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Security for Costs After Brexit: Rationale vs Residence

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Before Brexit, the fact that an EU-domiciled litigant was resident outside the jurisdiction did not of itself offer any basis on which to seek security for costs. Rather, they were treated essentially in the same way as a domestic litigant for such purposes, on grounds that they resided within a single legal market which included England & Wales. This article examines the post-Brexit position, in light of a potential anomaly in the new r 25.13 CPR, and asks how, after years of EU-domiciled litigants being regarded as 'one of us', they are to be treated now?

The Security for Costs Regime pre-Brexit

1. The security for costs provisions in CPR 25 exist for the simple purpose of protecting parties against the risk of being unable to enforce costs orders later made in their favour.[1] The circumstances in which security may be sought are set out in r 25.13 CPR. One such circumstance (provided for at subsection (2)(a) of the rule) allows for an application to be made against a foreign domiciled party (referred to throughout this article as the "**foreign claimant limb**").

[1] Predominantly defendants, to reflect the fact that they have had no say in the decision to commence litigation – although see the commentary at 25.13.1.1 regarding the need to examine the substantial position of each party.

2. Before Brexit, the foreign claimant limb provided that security for costs may be available[2] where: *"the claimant is (i) resident out of the jurisdiction; but (ii) not resident in a Brussels Contracting State, a state bound by the Lugano Convention, a state bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982."*

3. Before examining how the rule has changed post-Brexit, it is first necessary to unpack the rationale underpinning it, as explained in the well-known judgment of the Court of Appeal in *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556. In that case, the Court examined the security for costs regime through the prism of the European Convention on Human Rights (**ECHR**). It found that, since an order granting security against a foreign domiciled litigant would potentially restrict that litigant's Article 6 rights, the jurisdiction to make such an order should be exercised in accordance with the ECHR, and accordingly could not be exercised in a manner which discriminated on the basis of nationality.

4. When considering how that principle played out in applications for security, the Court concluded that the availability of mutual enforcement regimes in Brussels[3] and Lugano[4] states justified putting litigants resident in those states beyond the reach of the foreign claimant limb altogether: *"The single legal market of the Brussels and Lugano Conventions is a significant achievement on the road to easy and automatic recognition and enforcement of judgments..."* [57]. It even went so far as to record that *"'abroad' in this context now means not merely outside England or the United Kingdom, but outside the jurisdictions of the*

[2] Subject of course to the Court's exercise of its discretion pursuant to r 25.13(1)(a) CPR.
[3] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[4] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2007).

states party to those Conventions" [46]. The Court essentially asked why, in circumstances where a litigant with the benefit of an English judgment in their favour may directly enforce against the judgment debtor not only in England and Wales but also most likely in any Brussels or Lugano state, a foreign domiciled judgment debtor resident in such a state should be any more susceptible to an order for security than their English equivalent.

5. In applications for security against those litigants resident outside such a state, the foreign claimant limb could be satisfied; but the Court retained a discretion (r 25.13(1)(a) CPR), which again it was bound to exercise in accordance with the ECHR (and therefore not in a manner which discriminated on the basis of nationality). So the simple fact a litigant resided outside a Brussels or Lugano state was not of itself enough; the Court should examine the available mechanisms for enforcement in that litigant's home jurisdiction, and assess whether those presented a significantly greater challenge than enforcement mechanisms available in Convention states: *"Potential difficulties or burdens of enforcement in states not party to the Brussels or Lugano Convention are the rationale for the existence of any discretion. The discretion should be exercised in a manner reflecting its rationale, not so as to put residents outside the Brussels/Lugano sphere at a disadvantage compared with residents within"* [58].

6. Thus, before 1 January 2021, security for costs was not available against EU-domiciled litigants on grounds of their domicile alone.[5] As against litigants resident outside of Brussels and Lugano states (i.e. EU and EEA Member States), security was available under the foreign claimant limb, but essentially

[5] Although security would in principle have been available against such a litigant via one of the other jurisdictional gateways provided for in r 25.13(2).

only where enforcement in their home jurisdiction would be significantly more onerous than enforcement within a Brussels or Lugano state.

The Change from 1 January 2021

7. Unsurprisingly, upon the UK's exit from the EU, its concomitant departure from Brussels and Lugano has been reflected in r 25.13(2)(a) CPR. For cases issued on or after 1 January 2021, the foreign claimant limb now provides that security may be available where the claimant is resident out of the jurisdiction but *"not resident in a State bound by the 2005 Hague Convention, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982"*. Thus, residency in a Brussels, Lugano, or Regulation State[6] no longer offers any protection against an order for security under the foreign claimant limb. As of 1 January 2021, only a litigant resident in a state bound by the 2005 Hague Convention[7] will be afforded such protection.

8. At first blush, that may not appear to be much of a change. All EU Member States are signatories to the Hague Convention, after all.[8] Accordingly, all those who are *"resident"* in EU Member States will still be protected from applications under the foreign claimant limb. On the face of it, save for those litigants resident in Norway, Iceland, Liechtenstein or Switzerland (formerly covered by Lugano), it may seem there is not much to write home about.

