English courts to decide jurisdiction on the basis of appropriate forum, and in many cases introduce mandatory rules which override what the parties may have expressly agreed – both as to substance and jurisdiction. This does not make life easy for employees or employers in these situations, or for those advising them.

3. We have divided this talk into three parts:

   (1) Choice of Law

   (2) Jurisdiction

   (3) Territorial Scope of Employment Rights

B. Choice of Law

1) The Rome Convention and the Rome I Regulation

4. Questions of applicable law in contract cases are presently governed by the Rome Convention 1980[1], given the force of law in England by the Contracts (Applicable Law) Act 1990[2]. In relation to contracts concluded after 17 December 2009, this will be superseded by the "Rome I" Regulation,[3] which clarifies and develops the Convention in certain respects.

5. The general principle is that the parties are free to choose the law applicable to their contract (Convention Art. 3; Regulation Art. 3). However, this principle is made subject to a number of exceptions, one of which relates to "individual employment contracts". This provides additional protection for the employee. Art. 6 of the Convention provides:

> *1 Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.*
>
> *2 Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:*
> *(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or .*
> *(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; .*
> *unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.*

6. The equivalent provision of the Rome I Regulation, Art. 8, contains some differences in wording, and provides additional clarification of how to deal with (i) employees

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1 Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 and signed by the United Kingdom on 7 December 1981.

2 Section 2. By s.2(2), Articles 7(1) and 10(1)(e) of the Rome Convention are not given the force of law in the United Kingdom.

3 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177/6. The Commission Decision on the UK opt-in is at [2009] OJ L 10/22.

who work in various countries from a given base, and (ii) workers on temporary foreign postings[4]:

> *1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.*
>
> *2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.*
>
> *3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.*
>
> *4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.*

7. Another exception relates to public policy (*ordre public*). Article 16 of the Convention provides:

> *The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.*

8. Art. 21 of the Rome I Regulation is substantially identical.

9. The effect of these provisions is that:

   (1) (unsurprisingly), in the absence of an express choice, the employment contract of an employee who habitually works in England will be governed by English law

   (2) employers are free to include express choice of law provisions in their employment contracts with employees who habitually work in England, and the choice will be generally effective, but not where it would deprive the employee of the protection of provisions of English law that

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[4] Recital 34 provides that the Regulation does not prejudice the overriding mandatory provisions of the country to which a worker is posted in accordance with the Posted Workers Directive (96/71/EC). Recital 36 provides that "work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily."

cannot be derogated from by agreement, or where it would be manifestly contrary to English public policy.

10. For example, a contract of employment with an employee based in England contains an express choice of the law of Vulgaria. The court will apply Vulgarian law in all cases where it is more favourable to the employee, and in many cases where it is not (for example if it gives the employer a more generous measure of damages for the employee's breach of contract). But a choice of Vulgarian law cannot deprive the employee of English law protections such as the Employment Rights Act, the national minimum wage, the Working Time Regulations, and discrimination law, because of Art. 6 of the Rome Convention.

11. However, the application of Arts. 6 and 16 to restrictive covenants is less obvious, and was considered by Field J in *Duarte v Black & Decker Corporation* [2007] EWHC 2720 (QB); [2008] 1 All E.R. (Comm) 401. The case concerned a senior employee of Black & Decker Europe, an English company which was a subsidiary of a large corporation based in Maryland, USA. The business of the group was managed on a globally integrated basis. Mr Duarte was based in England and his contract of employment was governed by English law. However, he was also selected for Black & Decker's Long-Term Incentive Plan ("LTIP") which operated on a worldwide basis. Participation in the LTIP was governed by a separate contract, which contained an express choice of Maryland law. It also included restrictive covenants (a) not to accept employment with ten named competitors of Black & Decker, and (b) not to hire any of Black & Decker's employees or to induce any to leave, for two years following termination of employment by resignation or for cause. Mr Duarte subsequently received an offer of employment from one of the listed competitors and issued proceedings in England for a declaration that the restrictive covenants were unenforceable as being in unreasonable restraint of trade.

