

**COMPARATIVE STUDY OF "RESIDUAL JURISDICTION"
IN CIVIL AND COMMERCIAL DISPUTES IN THE EU
NATIONAL REPORT FOR:**

IRELAND

PREPARED BY:

**DAVID O DONOHOE & JAMES MURRAY
ARTHUR COX
EARLSFORT CENTRE – EARLSFORT TERRACE
DUBLIN 2 - IRELAND**

(A) General Structure of National Jurisdictional Rules for Cross-Border Disputes

1. Main legal Sources

The primary legal source for the rules regarding jurisdiction in Ireland, apart from the Brussels I Regulation and the Brussels/Lugano Conventions, is the Jurisdiction of Courts and Enforcement of Judgments Act, 1998 ("the 1998 Act"). The primary purpose of this Act was to incorporate the Brussels/Lugano Conventions (together "the Conventions") and more recently the Brussels I Regulation into Irish Law. Apart from the EU instruments (and with the exception of the treaties set out at 8 below) there are no other relevant multilateral treaties to which Ireland is party.

The Schedules to the 1998 Act contain the text of the 1968 Brussels Convention and also the text of the Lugano Convention .

The Brussels 1 Regulation was incorporated into Irish law by Statutory Instrument 52/2001. (SI 52/2001).

Copies of the 1998 Act and SI 52/2001 are attached as Appendix 1.

In the event that the 1998 Act or SI 52/2001 do not apply in individual cases, Irish jurisdictional rules derive from specific principles contained in individual statutes, other Irish statutory instruments (which constitute secondary legislation) or from Irish common law. Irish common law, which is similar in its origins to the common law of England, is an unwritten body of law that is derived from precedent and case law as established in the Irish Courts. In the event that the Irish Courts have no relevant precedent, Irish Courts may be persuaded by the precedent case law of other common law countries including England, Canada and the various Australian and United States jurisdictions.

There are no cases which we would categorise as "landmark cases" in relation to the Irish rules on jurisdiction. To the extent that there are important cases under the above mentioned statutory regime, these will be referred to at the relevant answer below.

It should be noted that all Irish legislation must be interpreted in a manner consistent with the provisions of the Constitution of Ireland (Bunreacht na hEireann) 1937.

2. Specific Rules (or Not) for Transnational Disputes

The jurisdictional rules applied by the Irish Courts are specific to trans-national disputes – there are no internal jurisdictional divisions within Ireland (such as federal units, provinces or cantons).

The Irish practice on jurisdiction in trans-national disputes is based on the notion that a person shall be sued in the Courts where they are domiciled, subject to certain exceptions (such as those set out in the Conventions or in the Brussels 1 Regulation). Only in circumstances where the statutory law provides no guidance are the common law rules of jurisdiction applied.

3. Specific Rules (or Not) for Article 4(1) Jurisdiction

There is no specific set of rules that have been designed to govern jurisdiction of the Irish Courts in relation to Article 4(1) of the Brussels 1 Regulation. Irish common law rules relating to jurisdiction and the court rules set out at 1 above are applied to cross border cases without an EU element.

4. Influence of EU Law

Domestic Irish law is heavily influenced by the Brussels I Regulation due to the significant extent to which Ireland's commercial activities take place with other EU states.

The primary purpose of the 1998 Act was to incorporate the Brussels/Lugano Conventions into Irish law. As a result both the main body of the 1998 Act and the Schedules thereto reflect the law of the Conventions. SI 52/2001 was passed in light of Brussels I Regulation to ensure that the provisions of Brussels 1 were fully incorporated into Irish law.

In addition, the 1998 Act specifically provides at Section 5 that:-

"The Conventions shall have the force of law in the State and judicial notice shall be taken of them".

Section 6 provides:-

- (1) *Judicial notice shall be taken of-*
 - (a) *a ruling or decision of, or expression of opinion by, the European Court on any question about the meaning or effect of a provision of the Conventions.."*
 - (b) *the reports listed in subsection 2*
- (2) *When determining a provision of the Convention, a Court may consider the following reports...and shall give them the weight that is appropriate in the circumstances*
 - (a) *the reports by Mr P Jenard on the 1968 Convention and the 1971 Protocol...*
 - (b) *the report by Professor Peter Schlosser...*
 - (c) *the report by Professors Demetrios Evrigenis and Professor KD Keraneus...*
 - (d) *the report by Mr de Almeida Cruz, Mr Desantes Real and Mr Jenard.....*

This section (together with SI 52/2001) ensures that account must be taken by the Irish judiciary of both the wording of the Conventions and the Brussels I Regulation and any decision of European Court of Justice on the meaning or effect of the Conventions or Brussels 1 Regulation. Further, judicial notice shall be taken of the reports set out at (a) to (d).

