

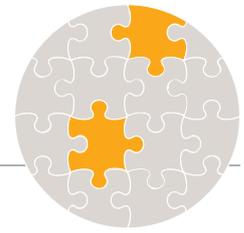
Cross-border disputes

International service

COVID-19: Service of proceedings abroad during and following the pandemic

A. Background

1. International service of proceedings is tricky, even in the best of times. It is generally desirable to effect service using a means which is both legally valid and as time/cost efficient as possible.
2. The more formal routes provide more certainty, but service can take considerable time to be completed. Less formal routes may be available, but their use demands more scrutiny when assessing their legitimacy, and so can increase the risk of a legal challenge:
 - in the forum in which the proceedings take place – thereby in fact adding to the delay of the progress of the proceedings and also increasing cost; and/or
 - in a country in which the defendant or its assets are based – thereby potentially rendering any judgment obtained unenforceable there.
3. Speed is usually important from a commercial perspective. However, certainty might be vital for legal reasons (for example, to ensure that the applicable limitation period for the claim is not exceeded), and the use of formal routes can sometimes prove to be the quicker and cheaper option overall. That said, there are instances in which speed of transmission is of the essence such that the use of formal channels will render the proceedings ineffective.
4. Consequently, it is crucial to assess these issues carefully before deciding what approach to take in the particular circumstances at hand.
5. During a global pandemic however, the factors in play are even more complex:
 - The more formal channels for serving proceedings might not be operating, and so claimants/ plaintiffs may be more inclined to explore whether other means might be available. However, any such alternative means must bear up to legal scrutiny, and they may present, in any event, their own challenges as regards procedure, practicality or timing.
 - Further, at a time when it may be more difficult to meet payment or other contractual obligations to other parties, and/or properly to assess the merits of adverse claims and/or to arrange, manage or fund a defence, defendants may be:



- less inclined to make service on them easy to effect (for example, by authorising their lawyers to accept service on their behalf); and/or
 - more likely to contest the validity of the means or method of transmission and delivery utilised.
6. Even once the global pandemic has sufficiently subsided – in the country in which proceedings have commenced and/or the country in which they are to be served – such that normal channels can resume their operations, service is still likely to take longer than usual in view of the likely backlog of requests and continuing issues of practicality. As such, the effects of COVID-19 on this issue, and its importance, will continue for some time to come.
7. This note highlights some of the issues arising, and considers the options available, in respect of:
- the service abroad of proceedings in the Courts of England and Wales; and
 - the service in England and Wales of foreign proceedings.

It also provides some commercial and practical guidance in this regard during these difficult times.

B. International agreements to which the UK is a party

8. The UK is party to various international agreements in respect of the service in the UK of proceedings in other contracting countries, and of UK proceedings in those countries. These include:
- the EU Service Regulation¹ – applicable as regards the UK and the 27 EU Member States²;
 - Article I of Protocol 1 to the Lugano Convention³ - applicable as regards the UK and Iceland, Norway and Switzerland⁴;
 - the Hague Service Convention⁵ - applicable as regards the UK and 48 of the signatory countries (including Iceland, Norway and Switzerland);
 - a number of bilateral treaties – applicable as regards the UK and various individual countries.

C. Service abroad of proceedings in the Courts of England and Wales

9. The means by which proceedings in the Courts of England and Wales can be transmitted for service abroad, and the actual methods of service which can be used, depend upon the country in which service is to be effected and the nature of the defendant to be served.

¹ Regulation (EC) No 1393/2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

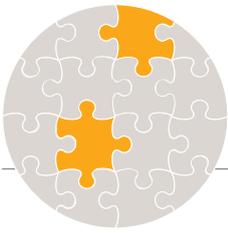
² Although this is an EU Regulation, during the Brexit Transition Period it is still applicable in the UK, and in EU Member States in respect of the UK, as if the UK were still an EU Member State. It takes precedence over other international agreements, such as the Hague Service Convention.

However, the UK and each of the EU Member States are also party to the Hague Service Convention (in their own right) - Austria signed the Hague Service Convention on 22 November 2019, although it has not yet come into force there. Consequently, when the application of the EU Service Regulation ceases that Convention will apply instead as between the UK and the Member States.