12. This directly raised the question whether the English court should apply its own doctrine of restraint of trade or whether it should respect the parties' express choice and apply the Maryland law of restraint of trade (the language and conceptual framework of restraint of trade in Maryland is similar to that in England, but in practice the courts of Maryland appeared to be more inclined to uphold 2-year restraints than their English counterparts). Indirectly, it raised the more general question whether an employer could, by a choice of the law of a country with less stringent controls over employment covenants (or even no controls at all), successfully enforce restraints on an employee in England which would be unenforceable under English law, or whether the Court should apply English law under Article 6 and/or 16 of the Rome Convention. It is worth noting that the effect of this would not be that the Maryland law was replaced by English law test, but that the covenants would not be enforced unless they passed both tests.[5]

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[5] In fact, Field J found that they fell at the first hurdle in that they were unenforceable as a matter of Maryland law. Since that was the law chosen by the parties, that was the end of the matter, and whether they would have been enforceable in England made no difference.

2) ***Article 6 - What is a contract of employment?***

13. It is all very well having rules for choice of law in employment contracts. But this begs the question as to whether there is an employment contract, and, if so, what it consists of.

14. One problem is that it is increasingly common in modern employment practice for there to be fragmentation of the employer (for example where the employees are legally employed by a service company but render their services to other companies in the same group) and of the contract of employment (for example where bonus or other incentive schemes are governed by a separate contractual regime, sometimes involving different parties).

15. Both of the principal cases dealing with this area, *Samengo-Turner* and *Duarte*, involved employees who were employed in England by an English company which was part of a multinational group with its headquarters in the USA. In each case, the contract of employment was with the English company and governed by English law, but the group also operated a worldwide bonus scheme contained in a separate contract containing an express choice of law (and also, in *Samengo-Turner*, jurisdiction) in favour of a US state. In each case, the provision sought to be enforced against the employee was contained in the bonus agreement rather than the employment contract itself. In each case, the employer argued that the bonus agreement was not a "contract of employment" for the purposes of Article 18 of the Judgments Regulation or Article 6 of the Rome Convention, because it did not itself require the employee to do any work, or the employer to provide any work. The first instance judge in *Samengo-Turner* agreed. The Court of Appeal, however, was not convinced:[6]

> *"The contract need not be in one document or made at one time. An agreement varying or adding to the terms of an earlier contract of employment will obviously become part of that contract even if on its own it does not contain all the terms one would expect to find in such a contract… In short I cannot see how it can be said that the claimants' bonus agreements do not relate to their contracts of employment. They are part of them. One cannot ascertain the terms upon which they were employed without looking at both the original contracts and the bonus agreements."*

16. The claim was therefore a matter "relating to individual contracts of employment" under Art. 18 of the Judgments Regulation.

17. In *Duarte* Field J, following the decision of the Court of Appeal under the Judgments Regulation in *Samengo-Turner*, held that it was not, saying at [52]:

> *"The LTIP agreement was obviously intended to operate as part of an overall package of Mr Duarte's employment terms. I also think that it cannot have been the intention of the framers of the Convention to allow Article 6 to be circumvented by hiving off certain aspects of an employment relationship into a side agreement which, standing alone, would not amount to an individual employment contract because neither party promises to work for the other."*

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[6] At [29]-[31] (Tuckey LJ)

3) Article 6 – what mandatory rules are covered?

18. The effect of Art. 6 was therefore that the express choice of Maryland law "shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of" English law. Did that include the doctrine of restraint of trade? It is certainly a mandatory rule, in the sense that it cannot be derogated from by contract. However, Field J held that it was not covered by Art. 6. He stated at [55], after referring to a passage from the Giuliano-Lagarde Report on the Rome Convention, that:

> *"In my opinion, the mandatory rules referred to Article 6.1 are specific provisions such as those in the Employment Rights Act 1996 and the Factories Acts whose overriding purpose is to protect employees. The law governing the enforceability and validity of restrictive covenants in employment contracts is of an altogether different character. It is part of the general law of restraint of trade which in turn is part of the general law of contract. It is true that covenants in employment contracts are harder to justify than covenants contained in commercial agreements, but the same test of what is reasonably necessary to protect the covenantee's legitimate interest applies to both types of agreement. The English law of restrictive covenants in employment contracts does not therefore consist of mandatory rules affording protection to employees within Article 6.1."*

19. Accordingly Art. 6 did not assist Mr Duarte.

4) Article 16 – public policy

20. Field J therefore went on to consider whether the application of Maryland law was "manifestly incompatible with the public policy" of England under Art. 16. He noted that "the doctrine of restraint of trade is probably one of the oldest applications of the doctrine of public policy", and went on:

> *When Mr Duarte entered into the covenants, he was working in England under a contract of employment which, pursuant to Article 6.2 (a) of the Convention, was governed by English law. The job he wishes to take up with Ryobi is a job in England whose terms are also governed by English law. The public policy of this country … is therefore directly engaged if the covenants are enforced by an English court applying Maryland law when they would be unenforceable under English law. In other words, the result of the application of the specified law would be "manifestly" incompatible with the public policy of the forum.*

21. He therefore concluded that, if the covenants were unenforceable as a matter of English law, the English court would refuse (under Art. 16) to enforce them even if they were enforceable under the law chosen by the parties.

22. This is an important decision of general application[7]. Because the English law of restraint of trade is an aspect of "public policy", this interpretation of Art. 16 means that no English court will enforce (at least in England) a covenant in restraint of trade which does not satisfy the English law test of reasonableness, regardless of any express choice of a different system of law. It is possible the position might be

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[7] Though strictly *obiter* given the conclusion that the covenants were unenforceable under Maryland law.

different if the court were not dealing with facts so closely connected with England: would English public policy be so easily offended by an employee being prevented by an English court applying Maryland law from taking a new job in Maryland, or in a third country?

23. *Duarte* is, however, only a first-instance decision. It might be criticised, firstly because it treats the whole body of law labelled "public policy" in domestic English contract law as constituting "public policy" for the purposes of Art. 16, rather than adopting a narrower approach, and secondly because it arguably gives insufficient weight to the requirement in Art. 16 that the application of the chosen law should be manifestly incompatible with the public policy of the forum. The effect of the test applied in *Duarte* is that the word "manifestly" adds nothing. A different approach might recognise that the conceptual framework of restraint of trade in Maryland law is broadly similar to that in English law, and that the simple fact that they may reach different results when applied to the concrete facts of a given case should not always suffice to render the application of Maryland law "manifestly incompatible" with English public policy.

C. Jurisdiction

1) Introduction

24. Under this heading we consider the question of jurisdiction, properly so called. It is not to be confused with the separate question of the territorial scope of a particular statutory employment right – such as whether the right to claim unfair dismissal is extends to some employees who work abroad, or is confined to those who work in the UK. Territorial scope is addressed in the following section.

25. The rules on when the English court will accept jurisdiction over a foreign defendant are complex, and depend on the interaction of various sets of European and domestic rules. In civil and commercial matters (including litigation about employment covenants) the starting point is of course now the "Judgments Regulation"[8], which governs the allocation of jurisdiction between the courts of different Member States of the European Union[9]). It also applies in modified form to determine allocation of jurisdiction between the courts of the various parts of the United Kingdom.[10] Where the question concerns the allocation of jurisdiction between England and one of Iceland, Norway and Switzerland, it is governed by the Lugano Convention, which has a similar structure to the Regulation but some differences of detail.

26. In cases where the defendant is not domiciled in a Regulation or Lugano state, the grounds of exclusive jurisdiction in Art. 22 of the Regulation do not apply and there is no jurisdiction agreement under Art. 23 of the Regulation, then the question whether the English Court has jurisdiction is determined by the domestic English common law rules.[11]

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8 Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (also known as the "Brussels I" Regulation). This superseded the Brussels Convention of 27 September 1968, as amended on various occasions, and given force of law in England by the Civil Jurisdiction and Judgments Act 1982 (as amended).

9 As from 1 July 2007, when the Danish opt-out ended, these are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark Estonia, Finland, France, Germany, Greece, Hungary, Republic of Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. The Brussels Convention continues to govern questions of jurisdiction between EU Member States and Aruba and the French overseas departments.

10 Civil Jurisdiction and Judgments Act 1982, Schedule 4.

11 Art. 4 of the Regulation.

2) *Relevant provisions of the Judgments Regulation*

a) The General Approach

27. The general principle of the Judgments Regulation is that defendants domiciled in a Member State should be sued in the courts of that Member State.[12] There are various exceptions. The relevant ones for present purposes include in particular: jurisidiction agreements, and provisions relating to employment contracts.

b) Jurisdiction Agreements

28. Art. 23 deals with the case where the parties have made an agreement that the courts of a Member State are to have jurisdiction. The Regulation does not expressly deal with the situation where the parties have made a jurisdiction agreement in favour of the courts of a non-Member State, but the European Court of Justice has held that Art. 23 "does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits"[13].