5. Impact of Other Sources of Law

As mentioned at Question 1 above, all Irish legislation must be interpreted in a manner consistent with the provisions of the Constitution of Ireland (Bunreacht na hEireann) 1937. This is a fundamental aspect of Irish jurisprudence. Regard will also be had by the Irish courts to human rights principles, and the European Convention on Human Rights (as implemented into domestic Irish law) is a significant consideration in Irish case law, although this has not been evident to date in case law dealing with jurisdictional issues. The Irish Courts recognise general principles of private international law and case law has also considered the impact of comity between jurisdictions.

6. Other Specific Features

There are no other specific or unique features in Ireland in relation to the exercise of jurisdiction by Irish Courts. It may be worth noting that, as with English courts, the Irish Courts will have jurisdiction provided that the Defendant is served with the proceedings in Ireland. The specific leave of the Irish Courts is not required to issue proceedings on a foreign domiciled Defendant provided that they are in Ireland, and can be shown to have an Irish address for service at the time of service of the proceedings.

It is also worth noting that Irish Courts can exercise jurisdiction over a Defendant who is outside of the jurisdiction, provided the Defendant has been duly served in accordance with Irish procedural requirements. However, in non Convention cases, the Claimant must first satisfy the Irish Court that the case should proceed in the Irish Courts and obtain permission to serve outside the jurisdiction in accordance with Order 11 of the Rules of the Superior Courts (dealt with further below at 10ff).

Irish Courts may also, if deemed necessary to prevent an injustice, either stay or strike out proceedings in Ireland under the principle of *forum non conveniens*. This principle will be considered in detail in section E below, but derives from the notion that the Irish Courts should have the power to stay proceedings (in favour of another jurisdiction) if they believe that Ireland is an inappropriate forum in which to bring the action.

The Irish Courts use the principles set out in the English House of Lords decision of *Spilada Maritime Corporation* (see the Irish case of [Doe and another v Armour Pharmaceutical Co Inc and others \[1994\] ILRM 416](#) which accepted the general principle of forum non conveniens) which held that there are three main issues to be considered before staying proceedings: (i) whether there is another forum available which is more appropriate; (ii) whether (Ireland) is not a natural or appropriate forum and the alternative forum is more natural and appropriate (this will involve looking at which forum will have the most real and substantial connection to the action); (iii) whether it is just that the Plaintiff be deprived of the right to trial (in Ireland).

7. Reform

At the time of writing, we are not aware of any proposed or contemplated changes to Irish rules of jurisdiction in relation to cross-border transactions.

(B) Bilateral and Multilateral Conventions

8. Conventions with Third States

Although Ireland is not party to other bilateral/multilateral conventions which specifically relate to jurisdictional matters regulated by the Brussels 1 Regulation, there are a number of international conventions to which Ireland is party which establish special rules, in relation to particular subject matter of the Conventions, regarding the Courts which are to have jurisdiction to hear and determine any disputes.

These conventions all relate to one specific subject area, namely the international carriage of passengers and goods by air, road, rail or sea. We list below the relevant conventions with the relevant Irish implementing legislation.

- The Warsaw Convention 1929 was transposed into Irish Law by the Air Navigation and Transport Act, 1936 (Section 17). It was amended by The Hague Convention 1955 which was transposed into Irish law by the Air Navigation and Transport Act, 1959. These appear to

have now been superseded by the provisions of the Convention for the Unification of Certain Rules for International Carriage by Air 1999 ("the Montreal Convention"), implemented in Ireland by the Air Navigation and Transport (International Conventions) Act 2004.

- The Guadalajara Convention, 1961 (which provides clarification on the rules relating to carriage by air being performed by someone different to the contracting carrier) was implemented by the Air Navigation and Transport Act, 1961.
- The Berne Convention, 1980 - relates to international carriage by rail was implemented by the Intergovernmental Organisation for the International Carriage by Rail (Otif) (Designation of Organisation) Order (SI/1986/242) (See Regulation 3).
- The Geneva Convention, 1956 - relates to international carriage of goods by road was implemented by International Carriage of Goods by Road Act, 1990.
- The Athens Convention, 1974 - relates to the carriage of passengers and luggage by sea was implemented by the Merchant Shipping (Liability of Ship owners and Others) Act, 1996 (Section 19).
- The Chicago Convention, 1944 - relates to international civil aviation was implemented by the Air Navigation and Transport Act, 1946.
- Brussels Convention, 1952 - relates to civil jurisdiction in matters of collision at sea was implemented by the Jurisdiction of Courts (Maritime Conventions) Act, 1989.

9. Practical Impact of international conventions with third states

The above Conventions have limited general impact in Irish law but are clearly of considerable significance in the event of disputes relating to international carriage, notably air transport. As set out above, each of these conventions has been enacted in domestic Irish legislation and we understand they are subscribed to by all member states of the EU.

(C) Applicable National Rules Pursuant to Article 4 of the Brussels I Regulation

10. Structure

Irish jurisdictional rules relating to actions against Defendants resident or domiciled in non-EU states are complex. Substantial amendments have been made to the Rules of the Superior Courts 1986 concerning the service of documents outside the jurisdiction. In particular, the Rules of the Superior Courts (Jurisdiction, Recognition, Enforcement and Service of Proceedings) 2005 (the "RSC 2005 Rules") incorporate the principal international instruments on service, namely The Brussels Convention, The Lugano Convention, Brussels I, Brussels II, The Hague Convention and The EU Service Regulation. In the 2005 Rules, the RSC have been consolidated to reflect accession to all international instruments relating to service and have simplified to some degree this complex area.