³ The Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 2007.

⁴ The UK is still applying this Convention, and Iceland, Norway and Switzerland are still applying it in respect of the UK, during the Brexit Transition Period (despite the fact that the UK was party to it in its capacity as an EU Member State).

⁵ The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Document in Civil or Commercial Matters.



10. For service in most countries⁶, one or more formal means of transmission will be available, for example via:
- transmitting/receiving agencies⁷;
 - appropriate public officers of the UK and the other country⁸;
 - central authorities⁹;
 - consular or diplomatic channels or agents¹⁰;
 - judicial officers, officials or other competent persons of the UK and the other country¹¹; and/or
 - the government of the other country¹².
11. In order to put one of these processes in train, a “request for service” must be filed with the Foreign Process Section of the Royal Courts of Justice (“**FPS**”), together with the documents to be served and duplicates thereof, and any requisite translations. The Court officer will then seal them, and forward them to the Senior Master for onward transmission¹³.
12. Such Requests, however, are not currently being processed in view of the COVID-19 pandemic. The Queen’s Bench Division has issued a Guidance Note (the “**QBD Guidance Note**”)¹⁴ in this respect stating that:
- “The processing of requests for service of court documents on parties out of the jurisdiction is ... suspended for the present, but parties can attempt service without the intervention of the Foreign Process Section, provided that the manner of service complies with the Service Regulation, the Hague Service Convention or any other bi-lateral treaty in force which is applicable: see CPR 6.40. Service in a country which requires service through foreign governments, judicial authorities or British Consular authorities, which would normally be transmitted through the Foreign & Commonwealth Office, is suspended at present.”*
13. As the QBD Guidance Note mentions, other, less formal, means of service might be available¹⁵ for the service abroad of proceedings in the Courts of England and Wales, whether pursuant to, or in accordance with, the terms of any relevant international agreements, or otherwise (if there are no such agreements). Whether, and which, less formal means are available will, at least to some extent, depend upon any declarations made by the country in which service is to be effected and/or its local law. The less formal means that may be available include:

6 In respect of a limited number of Commonwealth States, the Isle of Man and the Channel Islands, and British overseas territories, service, formal means of service are not available and the claimant or its agent must effect service direct – see rule 6.42(3) of the Civil Procedure Rules 1998 in England Wales (“**CPR**”) and para 5 of Practice Direction 6B.

7 See Articles 2-11 of the EU Service Regulation.

8 See Article I(2) of Protocol 1 of the Lugano Convention and CPR rule 6.42(1)(b)(i).

9 See Articles 2-7 of the Hague Service Convention and CPR rule 6.42(1)(a).

10 See e.g. Articles 12 and 13 of the EU Service Regulation, and Articles 8 and 9 of the Hague Service Convention and CPR rules 6.42(1)(b)(ii) and (2)(b).

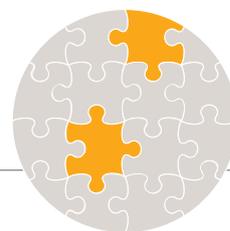
11 See Article 10 of the Hague Service Convention which states: “Provided the State of destination does not object, the present Convention shall not interfere with – ... b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination ...”, and CPR rule 6.42(1)(b)(i).

12 See CPR rule 6.42(2)(a).

13 See CPR rules 6.42(1)-(2) and 6.43, and para 4 of Practice Direction 6B.

14 HM Courts & Tribunals Service Coronavirus Update: “Coronavirus – Information for Queen’s Bench Division Court Users (Bulletin 5)”.

15 Most of these other methods are generally not available in the case of service on States however, for which specific rules apply – see Section 12 of the State Immunity Act 1978 (“**SIA**”), CPR rule 6.44 and e.g. *General Dynamics United Kingdom Ltd v Libya* [2019] EWCA Civ 1110. However, such service can be effected on a State in a manner to which the State has agreed – see Section 12(6) of the SIA and CPR rule 6.44(7).