29. The English courts have held that where there is an exclusive jurisdiction clause in favour of a non-Member State court, they retain a discretion whether to decline jurisdiction in favour of that court.[14]

c) Provisions specific to employment contracts

30. Arts. 18-21 deal with "individual contracts of employment" and are highly protective of employees:

> ***Article 18***
>
> *1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.*
>
> *2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.*

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[12] Art. 2(1).

[13] Case C-397/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337 (a case on Art. 17 of the Brussels Convention).

[14] *Konkola Copper Mines plc v Coromin Ltd* [2005] EWHC 898 (Comm); [2005] 2 Lloyd's Rep 555 (Colman J). See also *Catalyst Investment Group Ltd v Lewinsohn* [2009] EWHC 1964 (Ch) (Barling J). However, as the latter decision shows, it is likely that unless one of the exceptions to the Jurisdiction Regulation is satisfied, the English court may have no residual discretion to decline jurisdiction (eg on grounds of forum non conveniens) if it is properly seized of jurisdiction under Art 2 of the Regulation (or any other similar mandatory provision).

Article 19

An employer domiciled in a Member State may be sued:
1. in the courts of the Member State where he is domiciled; or
2. in another Member State:
(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or
(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.
2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 21

The provisions of this Section may be departed from only by an agreement on jurisdiction:
1. which is entered into after the dispute has arisen; or
2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

31. Where both parties are domiciled (or deemed to be domiciled under Art. 18) within the EU, the effect of this regime is clear. The employee can only be sued in his home courts, but can sue his employer in the place where he works, and these entitlements cannot be taken away by agreement in advance. The situation is, however, more complex where non-Member States are involved.

3) The Samengo-Turner Case

a) Introduction

32. The leading case on this area at present is *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd*[15]

33. In that case, a group of London-based reinsurance brokers were employed by an English company belonging to a group of companies headquartered in New York. As well as their contracts of employment they also entered into a separate incentive scheme, the parties to which included two New York group companies. Payments were made to them under the scheme. The terms of that scheme required them to repay their bonuses if they engaged in detrimental activity, and also required them to provide information to enable the company to determine whether they had complied with the terms of the award. The scheme terms also included a New York law and jurisdiction clause. When the employees gave notice to terminate their employment in

[15] [2007] EWCA Civ 723; [2007] I.L.Pr. 52; [2008] I.C.R. 18

order to join a competitor, the New York companies sued them in New York under the terms of the incentive scheme.

34. The employees applied to the English court for an anti-suit injunction to restrain the New York proceedings. They asserted that (a) those proceedings related to individual contracts of employment within the meaning of Art. 18 of the Judgments Regulation; and (b) Art. 20 of the Judgments Regulation gave them a right to be sued only in England.

b) <u>The content of the contracts of employment</u>

35. The first question which the court needed to consider was the scope and nature of the contracts of employment, and in particular whether they extended to the bonus agreements. As noted above, the Court of Appeal decided that they did (disagreeing with the trial judge on this).

c) <u>Who is the "employer"?</u>

36. The New York proceedings were brought by the US group companies rather than the English company who actually employed the London brokers. The Court of Appeal nevertheless held that those companies should be regarded as employers for the purposes of Art. 20 of the Judgments Regulation: [16]

> *"… their claim in New York is a claim relating to a contract of employment brought against English employees. It is an employment claim against the employees and one would expect such a claim to be made by an employer. [The US companies] have only been able to sue in the right of and as if they were employers because of the wide definition of "the company" in the bonus agreement and so I think they should be regarded as employers for the purpose of Section 5 [of the Judgments Regulation]… [The US companies] as companies within the same group have an economic interest in the contracts containing those terms and their enforcement and should be subject to the same jurisdictional restraint as [the English company]"*

37. On this basis – by classifying the bonus agreement as a contract of employment and by deeming the US companies to be employers, the English court considered that it was required by Art. 21 of the Judgments Regulation to disregard the exclusive New York jurisdiction clause in the bonus agreement.

d) <u>*Samengo-Turner* – a right to be sued in England?</u>

38. The most striking aspect of the *Samengo-Turner* case is that the Court of Appeal went on to hold that the employees had a "statutory right" to be sued in England and that the English court should enforce that right by granting an anti-suit injunction against the US companies. The Court's brief reasoning was as follows:[17]

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[16] At [33].