There are two issues to establish before serving a document outside the jurisdiction. The first issue is whether Ireland is the correct forum to determine the particular action; having regard to both the subject matter of the dispute and the jurisdiction where the defendant resides. Secondly, one must consider whether any particular mechanical procedures should be adopted to serve the documents.

The Court will consider the circumstances where the domestic conflict of law rules apply under Order 11, the key Order of the RSC in this situation. Service outside the jurisdiction will be required in a situation where a defendant is not present within the jurisdiction but the dispute to which he is party is so

closely connected with Ireland or with Irish law that there is a justification for the proceedings being tried within the jurisdiction.

Order 11 of the RSC governs service of documents outside the jurisdiction in its general form in general circumstances i.e. where the specific rules dealing with parties domiciled in Convention countries (where Order 11A—Order 11C do not apply). Order 11 will apply in two circumstances—where the defendant is resident in a country not party to Brussels I or the Lugano Convention and in cases where the defendant is resident in a contracting state but the subject matter is outside the remit of those international instruments. In both of these situations the Courts must rely on the Irish domestic conflict of law rules to determine jurisdiction.

Under Order 11 it is necessary to apply for *leave* (i.e. permission) of the High Court before documents can be served outside the jurisdiction. This ensures that service on defendants outside the jurisdiction is limited to cases where the Court is of the view that it has jurisdiction to consider the particular dispute. The burden of proof is on the applicant to establish that it is a proper case for service under Order 11. As the application is made *ex parte*, it must be made *uberimmo fides*, i.e. in good faith; therefore the applicant must disclose all facts within his or her knowledge including any which may be adverse to his application.

The application is made by grounding affidavit which must be sworn by the applicant. It should refer to "Intended Plaintiff" and "Intended Defendant" and should be entitled "As Between the Parties to the Intended Proceeding" and "In the Matter of the Courts of Justice Acts, 1924 to 1961, and the Courts (Supplemental Provisions) Acts, 1961 to 1981". Order 11 stipulates that an application for leave to serve a summons (the primary claim form) or notice of a summons must be made before the issue of the summons. Since the case of Traynor v Fagan a practice has developed where the summons may be issued before the leave application. The more appropriate method is to exhibit a draft copy of the summons along with the grounding affidavit. The affidavit must state:

- That in the belief of the deponent the plaintiff has a good cause of action. It is settled law that a good cause of action is established where "an arguable cause of action" has been made out.
- The country where the defendant is or may probably be found and whether the defendant is a citizen of Ireland. If the defendant is not a citizen of Ireland, a notice of summons must be served instead of a summons. It has been held in numerous cases that the failure to serve a notice of summons will result in the Court setting aside the service of the plenary summons.
- Why Ireland is a convenient forum to hear and determine the matter. The plaintiff must provide the particulars necessary for the Court to use its discretion, namely the amount of the action, comparative costs and the convenience of hearing the matter in Ireland.
- Which provision of Order 11 he/she is relying on. The applicant must establish that the claim falls within one of the criteria as laid down in Order 11. Reference should be made to the specific relevant category under Rule 1 although failure to do so will not be fatal. The relevant categories where service will be permitted include:
 - (a) Where the subject matter of the action is land within Ireland
 - (b) Where any relief is sought; against any person domiciled or ordinarily resident within the State. The domicile of a company is its place of incorporation.
 - (c) Where the action is one to enforce, rescind or to otherwise affect a contract in circumstances where the contract was formed in Ireland or its terms are governed by Irish laws

- (d) Where the action is founded upon a tort committed within the jurisdiction. The plaintiff must prove the occurrence in Ireland of any significant element of the tort. In fact, the case law indicates a rather broad interpretation of "any" significant element of a tort.
- (e) Where an injunction is sought within the jurisdiction. Since the case of Caudron v Air Zaire, the Courts have been reluctant to grant an injunction for ancillary relief. In the more recent case of McKenna v (E) H, however, the High Court permitted an interim injunction concerning English defendants in the limited circumstances where the Proceeds of Crime Act 1996 applied.
- (f) Where any person outside the jurisdiction is a necessary or proper party to an action brought against someone within the jurisdiction. An example is where a defendant is seeking to join a third party to the action. The standard test to be applied in exercising this jurisdiction is "whether the person out of the jurisdiction would, if he were within the jurisdiction, be a proper person to be joined as a defendant in the action against the other defendants".