9. But an important issue lies beneath the surface. The drafting of the rule apparently fails to appreciate that the Hague Convention is significantly narrower in scope than Brussels and Lugano. It applies only "*in international cases to exclusive choice of court agreements concluded in civil or commercial*

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6 I.e. an EU Member State (per s1(3) of the Civil Jurisdiction and Judgments Act 1982)

7 Convention of 30 June 2005 on Choice of Court Agreements. A copy of the Convention can be obtained here: https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

8 The other signatories are Singapore, Mexico and the UK.

matters" (Art 1).[9] It has no application to natural persons acting in their personal capacity (Art 2). The mutual recognition and enforcement provisions make clear (Art 8(1)) that they apply only to a *"judgment given by a court of a Contracting State designated in an exclusive choice of court agreement.*"

10. Thus, a party will only have the benefit of the mutual enforcement provisions in Chapter III if the judgment they are seeking to enforce is one in which jurisdiction is founded on an exclusive choice of court agreement. If jurisdiction is instead founded on a non-exclusive agreement, or on common law rules, the matter will fall outside the ambit of the Hague Convention, and the Convention's mutual enforcement regime will not be available.

An error on the face of the rule?

11. This is obviously important, bearing in mind the rationale for the rule given by the Court of Appeal in *Nasser*. The fundamental touchstone for engaging the foreign claimant limb is enforcement: *"The distinction in the rules based on considerations of enforcement cannot be used to discriminate against those whose national origin is outside any Brussels and Lugano state on grounds unrelated to enforcement"* [58]. The Court of Appeal in *Nasser* emphasised that the *absence* of a reciprocal enforcement agreement will also be an important [59] (although not necessarily determinative [65]) factor in the exercise of discretion. So, if the enforcement provisions of the Hague Convention do not actually apply, such that enforcement may be more difficult, surely that is a basis on which security should be available?

[9] An *"exclusive choice of court agreement"* is defined as one which designates the courts of one Contracting State to the exclusion of all others (Art 3).

12. All this strongly suggests that, if the rationale in *Nasser* still holds good (and is to be preserved), the new foreign claimant limb should exclude only those cases where the Hague Convention actually *applies*.[10] Yet the rule as presently drafted ignores all of this, instead focusing on where the litigant in question resides, rather than asking the (critical) question of whether it actually makes any difference for enforcement purposes. Not only does that represent a significant departure from *Nasser*, but it may also be discriminatory and contrary to Article 14 ECHR; since ordering security by merely pointing to where a litigant lives, without any objectively justifiable rationale, is not a permissible exercise of the Court's jurisdiction (per *Nasser* at [61]).

13. Given those considerations, it seems fairly clear that there is an error on the face of the rule. That is perhaps explicable given the sheer number and scope of legislative amendments required before the end of the transition period, particularly in view of the general pre-Brexit expectation that the UK would join Lugano (in which case the exception for those resident in Lugano states would presumably have been preserved in the foreign claimant limb, and business would have continued largely as usual). It seems reasonable to expect the rule to be revised to bring it in line with *Nasser* and the ECHR in the near future.

[10] In other words, where the English Court's jurisdiction is founded on an exclusive choice of court agreement within the scope of the Convention.

What next?

14. What does that mean for security against European-domiciled litigants? With the UK now permanently outside of Lugano[11] and Brussels,[12] the EU-UK Trade and Cooperation Agreement (the "**TCA**") not providing a mechanism for enforcement and recognition of civil judgments, and the enforcement provisions of the Hague Convention only applying in very limited circumstances, enforcement of English judgments against European-domiciled litigants has been very significantly curtailed. Evidently there is no longer a level playing field or a *"single legal market"* across Europe (or at least not one to which England & Wales also belongs). In those circumstances, the rationale for putting European-domiciled litigants out of reach of the foreign claimant limb simply dissolves altogether.

15. Are the Courts now, then, to return to the idea that 'abroad' means outside England & Wales, rather than outside Europe? If so, as seems inevitable[13], then it must follow that security should (in principle) be available against European-domiciled litigants, if enforcement in their home jurisdiction presents a significantly greater challenge than enforcement within England & Wales. After years of being treated like domestic litigants, it seems likely that very soon they will enjoy no special status at all.

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[11] The UK's accession was controversially blocked by the European Commission in May of this year: https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf.

[12] Brussels I no longer applies, and on 29 January 2021 the UK Government confirmed its position that the Brussels Convention 1968 is also inapplicable following the expiry of the transition period.

[13] And note that English claimants also now appear to be vulnerable to successful applications in Europe: a German court ordered security for costs against an English claimant in March of this year (http://www.disputeresolutiongermany.com/2021/04/security-for-costs-after-brexit-new-federal-patent-court-decision-and-a-question-mark/)

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