[17] At [43]

> *Doing nothing is not an option in my judgment. The New York court cannot give effect to Regulation 44/2001 and has already decided in accordance with New York law on conventional grounds that it has exclusive jurisdiction. The only way to give effect to the English claimants' statutory rights is to restrain those proceedings. A multinational business must expect to be subject to the employment laws applicable to those they employ in different jurisdictions. Those employed to work in the MM group in London who are domiciled here are entitled to be sued only in the English courts and to be protected if that right is not respected. There is nothing to prevent MMC and GC or any other company in the MM group from enforcing their rights under the bonus agreements here.*

39. The ordinary use of an anti-suit injunction is to enforce a legal or equitable right not to be sued in a particular jurisdiction, for example based on an exclusive jurisdiction clause. The leading case on anti-suit injunctions is *Société Nationale Industrielle Aerospatiale v Lee Kui Jak*[18], which emphasises that the order is directed not against the foreign court but against a party – who must be amenable to the jurisdiction of the English court – who is bringing proceedings before the foreign court in breach of the applicant's rights or which are vexatious and oppressive. The European Court of Justice has held that injunctions to restrain proceedings before the courts of another Member State are inconsistent with the Judgments Regulation[19] so it is somewhat surprising to see that Regulation being enforced by the grant of such an injunction.

40. The decision in *Samengo-Turner* has the virtue of providing robust protection for the interests of employees, regarded by the Judgments Regulation as "the weaker party" who "should be protected".[20] It might be thought that if an employee domiciled in England requires protection from being sued by his employer in France (even if the employee has agreed in advance to an exclusive French jurisdiction clause), then in policy terms he should equally require protection from being sued by his employer in the United States or elsewhere.

41. However, as stated above, the mechanism by which the employee is protected from being sued in France depends on the French court applying the Judgments Regulation and declining jurisdiction, rather than on the English court granting an anti-suit injunction. Non-Member State courts, of course, will not apply the Judgments Regulation, but it is highly dubious that the Judgments Regulation implies that they should, or requires Member State courts to step in and fill that gap (if it is a gap) by granting an injunction restraining the proceedings in the non-Member State court.

42. The decision has been the subject of sustained academic criticism, on a number of grounds.[21] First, the Judgments Regulation creates public law obligations binding on Member State courts in their decisions whether to accept or decline jurisdiction, rather

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18 [1987] AC 871 (Judicial Committee of the Privy Council).

19 Case C-159/02 *Turner v Grovit* [2004] E.C.R. I-3565; Case C-185/07 *Allianz SpA v West Tankers Inc (The Front Comor)* [2009] 1 Lloyd's Rep. 413.

20 Judgments Regulation, Recital 13.

21 E.g. A. Briggs [2007] L.M.C.L.Q. 433; A. Dickinson (2008) 57(2) I.C.L.Q. 465

than private law rights and obligations for litigants which can be enforced by injunction. Second, even if it did create private law rights, the Regulation does not apply to agreements to confer jurisdiction on a non-Member State court[22] so the Court should not have found that Art.21 invalidated the New York jurisdiction clause.

43. These criticisms suggest that *Samengo-Turner* may not be the last word on the subject, but for the present at least it represents a potential trap for foreign employers with employees domiciled in England. As Tuckey LJ said in the judgment, a multijurisdictional business must expect to be subject to the employment laws applicable to those they employ in different jurisdictions. And *Samengo-Turner* decides that that includes a rigid rule that employers should sue their employees where those employees are domiciled.

[22] *Coreck Maritime*, above.

D. Territorial Reach of Employment Legislation

1) Introduction

44. A particular concern to workers whose work is not entirely UK-based is the territorial reach of the various legislative measures relating to employment.

45. This is also often described as a "jurisdictional" issue relating to the jurisdiction of the employment tribunals. However, it is helpful to distinguish between the first question of whether a tribunal has jurisdiction to consider a claim at all – which is addressed above – and this second question of whether the facts of the particular case engage a right which is protected by employment law. This second question is arguably not so much about whether the tribunal has the power to hear the claim, but whether any of the claimant's rights have actually been infringed.[23] We therefore refer to this issue as the territorial reach of employment legislation.