Leave shall not be granted unless the Court is of the view that the case is a proper one for service out of the jurisdiction under Order 11. It is important to note that the Order of the Court is discretionary and not mandatory in nature. This was made clear by the Court in Grehan v Medical Incorporated where it stated that:-

"There is of course a heavy burden on the Court to examine the circumstances of each case before exercising its discretion to make an order for service out of the jurisdiction. It would be clearly wrong to refuse it on the application of any technical rule which insists on one element occurring in the jurisdiction, as it would be equally inappropriate if the Court were to permit service out of the jurisdiction where the case only had a tenuous connection with the country on its facts and in terms of the law likely to govern questions of liability and related matters".

If leave is granted, the Court will impose a time limit in which the defendant may enter an Appearance. Order 11, R.10 provides that where an Order is made granting leave, a copy of the Order must be served with the service of the summons or notice of the summons. Order 11 also provides that where parties to a contract have agreed terms as to service, the Court will not interfere.

The Court in certain circumstances may use its power of inherent jurisdiction to either dismiss or "stay" a matter on the basis that the matter should be tried in another jurisdiction which it deems to be a more appropriate venue or jurisdiction. Thus, in the first instance, whilst the burden of proof is on the plaintiff, it shifts to the defendant who must prove that the granting of a stay on the basis of *forum non conveniens* is in the broad interests of justice if an application is made to stay or dismiss the proceedings. However, the application of *forum non conveniens* has been held in the recent European Court of Justice (ECJ) decision of Owusu v Jackson and Others not to apply in certain circumstances where the defendant is resident in a Member State of the EU (the possible impact of this decision is considered in more detail at 20 below).

Service out of the Jurisdiction under Order.11A (Brussels I)

The Brussels Convention has been superseded by the Brussels 1 Regulation. Article 1 of Brussels I provides that "Civil and Commercial Matters" whatever the nature of the Court or tribunal will be subject to its rules but will not extend to "revenue, customs or administrative matters". For these exempted areas, Order 11 (as dealt with above) will apply.

These explicitly exempted areas make clear that matters of public law are excluded from the scope of the Convention. This does not mean that public authorities are automatically exempt from the rules of Brussels I. It will depend on whether the subject matter of the dispute is concerned with the exercise of the public authority's public powers. Accordingly, determination of this question will entail an assessment of whether the public authority possesses, in the case in question, powers which differ from and are broader than those which a private individual, in a similar situation, would possess.

There are of course also four exclusions from the remit of Brussels I. These are: issues relating to the status or legal capacity of natural persons; rights in property arising out of a matrimonial relationship, wills and succession; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; and social security and arbitration. It is expressly stipulated that Brussels I will not apply to "rights in property arising out of a matrimonial relationship". However, pursuant to Art 5(2), it is clear that "matters relating to maintenance" are within its remit.

If, on the other hand, it is solely concerned with dividing property between the spouses, it will constitute a right in property and will thus be unenforceable. Council Regulation (EC) No.2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels II") now governs rights in property arising out of a matrimonial relationship and the enforcement of matrimonial judgments.

The ECJ has recently given guidance in a landmark case, *Owusu v Jackson and Others* which deals with the scope of Art.2, particularly with the application of the concept *forum non conveniens*. Previously, this principle applied to circumstances where the jurisdictional contest was between the national Courts of a Member State and those of a non-Member State. It remains to be seen what impact *Owusu* will have on the Irish Courts in the event that *forum non conveniens* is pleaded in a future case.

The Irish Courts are of course also bound by the provisions of Article 22 (exclusive jurisdiction) and Article 23 (choice of jurisdiction) as well as the application of Article 27 – *lis pendens*. Specific Irish case law dealing with these aspects will be dealt with below in the appropriate section.

Procedural Rules under Order 11A

Once it has been established that the matter falls within the remit of Brussels I, Order 11(A) of the Rules of the Superior Courts 1986 sets out the procedures which must be followed. Unlike Order 11 (set out above) there is no necessity to obtain leave of the Court under Order 11(A) prior to instituting proceedings against Defendants domiciled out of the jurisdiction provided the conditions set out in Order 11(A) are satisfied.

Indorsement of Claim

Compliance with the following conditions must be set out in the Indorsement of Claim. They are:

- That the Court has the power to hear and determine the claim. The provisions of Order 11(A) only apply to proceedings which are governed by Article 1 of Brussels I. The Indorsement of Claim must specify the provisions of the Convention under which the Court should assume jurisdiction.
- That there are no proceedings between the parties concerning the same cause of action pending in another contracting state (see the *lis pendens* rule above) to ensure compliance

with this Rule. The Court requires that the Plaintiff certify the following in the Summons: *"no proceedings between the parties concerning the same cause of action is pending between the parties in another contracting state"*.

The time to be inserted in the Summons within which the Defendant served shall enter an Appearance is five weeks after service of the Summons where the Defendant is in an EU contracting state, or six weeks where the Defendant is resident in a non-European territory of a contracting state. This includes an Appearance entered solely to contest jurisdiction. Where the Defendant is not, or is not known or believed to be, a citizen of Ireland, Notice of the Summons and not the Summons itself shall be served upon him. Where two or more Defendants or parties to proceedings to which the provisions of Order 11(A) apply but not every such Co-Defendant is domiciled in a contracting state, the provisions of Order 11 shall apply to each and every such Co-Defendant. The Order will not apply where article 22 of Brussels I concerning exclusive jurisdiction or Article 23 of Brussels I concerning choice of jurisdiction apply.

