

THE ENGLISH APPROACH TO JURISDICTION AND CHOICE OF LAW IN EMPLOYMENT COVENANTS NOT TO COMPETE

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Introduction

English law treats employment covenants not to compete as part of the general law of contract, rather than of any employment-specific regulation.² Covenants “in restraint of trade” are contrary to public policy unless they can be shown to be reasonably necessary for the protection of the legitimate interests of the employer. Other countries may regulate such covenants in their own way, which is unlikely to produce the same result in all cases. It may therefore be of vital importance in litigation about such covenants to decide which country’s law should apply and where the case should be heard. In two recent cases, the English courts have had to consider these questions, and in particular the extent to which an express choice of law or jurisdiction clause should be respected.

The European Union rules on jurisdiction and applicable law

Over the last 40 years or so, the English³ rules of jurisdiction and choice of law have been revolutionised by the impact of legislation originating from the European Communities. The Rome Convention 1980⁴, given the force of law in England by the Contracts (Applicable Law) Act 1990⁵, provides the framework for determining questions of choice of law in relation to employment covenants against competition (as in the rest of the law of contract). With effect from 17 December 2009 this will be superseded by the so-called “Rome I” Regulation.⁶

The rules on when the English court will accept jurisdiction over a foreign defendant are much more complex, and depend on the interaction of various sets of European and domestic rules. In civil and commercial matters (including litigation about employment

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² Although the overarching conceptual framework is the same, in reality covenants against competition in the employment context are subject to significantly more intense scrutiny for reasonableness than comparable covenants in commercial contracts such as business sale agreements where the parties tend to be dealing on more equal terms.

³ The United Kingdom contains three separate legal systems: England and Wales, Scotland, and Northern Ireland. Each has its own courts and its own body of substantive law (although the Judgments Regulation and the Rome Convention apply to all of them). This article focuses on England and Wales.

⁴ 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.

⁵ 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.

⁶ 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.

covenants) the starting point is now the “Judgments Regulation”⁷, which governs the allocation of jurisdiction between the courts of different Member States of the European Union⁸). It also applies in modified form to determine allocation of jurisdiction between the courts of the various parts of the United Kingdom.⁹ 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. 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.¹⁰

Relevant provisions of the Judgments Regulation

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.¹¹ There are various exceptions. 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”¹², and 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.¹³ 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.

⁷ 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).

⁸ 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.

⁹ Civil Jurisdiction and Judgments Act 1982, Schedule 4.

¹⁰ Art. 4 of the Regulation.

¹¹ Art. 2(1).

¹² Case C-397/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337 (a case on Art. 17 of the Brussels Convention).

¹³ *Konkola Copper Mines plc v Coromin Ltd* [2005] EWHC 898 (Comm); [2005] 2 Lloyd’s Rep 555 (Colman J).

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.

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.*

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.

The Samengo-Turner Case

In *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd*¹⁴ 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

¹⁴ [2007] EWCA Civ 723; [2007] I.L.Pr. 52; [2008] I.C.R. 18

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

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.

Relevant provisions of the Rome Convention / Rome I Regulation

The general principle of the Rome Convention is that a contract is governed by the law chosen by the parties, if the parties have made a choice which is express or otherwise demonstrated with reasonable certainty (Art. 3). However, this principle is made subject to a number of exceptions, one of which relates to “individual employment contracts”. Art. 6 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.

The equivalent provision of the Rome I Regulation, Art. 8, is as follows:

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.

Another exception relates to *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.

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

The Duarte case

The effect of the rules of the Rome Convention on a choice of law in a covenant against competition has only recently been the subject of a reported decision in England. *Duarte v Black & Decker Corporation*¹⁵ 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.

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. Mr Duarte argued that this was prevented by Article 6 and/or 16 of the Rome Convention.

¹⁵ [2007] EWHC 2720 (QB); [2008] 1 All E.R. (Comm) 401. One of the authors appeared as junior counsel for Black & Decker.

Common issues – what is a contract of employment?

