Competition Law Association
British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)
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Jurisdiction in disputes after Brexit

Date: 22 September 2022
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Introduction

Jurisdictional battles remain at the core of competition / IP disputes and are on the rise. The courts of England and Wales remain busy with cross-border cases, whether due to the quality of domestic judges and lawyers, broad disclosure and / or the availability of powerful interim and final relief.

It was noted, however, that there has been a fundamental change to the legal landscape following Brexit. The English law on jurisdiction has been firmly rooted to the EU framework for much of the past 40 years, resulting in a degree of harmonisation and legal certainty. The post-Brexit domestic rules differ markedly and offer much greater scope for judicial discretion.

Gateways

The UK position on serving a claim form out of the jurisdiction when the court's permission is required was summarised:

- Claimants must demonstrate that (i) at least one "gateway" in Practice Direction 6B, paragraph 3.1 is satisfied; (ii) there is a reasonable prospect of success; and (iii) England and Wales is the proper place in which to bring the claim.

Some key gateways were then compared with their European equivalents set out in the Brussels Regulation (Recast).

Patent validity

- Under EU law, it has always been the case that the court of the jurisdiction where the right is registered has exclusive jurisdiction, for reasons of principle and pragmatism (regardless of how validity is raised; *GAT*). This is now encapsulated by the amendment to Article 24(4) of Brussels (Recast), introduced despite the criticisms raised in relation to *GAT*. There is the potential for drastic consequences in patents litigation, giving defendants a powerful weapon to relocate forums.

- By contrast, there is no concept of exclusive jurisdiction under UK domestic law on jurisdiction and nor could there be given the UK's withdrawal from the internationally agreed regime under EU law. However, whilst parliament cannot exclude the jurisdiction of another country's courts, anti-suit injunctions (ASIs) may be invoked to protect the domestic court's interests or protect against

unconscionable conduct by a party. A recent illustration: ASI granted in a case where a party asked a foreign court to determine the validity of an EP (UK) (as in *Boston Scientific v Cook*).

- The EU rule is hard-edged, but domestic law is more flexible; it remains to be seen whether an English court could adjudicate on the validity of a foreign patent where there is personal jurisdiction over an English patentee, validity is one of many issues that have arisen, and the English court would otherwise be the natural forum. If the law is to develop in that direction, the Supreme Court's decision in *Lucasfilm* with respect to foreign copyright is likely to be the starting point.

Torts

- Differences between Article 7(2) of Brussels (Recast) and PD6B, paragraph 3.1(9) were noted. Article 7(2) provides a head of special jurisdiction in respect of the courts in which the harmful event occurred or may occur (which encompasses the place of the damage and the event giving rise it, where different, giving the claimant an option as to where to sue).

- However, the CJEU has encountered difficulties applying this concept in competition / IP cases, particularly with respect to economic harm. This has resulted in a "patchwork quilt" of rules for different types of tort.

- There has been little judicial appetite to import the complexities of the CJEU case law into the domestic gateway. The Supreme Court has rejected the argument that the domestic gateway should be interpreted in line with its EU equivalent (*Brownlie (no 2)*); there is no requirement that damage be direct; only that it be actionable. The principle of *forum non conveniens* is considered to be a robust mechanism to balance out a wider gateway.

Anchor defendants

- It was highlighted that while most civilised legal systems adopt a head of jurisdiction based on anchor defendants, they must each balance two competing factors:

    - the benefits of having all proper parties before the same court at the same time, with the accompanying reduction of cost and risk of irreconcilable judgments and the need to police against abuse.

- Whilst the EU provision in Article 8(1) of Brussels (Recast) appears clear and concise, CJEU jurisprudence reveals inconsistent decisions and reasoning on the key questions as to whether it is legitimate to enquire into (i) the merits of the claim against the anchor defendant(s) to check the viability of their inclusion into the proceedings; and (ii) the claimant's motives for bringing such a claim (*Freeport / Reisch Montage/ CDC*).

- This issue has also troubled the UK courts when applying the provision (*Sabbah v Koury / Kolomoisky*). Post-Brexit, the "necessary and property party" gateway in PD6B, paragraph 3.1(3) necessarily brings merits and reasonableness into the enquiry. Whilst outcomes may be less certain, the provision's flexibility and judicial discretion, in addition to the application of *forum non conveniens*, protect against abuse.

Forum conveniens

- ASKC provided an overview of the application of *forum conveniens* in the context of FRAND cases, focusing in particular on the profoundly different ways in which it is possible to characterise a FRAND dispute (patent infringement vs settlement of licence terms) and the consistent judicial view (despite the ingenious arguments to the contrary from implementers) that the claims in such actions are no more and no less what they appear to be: claims for UK patent infringement.

Anti-suit injunctions

- The Chinese courts (in addition to the courts of England and Wales) have developed a jurisdiction to set FRAND terms and grant ASIs to restrain foreign proceedings, including patent infringement claims brought in the place(s) where the patent(s) are registered. That has made China an attractive forum for implementers. In turn, patentees have sought relief in response in England. For example, anti-ASIs (AASIs) have been sought by and granted to patentees (e.g. *Philips v Oppo*) in the English courts in response to what might be characterised as "spoiling actions" in the Chinese Courts. The justification and to protect the patentee against unconscionable conduct by the implementer. This does raise, however, a number of difficulties with regard to exorbitance and unconscionability.

Points raised in Q&As

It was noted that:

- there is a forthcoming appeal hearing (*Otsuka*) which relates to the application of the *Moçambique* rule, in respect of the assessment of foreign designations of European patents by the English courts;

- there is a pending challenge before the World Trade Organization relating to the readiness of the Chinese courts to grant ASIs;

- whilst there is unlikely to be an onslaught of cases in which the courts of England and Wales grant ASIs, it is a further tool in the arsenal for litigants to seek in cross-border cases;

- a recent carefully reasoned cartel damages case (*Viegas v Cutrale*) has found that the English court did not have jurisdiction to hear a case against a Brazilian entity, notwithstanding that the long-standing centrality of London to its global operation had been argued; and

- where an undertaking was given by a party in UK proceedings not to challenge a foreign patent's validity, this is now simply a discretionary factor that will be taken into account by the court when carrying out a *forum conveniens* analysis (regardless of whether it is considered to be an adequate answer to the rule in *GAT*).