46. The reason that this can be a complex issue is that there is no general rule. Instead, one has to look to the language of the relevant enactment to determine its territorial scope. Whilst the courts have given helpful guidance in particular instances, there remains a raft of legislative provisions whose reach has not yet been subject to judicial consideration.

2) The Posting of Workers Directive (96/71/EC)

47. Some statutory rights must be given effect under the Posting of Workers Directive. This applies to workers who are posted to perform temporary work in another Member State.

48. Under Article 3, such workers must enjoy certain specified protections under the law of the host state. The specified protections are those relating to:

    (1) maximum work periods and minimum rest periods;

    (2) minimum paid annual holidays;

    (3) the minimum rates of pay, including overtime rates;

    (4) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

    (5) health, safety and hygiene at work;

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[23] This approach was confirmed in *Bleuse v MBT Transport Ltd* [2008] ICR 488: the Brussels Regulation is concerned with which courts should hear a claim, but it does not affect the content of the substantive law applicable to the claim itself. Accordingly, the fact that the English courts have jurisdiction does not alter the scope of the rights conferred by English law itself.

(6) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(7) equality of treatment between men and women and other provisions on non-discrimination.

49. What this means, in broad terms, is that workers posted for a limited period of time to the UK are entitled to the protections listed above.

50. Similarly, UK employers who send their workers to do temporary work in other Member States must give those workers the protections which they would be entitled to in those Member States.

51. The Directive says nothing about the statutory rights which workers who do some or all of their work outside of the UK should have under UK employment legislation. However, as is set out below, the courts have nevertheless used the Directive as an aid to determining the territorial reach of UK employment legislation.

3) Unfair dismissal

52. The territorial reach of the right to claim unfair dismissal under the Employment Rights Act 1996 was considered by the House of Lords in the joined cases of *Lawson v Serco Ltd, Botham v MOD and Crofts v Veta Ltd* [2006] UKHL 3, [2006] ICR 250.

53. The claimants all claimed unfair dismissal in circumstances where there was an issue about the connection of their work to the UK:

53.1. Mr Lawson worked as a security supervisor at an RAF base on Ascension Island, a dependency of the British Overseas Territory of St Helena. His employer was registered in England and he was paid in sterling, although he paid no UK tax.

53.2. Mr Botham worked for the Ministry of Defence as what was called a "UK-based youth worker" at various MOD establishments in Germany. He was part of the "civil component" of the British Forces in Germany and was treated as resident in the UK for tax purposes.

53.3. Mr Crofts was a pilot who worked for a Hong Kong company. His contract allocated him a permanent "home base" at Heathrow, he resided in the UK, and his flying circles normally started and finished at Heathrow.

54. Lord Hoffmann noted that, read literally, s.94(1) ERA 1996 applies to any individual who works anywhere in the world. The parties agreed that it could not have been intended to have such broad application.

55. Lord Hoffmann then referred to what was previously s.196 ERA 1996, which had provided that the statutory rights do not apply to employees who ordinarily work outside Great Britain. That section had been repealed by the Employment Relations Act 1999, but nothing put in its place. The fact that it was repealed suggested that the place of work could no longer be the "litmus test", although it remained relevant to determining the territorial reach of the ERA.

56. The court also referred to the Posting of Workers Directive. Lord Hoffmann stated that the repeal of the old s.196 was intended, in part, to ensure that the Directive could be given effect by the courts. He acknowledged that the Directive only applies to certain specified rights and that there is no reason why all of the rights in the ERA 1996 should have the same territorial scope. He commented, however, that, *"uniformity of application would certainly be desirable in the interests of simplicity"* (para 14).

57. The court set out the following principles:

57.1. In "standard cases", where the employee worked in Great Britain, "ordinarily the question should simply be whether he is working in Great Britain at the time when he is dismissed" (para. 27).

57.2. In cases involving "peripatetic employees" (like airline pilots) one should adopt a "common sense" approach of asking whether the employee was based in Great Britain (para. 29). Lord Hoffmann endorsed the comment of Lord Denning MR in *Todd v British Midland Airways Ltd* [1978] IRLR 370 at p.371 that:

> "A man's base is the place where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas. I would only make this suggestion. I do not think that the terms of the contract help much in these cases. As a rule, there is no term in the contract about exactly where he is to work. You have to go by the conduct of the parties and the way they have been operating the contract. You have to find at the material time where the man is based."