- postal channels¹⁶;
- service directly through judicial officers, officials or other competent persons in the country in which the documents are to be served¹⁷;
- other more direct methods of service, possibly via local lawyers or process servers, that are permissible in accordance with the law of the country in which service is to be effected¹⁸; or
- service using a contractually agreed method (even if that envisages service outside the jurisdiction)¹⁹.

14. Further, where there is “good reason” the Court may make an order for alternative service of the claim form (either by permitting service, in future, by an alternative method or at an alternative place, or by ordering that steps already taken to bring a claim form to the attention of a defendant by such a method or at such a place is good service)²⁰. However:

- since the Court may not authorise anyone to do anything that is contrary to the law of the country in which service is to be effected²¹, an order for alternative service cannot be made if its effect would be contrary to the law of that country;
- this means that alternative service may be ordered by a method not permitted by the law of that country, but not by a method which is positively contrary to, or contravenes, that law.

In addition, in “exceptional circumstances” the Court may dispense with service of the claim form altogether²².

16 See e.g.:

- Article 14 of the EU Service Regulation (which states: “Each Member State shall be free to effect service of judicial documents directly by postal services in persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent”). However, it is highly doubtful that this provisions allows individuals or corporate entities to effect such service directly, as opposed to the Member State via its competent authorities. Indeed, the notes to the White Book confirm that such service of proceedings commenced in England and Wales must be effected by the Senior Master through the FPS.
- Article 10 of the Hague Service Convention (which states: “Provided the State of destination does not object, the present Convention shall not interfere with – a) the freedom to send judicial documents, by postal channels, directly to persons abroad ...”). Note that the FPS has indicated that service using this means requires its involvement.

17 See e.g. Article 10 of the Hague Service Convention (which states: “Provided the State of destination does not object, the present Convention shall not interfere with – c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.” However, it may be that CPR rule 6.43 requires that service of proceedings in the Courts of England and Wales via such means is nevertheless effected via the Senior Master by filing a request for service with the FPS.

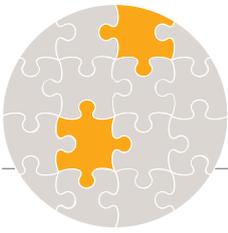
18 See e.g. Article 19 of the Hague Service Convention and CPR rule 6.40(3)(c).

19 CPR rule 6.11 – see also CPR rule 6.6(1) and, in the case of service of proceedings on States, Section 12(6) of the SIA and CPR rule 6.44(7). Note, however, that if the contractually agreed method of service is to be effected in an EU Member State, it may need to comply with the EU Service Regulation in order for it to be valid.

20 CPR rule 6.15. The Court cannot make such an order in respect of service on a State however – see Section 12 of the SIA and e.g. paras [52] and [61] of the Judgment of the Court of Appeal in the *General Dynamics* case mentioned above.

21 CPR rule 6.40(4).

22 CPR rule 6.16. The Court cannot, however, make such an order in respect of the service on a State of a claim form in proceedings to determine a dispute (or to enforce a foreign Court judgment by means of a claim made on the judgment debt, rather than via a registration process) – see the *obiter* comments of the Court of Appeal at paras [48]-[52] and [62]-[63] in the *General Dynamics* case mentioned above, albeit that this Judgment may be the subject of an Appeal to the Supreme Court. Thus, a claim form in respect of such proceedings must be served, and such service cannot be dispensed with. (This is in conflict with the *obiter* views of Andrew Henshaw QC in *Certain Underwriters at Lloyd’s of London v Syrian Arab Republic and Ors* [2018] EWHC 385 (Comm), and the views of Teare J in *Fiona Havlish et al v Islamic Republic of Iran et al* [2018] EWHC 1478 (Comm) and Master Kaye in *Qatar National Bank Q.P.S.C (formerly Qatar National Bank (S.A.Q.)) v (1) Government of Eritrea (2) State of Eritrea* [2019] EWHC 1601 (Ch).)



15. However, it remains to be seen whether, and in what circumstances, orders for alternative service, or dispensing with service, will be made in the context of the COVID-19 pandemic.