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). Both of the principal cases considered in this article, *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:¹⁶

“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.”

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

The judge in *Duarte* relied on and followed this reasoning in finding that the LTIP agreement in that case was also a “contract of employment” for the purposes of Art. 6 of the Rome Convention:¹⁷:

“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.”

¹⁶ At [29]-[31] (Tuckey LJ)

¹⁷ At [52] (Field J)

***Samengo-Turner* – was the claim brought by an “employer”?**

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:¹⁸

“... 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]”

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.

***Samengo-Turner* – a right to be sued in England?**

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:¹⁹

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.

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 *Soci t  Nationale Industrielle Aerospatiale v*

¹⁸ At [33].

¹⁹ At [43]

*Lee Kui Jak*²⁰, 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 Regulation²¹ so it is somewhat surprising to see that Regulation being enforced by the grant of such an injunction.

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”.²² 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. 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. The decision has been the subject of sustained academic criticism, on a number of grounds.²³ First, the Judgments Regulation creates public law obligations binding on Member State courts in their decisions whether to accept or decline jurisdiction, rather 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 court²⁴ so the Court should not have found that Art.21 invalidated the New York jurisdiction clause.

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.

²⁰ [1987] AC 871 (Judicial Committee of the Privy Council).

²¹ 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.

²² Judgments Regulation, Recital 13.

²³ E.g. A. Briggs [2007] L.M.C.L.Q. 433; A. Dickinson (2008) 57(2) I.C.L.Q. 465

²⁴ *Coreck Maritime*, above.

***Duarte* - whether the enforceability of covenants was governed by the chosen law**

In English law, covenants in “restraint of trade” are enforceable only insofar as the court considers them to be reasonable, both as between the parties and in the public interest. In the language of English contract law, this doctrine is part of “public policy”.

The *Duarte* case raised the question whether the enforceability of a restrictive covenant containing an express choice of foreign law was to be assessed only by reference to the standards of the chosen law, even where the covenant would be unenforceable under English law. Pursuant to Article 3 (1) of the Rome Convention, the parties having chosen Maryland law to be the governing law, the validity and enforceability of the covenants was prima facie to be decided in accordance with that chosen law. Mr Duarte argued that English law standards should apply by virtue of Art. 6 or 16.

In considering Art. 6, as stated above, Field J held that the case did involve a “contract of employment” within the meaning of Art. 6, even though the covenants were contained in a separate LTIP agreement. 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 (which was the law which would have applied in the absence of choice, because Mr Duarte worked principally in England). However, he went on to hold that the doctrine of restraint of trade was not a mandatory rule for the protection of employees covered by Art. 6. He stated that:²⁵

“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.”

Although the wording of Art. 8.1 of the Rome I Regulation has changed from Art. 6.1 of the Convention, so that it now refers to “depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement”, it seems unlikely that Field J would have reached a different conclusion under the Regulation.

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:

²⁵ At [55]

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.

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.

This conclusion turned out not to be determinative on the facts of the case (since the covenants were found to be unenforceable under Maryland law anyway²⁶) but it is an important decision of general application. 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 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.

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.

Conclusion

These two recent cases undoubtedly have important lessons for multi-national businesses engaged in employment litigation with staff working in the UK. First, choice of court questions will no longer be determined in accordance with traditional conflict of laws principles such as the doctrine of *forum conveniens* but will be required to yield to the regime of the Judgments Regulation based primarily on the employee's domicile. Secondly, an express choice of law clause will not be determinative when it comes to the enforcement of employment covenants where the chosen law conflicts with domestic public policy. Thirdly, where parties embark on employment litigation in competing

²⁶ On the basis that restricting the employee from working for any part of certain large corporate groups involved in making a wide range of products, anywhere in the world, was not necessary to protect the confidential information he had about professional power tools.

jurisdictions, tactical advantages can be secured by quick decisions as to where to commence, or where to challenge existing, proceedings. In the UK, the *Samengo-Turner* and *Duarte* cases are likely to remain the starting-point for consideration of these important issues for some time to come.

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