57.3. Cases involving "expatriate employees" are more difficult. It would however be unusual for an employee who works and is based abroad to come within the scope of the British labour legislation (para. 36). This has to be addressed on a case-by-case basis. Factors weighing in favour of such an employee having rights include:

(1) If their employer is based in Great Britain. It would be unusual to be within the scope of s.94(1) if this condition were not met. However, this would not in itself be sufficient to bring a person within the reach of the legislation.

(2) If the employee is posted abroad by a British employer for the purposes of a business carried on in Great Britain.

(3) If the British employer is operating within what amounts for practical purposes to an extra-territorial British enclave in a foreign country.

58. The result was that all three claimants succeeded.

59. The EAT has subsequently ruled on the territorial reach of employment legislation in several cases:

59.1. *Ravat v Halliburton Manufacturing & Services Ltd* [2008] All ER (D) 82 (Dec): The claimant was employed by a UK subsidiary of a US company. He worked in Libya, not for his employer's operations but for those of a related company based in Germany. He received instructions from a manager based in Libya. He was dismissed by an employee based in Cairo. His salary, though paid to him by his UK employer, was re-charged to the German company. He was not entitled to claim unfair dismissal. The governing law of his contract was irrelevant.

59.2. *Ashbourne v Department of Education & Skills* UKEAT/0123/07: The claimants were recruited in London and employed by a UK government department to educate the children of EU officials in schools outside Great Britain. They were not representatives working abroad for the purposes of a British business at home, and nor were the schools at which they taught British enclaves abroad. They were not entitled to claim unfair dismissal.

59.3. *Williams v University of Nottingham* [2007] IRLR 660: the claimant was employed by the University of Nottingham, recruited to take up a post in a joint venture between the university and another in Malaysia, which was where he worked. His work was for the purpose of the separate and distinct business of the joint venture and not for the purpose of his employer. He was not entitled to claim unfair dismissal.

59.4. *Bleuse v MBT Transport Ltd and Anor* [2008] ICR 488: the claimant was a German national who lived in Germany throughout the term of his employment with a company registered in the UK. He worked mainly in Austria and Germany, although his contract of employment identified English law as the proper law of the contract and purported to confer exclusive jurisdiction on the English courts. The EAT treated him as a "peripatetic employee" and decided that he was not based in Great Britain and so could not claim unfair dismissal.

4) <u>Discrimination</u>

60. Section 10 of the Sex Discrimination Act 1975 (amended) states:

> (1) For the purposes of this Part … employment is to be regarded as being at an establishment in Great Britain if—
>
> (a) the employee does his work wholly or partly in Great Britain, or
>
> (b) the employee does his work wholly outside Great Britain and subsection (1A) applies.
>
> (1A) This subsection applies if—
>
> (a) the employer has a place of business at an establishment in Great Britain,
>
> (b) the work is for the purposes of the business carried on at that establishment, and
>
> (c) the employee is ordinarily resident in Great Britain—

(i) at the time when he applies for or is offered the employment, or

(ii) at any time during the course of the employment.

61. There are broadly similar provisions in s.8 of the Race Relations Act 1976, s.68 of the Disability Discrimination Act 1995, reg. 9 of the Employment Equality (Religion and Belief) Regulations 2003 and reg. 9 of the Employment Equality (Sexual Orientation) Regulations 2003.

62. The starting point for determining the reach of these provisions is the Court of Appeal judgment in *Saggar v Ministry of Defence* [2005] EWCA Civ 413. It is important to note that the question in that case, under the legislation then in force, was whether the claimant did his work "wholly or mainly outside Great Britain".

63. The claimant in *Saggar* was an MOD employee who was initially based in the UK for 16 years but was then permanently stationed abroad. The question was whether he worked wholly or mainly outside Great Britain so as to lose the protection of the RRA. The Court of Appeal held that the correct approach was not to divide the period up into segments, but to look at the period of employment as a whole.

64. The question of whether a person worked "wholly or partly in Great Britain" was considered by the EAT in *Tradition Securities & Futures SA v Ms X and Ms Y* [2008] IRLR 134. The employee initially worked in France and then moved to Great Britain. The issue was whether the SDA applied to the French period of employment. The EAT held that it did not, because jurisdiction could not be conferred retrospectively. It did not apply at the time of the discrimination (when there could have been no possibility of bringing a claim in Great Britain), and it could not then apply retrospectively simply because the employee then moved to Great Britain.