D. Service in England and Wales of foreign proceedings

16. The service of foreign proceedings in England and Wales may likewise be effected using one or more of the formal channels mentioned above.
17. Upon receipt of a request for service (together with the documents to be served and any requisite English translations) from:
- a consular or other authority of a country with which there is a relevant international agreement on international service; or
 - from the Secretary of State for Foreign and Commonwealth Affairs, with a recommendation that service should be effected,

the Senior Master will arrange for such service to be effected²³.

18. Service via Transmitting/Receiving Agencies under the EU Service Regulation, and via Central Authorities under the Hague Service Convention, may be effected either:
- by a method in accordance with / prescribed by the law of England and Wales for the service of documents in domestic actions upon persons who are in England and Wales²⁴; or
 - by a particular method requested by the transmitting agency / the applicant, unless that method is incompatible with the law of England & Wales²⁵.

19. In this respect:

- as regards service under the Hague Service Convention, the Hague (HCCH) website indicates that, in the UK, the method which tends to be used by the Senior Master is:

*"Personal service on individuals & postal service on registered offices on companies. If this fails by first class post."*²⁶

- as regards service of foreign proceedings via the Senior Master more generally, it is for the Senior Master to determine the method of service to be used and:

*"The usual practice is to require service by a county court bailiff and to provide a certificate to complete and return. The Senior Master may make an order for alternative service based on the certificate if appropriate."*²⁷.

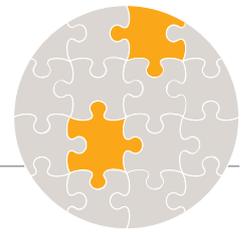
23 CPR rule 6.50. These provisions do not apply to service under the EU Service Regulation – instead, its rules apply directly; however, it is still the Senior Master who, upon receipt of a request from a Transmitting Agency, will arrange for service to be effected, and he/she will do so using an appropriate method pursuant to those rules.

24 Article 7 of the EU Service Regulation / Article 5(1)(a) of the Hague Service Convention.

25 Article 7 of the EU Service Regulation / Article 5(1)(b) of the Hague Service Convention. Subject to Article 5(1)(b), a document may always be served under the Hague Service Convention by delivery to an addressee who accepts it voluntarily (Article 5(2)).

26 United Kingdom - Central Authority & practical information, (HCCH, last updated 01 April 2020), <<https://www.hcch.net/en/states/authorities/details3/?aid=278>>.

27 CPR rule 6.51 and paragraph 24.1.3 of the Queen's Bench Guide. These provisions do not apply to service under the EU Service Regulation – instead, its rules apply directly. Service will be effected using an appropriate method pursuant to those rules.



20. However, such processes are also currently suspended. In this respect, the QBD Guidance note states:

"The COVID-19 outbreak has inevitably led to delays in the service of documents from foreign courts. County Court Bailiffs whom we usually instruct to effect service are suspended from work and we are unable to process tracked postal service requests at present. For the moment service of judicial and extra-judicial documents is suspended, but as soon as we are able to do so, court staff in the Foreign Process Section will work to complete requests for service as promptly as they can."

21. However, other less formal means of service may be available for the service of foreign proceedings in England and Wales. Of course, the question of whether that is so will depend, at least in part, upon the procedural law of the country in which the proceedings are commenced. However, this question may also depend upon the law of England and Wales if:

- the country in question is also party to the EU Service Regulation, the Hague Convention or a bilateral treaty with the UK, and the terms of that require that the method in question is, for example, not one to which the UK objects or that it is a method which is permitted by the law of England and Wales; and/or
- under the procedural law of the country in question, service using such means must, for example, be permitted by, or must not be incompatible with, the law of England and Wales.

22. In this respect, the following points are worth noting:

- Service is possible by postal services of proceedings commenced in an EU Member State²⁸.
- The UK has not declared any objection to service by postal channels under the Hague Service Convention²⁹.
- As regards the possibility of service of proceedings, commenced in an EU Member State, directly through judicial officers, officials or other competent persons in England and Wales under the EU Service Regulation³⁰, the UK has declared, in respect of England and Wales that:

"...We will not be affecting [sic] direct service."