Service out of Jurisdiction under Order 11(B)

The Lugano Convention is dealt with under Order 11(B) which provides for the procedural service out of the jurisdiction to countries party to the Brussels Convention and the Lugano Convention which are not party to Brussels I. Under Order 11(B) there is no necessity to obtain leave of the Court prior to instituting proceedings against Defendants domiciled out of the jurisdiction provided the additions set out in Order 11(B) are satisfied.

Indorsement of Claim

The following must be set out in the Indorsement of Claim:-

- That the Court has power to hear and determine the claim. The provisions of Order 11(B) only apply to proceedings which are governed by the Brussels Convention and Part II of the 1998 Act and the Lugano Convention and Part III of the 1998 Act. The Indorsement of Claim must specify the provisions of the Convention under which the Court should assume jurisdiction.
- That there are no proceedings between the parties concerning the same cause of action pending in another contracting state of the Brussels/Lugano Conventions.

The time limits are the same as provided for in Order 11(A) as set out above. The same exclusions in relation to exclusive jurisdiction and choice of jurisdiction as contained in Order 11(A) are also provided for in Order 11(B).

Service out of Jurisdiction under Order 11(C)

Order 11(C) deals with service out of the jurisdiction under Brussels II. Under Order 11(C) there is no necessity to obtain leave of the Court instituting proceedings against Defendants domiciled out of the jurisdiction provided that the conditions set out under Order 11(C) are satisfied.

Indorsement of Claim

The following must be set out in the Indorsement of Claim:-

- That the Court has power to hear and determine the claim by virtue of Brussels II. The Indorsement of Claim must specify the provisions of the Convention under which the Court should assume jurisdiction.
- That there are no proceedings between the parties concerning the same cause of action pending in another contracting state of Brussels II relating to divorce, legal separation or marriage annulment between the same parties or relating to parental responsibility relating to the same child and involving the same cause of action.

The time limits are the same as provided for in Order 11(A) and Order 11(B).

Where two or more Defendants are parties but not every member is domiciled in a state of the EU, the rules of jurisdiction contained in Brussels II will apply. This differs from Orders 11(A) and 11(B), where Order 11 is utilised in such circumstances. In this situation, one must refer back to the Regulation for guidance on jurisdiction.

11. General Jurisdiction

The general rule of Irish jurisdiction, as set out above, is that the Defendant shall be sued where the proceedings are issued. While the Irish Courts can issue proceedings against anyone who is in Ireland and has an address for valid service here, whatever the length of stay in the jurisdiction, the rules regarding service outside of the jurisdiction are more stringent (requiring permission of the Courts).

12. Specific Rules of Jurisdiction

RSC 2005 sets out those situations where permission may be given for service out of jurisdiction. These rules broadly resemble the provisions of the Convention/ Regulation (see answer 10 above)

a) Contract

There is no specific guidance available on connecting factors. On the basis that the Irish courts are likely to use caselaw under the EU regime (covering both Conventions and the Brussels 1 Regulation), it is worth noting this limited caselaw.

The Irish High Court has interpreted Article 5(1) in General Monitors Ireland Limited v SES-ASA Protection SpA [2005] 2 I.R. 301, where proceedings in the Irish jurisdiction were upheld on the basis that the obligations in questions arose under the contracts between the parties for the sale of goods. As delivery took place in Ireland, it was the place of performance of the obligation in question and therefore took jurisdiction.

The leading Irish case in this area is the sole recent Supreme Court decision, Leo Laboratories Ltd v Crompton BV [2005] 2 IR 225 which considered the interaction between contract and tort laws in circumstances where there was also a choice of jurisdiction issue under Article 23 and an issue in relation to “related proceedings” under Article 28. The Court held that the plaintiff’s claim in tort (brought in Ireland) could not be considered independently from the existing contractual claim instituted in Holland on foot of the choice of jurisdiction clause – the tort claim (being “related” within Article 28) had also to be brought in the Dutch Courts. The Irish Court therefore declined jurisdiction.

A further High Court decision illustrating the applicability of Article 23 in Ireland is Dan O’Connor and other v Masterwood UK and others [2006] IEHC 217, where the Court enforced an original contractual choice of Italian jurisdiction in order to refuse an attempt to gain Irish jurisdiction over the matter.

However, in Marco Montani v First Directors Limited and others [2006] IEHC 92, the Irish Court assumed jurisdiction of a dispute involving assets (ultimately primarily composed of Italian property assets) on the basis that the dispute centred on issues which arose under Irish company law – the Italian courts could not take further steps in the proceedings already before them without a decision of the Irish Courts in relation to the Irish company law issues.

b) Tort

Again, there is no specific guidance available on connecting factors in tort in non EU cases. From the common law caselaw and commentaries, it is felt that place of the tort and place of damage suffered are the central connecting factors. However in two recent cases, the courts have declined tortious Irish jurisdiction when faced with a co-existing contractual jurisdiction in another EU state.