65. The courts have also addressed the circumstances in which work "is for the purposes of the business carried on at that establishment" – another phrase which appears in all the relevant discrimination legislation. As is mentioned above, the case of *Williams v University of Nottingham* concerned an employee who was recruited by the University of Nottingham to take up a post in a joint venture between the university and another in Malaysia, which was where he worked. His unfair dismissal claim was rejected because he worked for the purpose of the joint venture rather than for the purpose of his employer. Mr Justice Wilkie also rejected his claim for disability discrimination on the same ground, holding that the same approach should be taken to this question in the contexts of unfair dismissal and disability discrimination.[24]

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[24] It is important to stress that the *Williams* case did not decide that the DDA has the same territorial scope as the unfair dismissal legislation. It simply decided that this particular question – whether employment is for the purposes of the business carried on at the overseas establishment – should be answered in the same way in both contexts.

5) <u>Different rules for directly effective EC rights?</u>

66. This whole area has been thrown into some uncertainty following the decision in *Bleuse v MBT Transport Ltd* [2008] ICR 488.

67. Mr Bleuse made a claim against his UK employer under the Working Time Regulations 1998. He had never worked in the UK. Mr Justice Elias accepted that, absent any question of EU rights, there was no reason to think that the territorial reach of the Working Time Regulations 1998 would be any different to the limitation implied in the Employment Rights Act by the House of Lords in *Serco*.

68. However, the Working Time Regulations 1998 of course implements rights derived from European law, namely the Working Time Directive 2003/88.

69. Mr Justice Elias held that, "where either English law is the proper law of the contract, or where it provides the body of mandatory rules applicable to the employment relationship by virtue of Article 6(2) of the Rome Convention, an English court properly exercising jurisdiction must seek to give effect to directly effective rights derived from an EU Directive by construing the relevant English statute, if possible, in a way which is compatible with the right conferred" (para. 56).

70. It was therefore necessary to give Mr Bleuse an effective remedy for breach of the EU right by allowing him to bring his claim under the Working Time Regulations.

71. The *Bleuse* case therefore suggests that, where directly effective European rights are at stake, the legislation must be construed so as to allow the claim to be brought in Great Britain even if that would not otherwise be possible.

72. This reasoning was followed by the EAT in *Duncombe & Others v The Department for Education and Skills* Appeal No. UKEAT/0433/07/DM. This was another case in which the claimants had been employed to work in European Schools abroad. It will be recalled that in the earlier case of *Ashbourne v DFES*, such claimants had not been permitted to bring claims of unfair dismissal. They had also not been permitted to bring claims under the Fixed Term Employment (Less Favourable Treatment) Regulations 2002, the EAT holding that the "*Serco* principles" apply to the territorial scope of the Fixed Term Employment Regulations in the same way as they apply to right not to be unfairly dismissed.

73. The question of the territorial reach of the Fixed Term Employment (Less Favourable Treatment) Regulations 2002 was revisited by the EAT in *Duncombe* in light of the *Bleuse* judgment. The EAT in *Duncombe* held that, since those regulations implement the directly effective rights under the Fixed-Term Working Directive (99/70/EC), they could be relied on.

74. It is worth raising two notes of caution about the *Bleuse* case:

    74.1. First, there is now arguably a conflict between *Bleuse* and *Duncombe* on the one hand, and *Ashbourne* on the other. The EAT in *Bleuse* (at para. 61) suggested that the argument had not been fully put in the *Ashbourne* case, but it is certainly true that, even if this particular version of the argument was not raised in *Ashbourne*, something very close to it was (see para. 26 of *Ashbourne*).

74.2. Second, although the decision in *Bleuse* was followed in *Duncombe*, it was followed reluctantly. The EAT highlighted that the crucial problem with the reasoning in *Bleuse* is that it is not enough to say simply that directly effective European law must be given full effect. One also needs to demonstrate why it is that the territorial reach of domestic law should be expanded. According to HH Judge Peter Clark: "That is simply not addressed in the F-T Directive" (para. 21).

E. Conclusion

75. As can be seen from the above, employment relationships with an international element therefore can raise very difficult issues about the enforceability of employment and related arrangements, and where they can even be enforced. This is a potential minefield – proceed with care!

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