# The recast Brussels regulation: to sue or not to be sued

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*Petter considers the recast Brussels regulation on jurisdiction and the recognition and enforcement of civil judgments in an employment dispute, and provides useful guidance on the ambit of the regulation and the availability of an anti-suit injunction to enforce it.*

***Background***

Many US corporations grant awards to executives who are employed by group companies and based outside the US. The rules that govern these awards often contain restrictions on the activities of the executive and commonly contain governing law and exclusive jurisdiction clauses which do not relate to the jurisdiction in which the executive is domiciled or carries out his or her work, but to the home state of the corporation.

However, where the executive is based in England (or another member state), the position in relation to governing law and jurisdiction is not straightforward.

*Petter* is the most recent case to consider the difficult jurisdiction issues that can arise in these situations in the context of the recast EC regulation (see below).

***New rules and guidance***

As of 1 March 2015, Brussels 1a came into force. The recast EC regulation (1215/2012) changes the regime applicable to determining jurisdiction in respect of individual contracts of employment and expands that jurisdiction.

In *Petter*, the first case on the application of Brussels 1a to an employment dispute, the High Court has given valuable guidance on both the extended European definition of 'employer' and the circumstances in which an employee may obtain an anti-suit injunction. The first issue determines where an employee can sue, while the second dictates whether he or she can avoid being sued in another, perhaps less employee-friendly jurisdiction.

***Provisions of the recast regulation***

The key provisions are set out in Section 5 and relate to 'jurisdiction over individual contracts of employment'.

Article 21 states that:

'1. an employer domiciled in a member state may be sued: (a) in the courts of the member state in which he is domiciled; or (b) in another member state: (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so …

2. an employer not domiciled in a member state may be sued in the court of a member state in accordance with point (b) of paragraph 1.'

Article 22 provides that:

'An employer may bring proceedings only in the courts of the member state in which the employee is domiciled.'

***The facts of the case***

Employee (P) jumps ship from his direct employer EMC Europe (D1) to a rival company and is sued by EMC Corporation (D2) in Massachusetts. D1 is a subsidiary of D2. The claim against P is based on contracts between P and D2 for the Grant of Restricted Stock Units (RSUs), which incorporate D2's 'stock plan'. The stock plan contains an exclusive jurisdiction clause and also a governing law clause in favour of Massachusetts.

D1 accepts that certain post-termination agreements in its employment contract are unenforceable as a matter of English law. The RSU agreements are conditional upon observance by P of a 'key employee agreement' (KEA) contained in an employee handbook which is incorporated into the employment contract between P and D1. The post-termination restrictions in the KEA broadly mirror those in the D1 employment contract.

In the Massachusetts (US) proceedings, commenced before the proceedings in England, D2 claimed to be entitled to rescind/forfeit shares under the RSU arrangements because of

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alleged 'detrimental activity' by P under the RSU agreements. It also sought declarations as to jurisdiction in an amended complaint after P had launched proceedings in the High Court in England.

In the High Court, P sought relief in respect of the cancelled shares, partly in reliance on the claim that the 'detrimental activity' alleged entailed a breach of the unenforceable post-termination restrictions in his D1 contract.

D2 challenged the High Court's jurisdiction over P's claim. P sought to prevent the further prosecution of the US proceedings by an anti-suit injunction to restrain the proceedings in Massachusetts.

***Jurisdiction I: who is an employer?***

The High Court acknowledged that, as a matter of English law, P had a contract of employment with D1 and not D2. While the RSU agreements/stock plan claimed not to give rise to any 'service relationship', P viewed the awards as a form of deferred consideration. The RSU awards were contingent on P's positions as an employee of D2's subsidiary.

Applying *Samengo-Turner*, Cooke J found that, on a good arguable case basis, the RSU agreement became part of P's contract of employment, despite an entire agreement clause and the disclaimer as to any right to a service relationship with D2. Therefore P had the better argument in respect of the key questions that emerged from the CA in *Samengo-Turner*. So that in effect: (i) the US claim 'related' to P's individual contract of employment; (ii) the terms of the RSU agreement became part of P's contract of employment; and (iii) the claim was brought in the US by an 'employer' within the meaning of Article 22 of Brussels 1a, even if it was not as a matter of English law.

Cooke J also drew comfort from *Duarte* in which Field J considered that a 'long-term incentive plan' (LTIP) was a contract of employment for the purposes of Article 6 of the *Rome Convention*. European law could not be circumvented by hiving off aspects of an employment relationship into a side agreement with a different party.