The leading Irish case is Burke v Uvex Sports GmbH [2003]. The Irish court, based solely in tort (arising from an allegedly faulty motorcycle helmet), was dismissed for want of jurisdiction, given the existence of a contractual relationship between the Plaintiff and Defendants.

A similar decision in relation to related contract and tort actions was reached by the High Court in Daly v Irish Group Travel Holidays Limited and others (unreported High Court 16th May 2003).

c) Criminal Proceedings

We are not aware of any such specific ground of jurisdiction in Irish law – there is no guidance on whether the court seized of criminal proceedings is necessarily competent to hear a related civil claim.

d) Secondary Establishment

We are not aware of specific jurisdiction being assumed by Irish courts arising purely from establishment in this country. However, we feel it likely (based on practice) that an Irish court would allow a claim against a non EU defendant to be brought on grounds that there is an establishment, branch or agency in Ireland. That said, we feel it would probably be necessary to show some connection between that claim/dispute and the Irish established entity – the Irish courts would be much less likely to accept jurisdiction if the claim was un-related to the Irish establishment. See answer 10 above for the circumstances in which an Irish court will allow for service.

e) Trust

We are not aware of any specific ground of jurisdiction for trusts in actions against non EU domiciled defendants. The general rules set out in 10 above should be considered in such applications.

f) Arrest and/or location of Property

We are not aware of any specific ground of jurisdiction for arrest of property for actions against non EU domiciled defendants. The general rules set out in 10 above should be considered. However, where the subject matter relates to land within the Irish jurisdiction, it is felt likely that an Irish court would be amenable to granting leave to serve the proceedings under Order 11.

13. Protective Rules of Jurisdiction

Ireland does not have specific protective rules of jurisdiction for non-EU Defendants. The position under Irish common law is that if the Defendant is within the jurisdiction, then he can be served with proceedings. The Court may decide to decline jurisdiction on the basis of *forum non conveniens* (as set out above) if it finds that it is not the most appropriate forum to hear the case.

a) Consumer Contracts

The normal rules regarding service out of the jurisdiction in contract cases apply (see 10 above). However, when exercising its discretion as to whether to accept jurisdiction, the Irish Courts will consider the impact on the non-EU consumer being brought to trial in the Irish Courts when the Plaintiff is a professional.

b) Individual Employment Contracts

Depending upon the nature of the right to be enforced, claims arising out of the employment relationship may be brought before the District Court, Circuit Court or High Court. They can also be brought before the Employment Appeals Tribunal (a specialist employment tribunal). The choice of appropriate forum will depend entirely upon the nature of the right to be enforced. The vast majority of the rights of employees and workers in Ireland derive from primary or secondary legislation, which in turn derive primarily from Irish compliance with EU instruments. These include rights include the right to a minimum wage, to holidays, a maximum working week and time off, the right not to be unfairly dismissed, the right to a redundancy payment. In addition, Ireland has extensive domestic legislation protecting workers against discrimination against on the basis of, amongst others, sex, sexual orientation, race or ethnic origin, age and disability age.

These various rights are enforced before either, or occasionally both, Courts and the EAT. The jurisdiction of the EAT to deal with contractual claims is limited both in extent and in value. The High Court has a generally unlimited jurisdiction in contractual claims. As a result, any consideration of the appropriate jurisdiction in employment matters in Ireland must properly characterise the right to be enforced.

As a general rule an employee working in Ireland for an employer domiciled outside the EU cannot, in the absence of an Irish establishment, bring a statutory claim before the EAT. However, if a worker carried out work in Ireland for a non EU domiciled employer for a period of time the EAT could possibly be persuaded that the employment of the worker in Ireland constituted carrying on business. However, this would be against the general rule.

There is no Court caselaw of which we are aware but there is a determination of an Equality Officer (an official under the Employment Equality legislation) reported as [A Complainant v A Company \[2003\] ELR 333](#). In that case, the complainant worked and lived in Northern Ireland, but divided his working time between Ireland and Northern Ireland. However the fact that he spent 60% of this working time in Ireland was not sufficient (in light of countervailing factors, notably the fact that the employer was based in Northern Ireland) to find that he habitually carried out his work in this jurisdiction.

There are no circumstances where the EAT has jurisdiction to hear a claim by an employer against an employee.

In the ordinary Courts, the general rules of jurisdiction which apply in the Courts under the Brussels 1 Regulation or the Conventions will apply to contractual employment claims. The range of contractual employment claims include normal breach of contract claims, debt collection, etc.