- As regards service, via official channels³¹ of proceedings commenced in a country in which the Hague Service Convention applies, the UK has declared³² that:

"... documents for service through official channels will be accepted in the United Kingdom only by the central or additional authorities and only from judicial, consular or other diplomatic officers of other Contracting States",

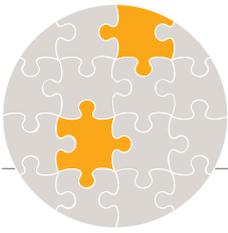
²⁸ Article 14 of the EU Service Convention – see footnote 16 above.

²⁹ I.e. under Article 10 (a) – see footnote 16 above.

³⁰ Pursuant to Article 15.

³¹ I.e. via judicial officers, officials or other competent persons.

³² With reference to Articles 10(b) and (c).



- although it has also subsequently clarified that declaration³³ in a letter from the Foreign and Commonwealth Office stating:

*"... I am happy to confirm that our declaration does not preclude any person in another Contracting State who is interested in a judicial proceeding (including his lawyer) from effecting service in the United Kingdom "directly" through a competent person other than a judicial officer or official, such as a solicitor."*³⁴.

- The law of England and Wales is generally not opposed to the service of foreign proceedings in England and Wales by means of direct service by a party, for example via a solicitor.

E. Commercial and practical points

23. The effects of the COVID-19 pandemic constitute an additional illustration (if any be needed) of the benefits for claimants/plaintiffs of agreeing – at the time of contracting – a method and place³⁵ by which proceedings in connection with a particular legal relationship may be served on those party to the contract.

24. Claimants/plaintiffs wishing to serve proceedings during, or following, the global pandemic should note the following:

- Service via formal channels may currently be suspended.
- Even once the global pandemic has subsided sufficiently – in the country in which proceedings have commenced and/or the country in which they are to be served – such that normal channels can resume their operations, service is still likely to take longer than usual in view of the likely backlog of requests and continuing issues of practicality.
- A contract to which the defendant is a party may provide for service by an alternative means and/or methods, and/or at an alternative place, to those which would otherwise have been available, and it may be much easier to comply with those provisions quickly and efficiently in these difficult times³⁶.
- Alternatively, or in any event, it may be that a defendant is prepared to agree to service by a particular means/method and/or at a particular place. Thus, in respect of proceedings in the Courts of England and Wales, a defendant may be prepared, for example:
 - » to provide an address at which the defendant resides or carries on business within the UK (or another EEA state³⁷) for the purpose of being served with the proceedings³⁸; or
 - » to provide in writing the business address of a solicitor in the UK or an EEA state as an address at which the defendant may be served with the claim form, or to instruct a solicitor acting for the defendant to notify the claimant in writing that the solicitor is instructed accept service on the defendant's behalf at that solicitor's business address³⁹.

33 In respect of Article 10(c).

34 United Kingdom - Central Authority & practical information, (HCCH, last updated 01 April 2020), <<https://www.hcch.net/en/states/authorities/details3/?aid=278>>.

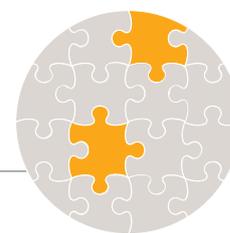
35 Ideally, within the jurisdiction(s) in which proceedings will take place.