So the message is clear: the totality of the contractual arrangements need to be considered to determine the terms upon which an employee is engaged. That includes agreements with third parties as in *Samengo-Turner, Duarte* and *Petter* in respect of seemingly unconnected bonus, LTIP or stock option agreements. The counter-intuitive consequence of that approach is that the third party is considered an 'employer' for Brussels 1a purposes, notwithstanding the position in English law terms.

***Jurisdiction II: employee can only be sued in his country of domicile***

The first, perhaps unwelcome, ramification of being considered an 'employer' under s.5 of Brussels 1a is that the employer is only able to sue the employee in the member state of his domicile. Therefore, notwithstanding the exclusive jurisdiction clause, D2 was precluded from suing P in the US as a result of Article 22. Although the jurisdiction clause would also have been invalid by operation of Article 23 in any event, as it was not entered into after the dispute had arisen, nor was it being invoked by the employee. In *Samengo-Turner*, that 'right' was enforced by an anti-suit injunction. P was not so fortunate.

***Jurisdiction III: employee has choice of where to sue***

The preamble to Brussels 1a at Recital 18 recognises that employees are the weaker party in employment contracts and therefore require 'more favourable' jurisdiction rules. Accordingly employees could, even under Brussels 1, sue their employer (i) in the member state of the employer's domicile or (ii) in another member state either where the employee habitually carried out his work or, failing that, where the business which engaged the employee is/was situated.

The novel aspect of Brussels 1a is that jurisdiction for employment contracts now extends to employers who are *not* domiciled in a member state (Article 21.1(b) and Article 21.2). So in *Petter*, D2 could be sued in England where he worked. D2's attempts to argue that the RSU agreements/stock option were to be distinguished from the bonus and LTIP agreements in *Samengo-Turner* and *Duarte* failed to persuade Cooke J. The employer's arguments either did 'not hold good' or made no material difference. The second unwelcome consequence of being an 'employer' for D2 meant that it could now be sued in England, even though domiciled outside the EU.

Did that entitle P to an injunction in respect of the US proceedings? No, as we shall explore.

***Anti-suit injunction: still a discretionary remedy***

Although, in *Samengo-Turner*, an anti-suit injunction was granted, Cooke J did not consider himself bound by the decision given the discretionary nature of injunctions. He also noted that the decision to grant such an injunction in

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*Samengo-Turner* had been the subject of criticism.

P's application for an anti-suit injunction was made against the backdrop of a ruling in the US that the relevant provision of the Stock Plan was enforceable under Massachusetts law and was subject to the exclusive jurisdiction of the Massachusetts court. Cooke J noted that P was in breach of contract in pursuing his claim outside Massachusetts, notwithstanding that he was entitled, as a matter of English law, to do so. Further, the proceedings in the US were not vexatious and oppressive and the principle of comity should be respected as regards the Massachusetts court.

Cooke J also took into account that the relevant regulations created public law obligations binding on member states, not private law rights and obligations for litigants, which could be enforced by injunctions.

Accordingly, although Cooke J found that there was 'an irreconcilable clash between the two courts in respect of the question of jurisdiction', he decided that, in all the circumstances, it would not be appropriate to grant an anti-suit injunction. The judge also took account of the fact that an interim injunction would, in practical terms, effectively prevent D2 from bringing its claim against P in the forum that had actually been chosen by the parties. P was in breach of the exclusive jurisdiction clause by electing to sue in England. However, D2 was not acting in breach of contract, even though the Recast Regulation conferred exclusive jurisdiction on the English HC to hear the claims.

Further, the Massachusetts Court could not be said to be acting in breach of customary international law.

### *Conclusion*

Currently, the parties have, effectively, reached a stalemate; each of the HC and the District Court of Massachusetts consider that they have jurisdiction. However, *Petter* is currently being appealed and there is no doubt that the decision will be instructive.

Regardless of the outcome, it is sensible for US corporations that make awards to executives based in member states to review the rules governing those awards to ensure that they are not vulnerable as regards future enforcement.

***KEY:***

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| Brussels 1a | Regulation (EU) NO. 1215/2012 of 12 December 2012 on jurisdiction and the recognition of enforcement of judgments in civil and commercial matters |
| *Petter* | *Petter v EMC Europe Ltd & anor* [2015] EWHC 1498 |
| *Samengo-Turner* | *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd* [2008] ICR 18 |
| *Duarte* | *Duarte v Black and Decker Corp.* [2007] EWHC 2720 (QB) |
| Rome Convention | Convention on the law applicable to contractual obligations 1980 (80/394/EEC) |