Fountain Court CHAMBERS

# INTERNATIONAL EMPLOYMENT CASES POST BREXIT

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Much has been written about the implications of Brexit for the law relating to civil jurisdiction and enforcement of judgments given by the courts of EU and EFTA member states (see, for example here). This short piece focuses on the particular area of international employment law. It first looks briefly at the questions of applicable law and territorial scope, before turning to the specific jurisdictional rules that apply in employment cases.

**Applicable Law**

The rules for determining the law applicable to international employment disputes remain substantively the same. The rules previously found in the Rome I Regulation and Rome II Regulation now apply as domestic law being part of retained EU law post Brexit (see the Law Applicable to Contractual Obligations and Non Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019). However, issues will arise, in particular, in relation to interpretation. Although the rules may look the same, they are now being applied as part of domestic (not EU) law. European considerations, for example, relating to mutual trust and confidence and the overriding importance of the internal market, will no longer necessarily govern interpretation. Furthermore, in the medium term now the rules are part of domestic law, the UK Government will be free to amend the rules to take into account domestic policy considerations (for example, in relation to the application of third state mandatory rules or the law applicable to claims arising on the nullity of a contract, both of which are areas where the UK had previously exercised the opt-outs available under the Brussels Convention). The continuing role of CJEU case law will also remain an area of controversy.


## AUTHORS

**Louise Merrett**
Call Date: 1995

**Daniel Carall-Green**
Call Date: 2015

**Territorial scope**

A brief look at the law reports shows that in the past fifteen years, international employment cases in the English courts have tended to focus on territorial scope (ie the issue addressed by *Lawson v Serco* [2006] UKHL 3 and the line of case law which has followed) rather than applicable law. That is because UK employment legislation, particularly the Employment Rights Act 1996 and the Equality Act 2010, either expressly provides or has been held to provide overriding mandatory rules ie law which applies regardless of whether the employment contract is governed by English law. Issues relating to territorial scope are not strictly speaking issues of private international law. They form one of the conditions to be satisfied before rights can be invoked (equivalent to requirements such as being an employee or worker or having worked for minimum time period). Territorial scope is likely to remain an important and contentious issue, and because it is ultimately a matter of statutory construction the issues are largely unaffected by Brexit.

**Jurisdiction**

Rules relating to international jurisdiction are the rules which are most affected by Brexit.

The Brussels I Regulation and Lugano Convention no longer have effect. Instead all cases are now governed by the traditional common-law jurisdiction rules (in particular, the Civil Procedure Rules governing service and the court's *forum non conveniens* adjudicatory discretion).

In some cases those rules are more generous than those under the previous European regimes (eg any company doing business in England can be served with proceedings). However, there was a concern that because consumers and employees were given special rights under the European rules, these vulnerable litigants could be worse off in the event of a no-deal Brexit (as has come to pass at least in the sector of civil litigation).

For that reason, the Civil Jurisdiction and Judgments Act 1982 has been amended to provide new special rules in consumer and employment cases mirroring the protective rules previously found in the recast Brussels Regulation and the Lugano Convention. Specifically, the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 have added a new section to the 1982 Act. In relation to employment cases, section 15C effectively transposes Articles 20 to 23 of the recast Brussels Regulation into the domestic jurisdiction rules. These rules:

a) guarantee employees (whether they are domiciled in the UK or not) broad grounds on which to sue their employer in the part of the UK (i) where the employer is domiciled, (ii) where the employees habitually work or worked, or (iii) (or in limited circumstances) where the business that engaged them is or was situated;
b) for employees domiciled in part of the UK, provide that the employer may only sue the employee in that part of the UK; and
c) limit the effectiveness of jurisdiction agreements against employees.

There are a number of points to note about the new rules.

First, the rules provide an interesting hybrid between the previous European approach and the common-law rules. Historically there have been no special rules for employees or consumers, and so the new provisions represent a change in philosophy.

Second, the rules effectively incorporate a European approach to procedure into the domestic context: if the relevant conditions are met, a party can be sued whether or not in the jurisdiction, and permission to serve the claim

is not required (see the recent amendments to CPR 6.33(2)).

Third, the new section 15E expressly provides that the rules are to be interpreted in line with the previous European provisions.

The result is a complex set of overlapping jurisdiction rules for international employment cases. Thus:

a) cases that were pending before the end of the transition period are governed by the recast Brussels Regulation or Lugano Convention;
b) new cases are generally governed by the new provisions of the 1982 Act;
c) new cases in the High Court not covered by those provisions are governed by the traditional common-law rules; and
d) new cases which must be brought in an Employment Tribunal are governed by the Employment Tribunals Rules of Procedure 2013.

Finally, there may well be an increasingly important role for anti-suit injunctions. Such injunctions were previously forbidden against other Member State courts as being inconsistent with the principle of trust and confidence (*Turner v Grovit* Case C-159/02). Post Brexit, English courts will be freed from that constraint. Employees, for example, may well rely on the decision in *Petter v EMC* Europe Limited [2015] EWCA Civ 828 to enforce a right to be sued in England under section 15C(3) of the 1982 Act.

## Get in touch

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