36 Note, however, footnote 19 above.

37 The EU Member States and Iceland, Liechtenstein and Norway.

38 CPR rule 6.8.

39 CPR rule 6.7.



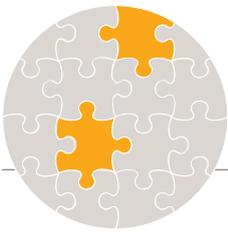
- Even if a defendant is based abroad, in some instances, it might still be possible to serve that defendant within the jurisdiction⁴⁰.
- If, however, there is no prior agreement in relation to service, the defendant is not prepared to agree such a means/method of service now and service cannot be effected within the jurisdiction, it may nevertheless be possible to effect such service overseas by means other than via the more formal channels.
- The question of the validity of such less formal means should, however, be carefully assessed. That assessment, albeit conducted primarily from the perspective of the law of the country in which the proceedings have been commenced, will often entail the need for advice from foreign lawyers. It should:
 - » include the application of the relevant provisions of any international agreements between the country in which the proceedings have been commenced and the country in which service is to be effected;
 - » take into account the law of the country in which the proceedings are to be served as appropriate or necessary; and
 - » perhaps also involve consideration of the validity of service from the perspective of the law of the country or countries in which any judgment that is obtained might subsequently be enforced.
- Where there is doubt as to the validity of service via a particular less formal means, one option might be to:
 - » transmit the documents by such means, and see what the defendant's reaction is: if it does not contest the validity of service but takes part in the proceedings, the validity of service is then unlikely to be an issue; and
 - » in parallel, either at the same time or if and when the defendant either objects or takes no part in the proceedings, put in train the more formal means of service, so as to minimise the time lost if it transpires that the formal means must be used.
- Depending on the situation (and its availability as an option) it might be worth considering applying for an order permitting service by alternative means or for an order dispensing with service.
- In all the circumstances, it might be necessary for a claimant/plaintiff to apply for an order extending the time for service of a claim form or equivalent if any timescales⁴¹ might not be met⁴².
- Doing so will be even more crucial if, following the issuing of the claim, the relevant limitation period will come to an end imminently – since in that event it will not be possible to simply re-issue the claim at a later date if the first claim form expires.

⁴⁰ E.g.:

- if the defendant is a company and has a branch office, or other place of business, in England and Wales (Sections 1046 and 1139(2) of the Companies Act 2006 and/or CPR 6.9(2));
- if the defendant is an individual being sued in the name of a business and has a place of business in England and Wales (CPR rule 6.9(2));
- if the defendant is an individual and either has a residential address within the jurisdiction (CPR rule 6.9(2)) or can be served personally whilst visiting (see CPR rule 6.5).

⁴¹ In proceedings in the Courts of England and Wales, 4 months if served within the jurisdiction or 6 months if served out - see CPR rule 7.5.

⁴² In proceedings in the Courts of England and Wales, see CPR 7.6.



25. Defendants, on the other hand, should be aware of the following:

- The rules as regards the permissible means and methods of service, including the various international agreements that exist between countries, are there for a reason, and they are not mere “technicalities”.
- It may currently be more difficult than usual for claimants/plaintiffs to effect service of proceedings on them pursuant to, or in accordance with, those rules, and the global pandemic cannot be viewed as a licence, on the part of claimants/plaintiffs, to flout those rules.
- Depending upon the circumstances, it therefore may be perfectly legitimate for a foreign defendant to insist that service be effected in accordance with those rules and/or to contest the validity of any means/methods that a claimant/plaintiff uses.
- Doing so may have considerable legitimate commercial advantages - particularly in circumstances in which, because of COVID-19, the defendant is unable properly to focus on assessing the merits of the claim made against it and/or to arrange, manage or fund its defence.
- Further, if a limitation period is close to expiry, the failure by a claimant/plaintiff to serve a claim form or the equivalent legitimately within a prescribed timescale could ultimately prove fatal to the success of the claimant’s/plaintiff’s claim.
- A defendant’s conduct (for example if it obstructs service) might in some circumstances work against it however – for example, such conduct might result in, or lend support to, an application by the claimant/plaintiff for an order for alternative service or dispensing with service.
- Further, challenging the validity of service, or resisting applications for orders for alternative service or dispensing with service, may result in adverse costs orders if a defendant does so unsuccessfully.

26. All of the above said, the approach to be taken by Courts to international service issues against a COVID-19 backdrop (including as regards whether and when orders for alternative service or dispensing with service should be made) is not yet clear:

- on the one hand, it might be unfair for claimants/plaintiffs to be prevented, albeit temporarily, from pursuing their legal (and perhaps time-sensitive) claims;
- on the other hand, however, it may be unfair to deprive foreign defendants of their normal rights to be properly served and, as a consequence, force them – during such difficult times – to defend claims which may not in fact require urgent determination (and may even resolve themselves in any event once some sort of normality resumes).

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