The Conventions will not, of course, apply to those states outside the EU and EEA. As a result the Irish common law rule that a defendant must be sued in his domicile will apply. Therefore, an employee who works for an employer domiciled outside of the EU and EEA will have no basis to

bring a claim before the Irish Courts. This is not the case for an employer domiciled within the EEA or EU to whom the Regulation/Conventions will apply and who as a result may be pursued wherever the contract is performed.

c) Insurance Contracts

For insurance matters, it is again necessary to look at the rules regarding service out of jurisdiction for contract cases as set out above. Provided that the insurance matter has some real connection with Ireland and the Irish Courts believe themselves to be the most appropriate forum to bring the matter, a non-EU defendant can be sued in the Irish Courts (subject to the ability to achieve satisfactory service of those proceedings). The Court will again consider the practical impact on the policyholder when considering whether Ireland is or is not the most appropriate forum.

d) Distribution Contracts

Again there are no specific rules regarding distribution contracts, including the three categories set out in the question. The general rules regarding contracts are the most appropriate source of Irish law and procedure. The 2006 High Court case of Nestorway Limited v Ambaflex Limited 2006 [IEHC] 235 represents the most comprehensive review by the Irish Courts of the law in this area. In that case, concerning a distribution arrangement, the Irish Courts held that the Plaintiff had failed to adequately demonstrate that the Irish Courts should take jurisdiction of the claim under Article 5(1)(a), having failed to establish where the place of performance of the relevant obligations would have taken place under Dutch law (the law of the contract in question). Accordingly the purported service of the proceedings on the defendant was set aside.

e) Protective Rules in Other Matters

There are no other specific matters subject to protective rules of jurisdiction.

14. Rules for the Consolidation of Claims

a) Co-Defendants

Under Irish law, it is clear that if proceedings have been or are to be commenced against the original Defendant within the jurisdiction then it is possible to serve proceedings out of the jurisdiction against another party (including a party domiciled in a non EU state), provided that the Irish Courts are satisfied that (i) there is a real issue between the Plaintiff and the original Defendant, which is reasonable for the Courts to try and (ii) the other party is a necessary and proper party to the claim.

An interesting recent case, however, is Spielberg v Rowley [2004]. A number of defendants had been served as co-defendants outside Ireland on the basis that other defendants were within the jurisdiction. However the Irish defendants were subsequently released from the proceedings. The non EU defendants then succeeded in an application for a declaration that the Irish court had no jurisdiction over them in the absence of the Irish proceedings.

b) Third Party Proceedings

While there are no specific rules in Irish law regarding third party proceedings with regard to warranty and guarantee claims the rules can be applied (as set out at (a) above, provided that the third party is held by the Court to be a proper and necessary party to the claim.

A recent Irish case examining the position in relation to third parties is Hassett v The South Eastern Health Board and others [2006] IEHC 105. In that case, the Court found that in a conflict between Article 6(2) and Article 22(2) (i.e. exceptions to the general jurisdictional provisions), Article 22(2) takes precedence. In that situation a third party tried to set aside the Notice joining it as a third party on the basis that the Court did not have jurisdiction to hear the claim because a key issue in the case was the validity or otherwise of a decision of the organ of another party to the proceedings, being a mutual defence association, and was therefore a company law issue.

c) Counter-Claims

An Irish party sued in Ireland by a party domiciled in a non EU state can bring a claim against that party before the Irish Courts (again subject to the Order 11 provisions set out above, requiring permission if the defendant to the counterclaim will not be available within the jurisdiction for service of the proceedings).

d) Related Claims

At the time of writing, we are not aware of any further rules apart from those mentioned above relating to co-defendants, third parties and counterclaim. The answers at (a) to (c) above cover the most likely circumstances in which non EU parties can become involved in Irish matters.

e) Any Problems Pertaining to Lack of Harmonisation

At the time of writing, we are not aware of any specific problems that have arisen before the Irish Courts in practice relating to lack of harmonisation of the above mentioned rules.

15. Rules of Jurisdiction Pursuant to Annex I of Brussels I

a) The rules listed in annex I

Ireland has just one jurisdictional rule listed in Annex 1 to the Regulation. This is:

“The rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland”

b) Practical use of the rules listed in Annex I

This rule is used whenever the action involves a question of cross border jurisdiction where the defendant does not have a permanent presence in Ireland. The application of this principle – a fundamental principle of Irish procedure - has already been covered above, particularly in the answer to 10.

c) Extension of jurisdiction pursuant to article 4(2) of Brussels I

We are not aware of any reported cases in relation to Article 4(2) of the Brussels 1 Regulation.

16. Forum *necessitatis*

The principle of *forum necessitatis* is not a principle known to the Irish Courts. Please note however the existence of the doctrine of *forum non conveniens* in Irish common law (as dealt with further at 20 below).

(D) National Jurisdiction & Enforcement of Non-EU Judgments

17. National rules of jurisdiction barring the enforcement of a non-EU judgment

When it is sought to enforce a foreign judgment in Ireland in a situation where the European Judgment Conventions are inapplicable, it is necessary to rely on the rules of Irish common law. The common law rules are extremely restrictive and the result can give rise to circumstances where there are practical difficulties in enforcing non-EU judgments in this jurisdiction. The common law rules are largely shared with other common law jurisdictions but (unlike these other jurisdictions) Ireland's statutory regime to provide for enforcement is limited.

At common law, subject to certain qualifications, a judgment *in personam* of a foreign Court in a competent jurisdiction is capable of recognition and enforcement in Ireland. To be enforceable, the judgment must be (a) for a definite sum of money (b) final and conclusive (c) given by a Court of competent jurisdiction (as defined by Irish rules of private international law). Difficulties in relation to this final requirement relate largely to proper service (in Irish terms) of those proceedings on the defendant. The leading Irish case in this area is Rainford v Newell Roberts [1962] IR 95.

A foreign judgment will not be recognised if it shows on its face a perverse and deliberate refusal to apply generally accepted doctrines of private international law. In addition, a judgment will not be recognised or enforced in Ireland if (i) it was obtained by fraud (such as deliberate deception by the Plaintiff) (ii) its recognition or enforcement would be contrary to public policy (the limits of Irish public policy have not been recently defined by the Irish Courts) (iii) it was obtained in proceedings which were contrary to natural or substantial justice (iv) it relates to foreign revenue codes or foreign criminal provisions (v) if it is irreconcilable with an earlier Irish judgment or an earlier foreign judgment which is entitled to recognition and enforcement within Ireland.

(E) Declining Jurisdiction

18. Forum Non Conveniens

The Irish rules are quite similar to those in existence in the common law of England and other common law jurisdictions.

The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the Court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice. In order to demonstrate this, the Plaintiff must show:-

- (i) **There is another available forum which is clearly more appropriate.**
The burden of proof is on the Defendant to show that there is another available forum which is clearly or distinctly more appropriate than the Irish Courts. It is insufficient to show that Ireland is not the natural or appropriate forum for trial. Nor is it enough to establish a mere balance of convenience in favour of the foreign forum.
Furthermore, where there is no clearly more appropriate forum abroad, the Courts will ordinarily refuse a stay of proceedings. This will be the case where an action arises out of a collision on the high seas and accordingly, no natural forum exists and a stay will be refused.
- (ii) **The Requirements of Justice**
"If there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it [the Court] will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted." (as per Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 478.)
Once it has been shown that there is clearly a more appropriate forum for trial abroad the burden of proof shifts to the Plaintiff to justify jurisdiction before the Irish courts.
In determining whether justice requires that a stay should not be granted, all of the circumstances of the case will be taken into account, for example; (i) where the judiciary is not independent; (ii) where a Plaintiff, who had an arguable claim, finds his claim summarily rejected; (iii) an inordinate delay before the action comes to trial (ie 10 years); (iv) the imposition of a derisory low limit on damages; (v) where the Plaintiff would be liable to imprisonment if he were to return to the alternative forum.

19. Declining Jurisdiction when the Defendant is Domiciled in a Third State

In Marco Montani v First Directors Limited and others [2006] IEHC 92, the Irish Court assumed jurisdiction of a dispute involving assets (ultimately primarily composed of Italian property assets) on the basis that the dispute centred on issues which arose under Irish company law – the Italian courts could not take further steps in the proceedings already before them without a decision of the Irish Courts in relation to the Irish company law issues. The Irish court expressly adopted the reasoning of the British House of Lords in Sarrio SA v Kuwait Investment Authority [1997] 1 Lloyd's Rep 113.

In *Montani* (as in *Sarrio*) the case involved an alternative EU forum. It is not clear if this principle would extend to a non EU forum.

(a) Non-EU Jurisdiction Agreements

Irish courts will be heavily persuaded by a choice of court clause, regardless of whether the parties are EU or non EU. An agreement by the parties to trial in a foreign country is a strong indication that the appropriate forum is the one chosen by the parties – Irish courts would be most reluctant to overturn this choice, even under the doctrine of *forum non conveniens*.

(b) Parallel Proceedings in a non-EU court

Irish courts can decline where a non EU state is seized of a parallel proceeding, but it is not necessary that the foreign proceedings are *ex tempore*.

(c) "Exclusive" Jurisdiction in a non-EU State

Whilst there is no specific guidance we feel that Irish courts would be reluctant to assume jurisdiction in circumstances such as where the dispute relates to immovable property. However the attitude will depend on the existence and weight of other connecting factors (such as in the *Montani* case dealt with above).

In *Popely v Popely and others* [2006] IEHC 134, the Irish Court was asked to provide declarations under Articles 27 and 28 of Brussels I, on the basis of earlier English proceedings between the parties. However, the Court formed the view (given the nature of the dispute) that there was no risk of irreconcilable judgments if the English and Irish proceedings both continued and were heard separately – that they were not so closely connected that the Irish proceedings could not proceed. This reasoning could also apply in a non EU context.

20. Declining Jurisdiction When the Defendant is Domiciled in the EU

It is possible that the Irish courts would decline jurisdiction in such circumstances in favour of a non EU court, although much depends on the nature and weight of the other connecting factors (as set out in 19 above). Irish courts will be very reluctant to ignore – for example – a choice of court clause in favour of non EU courts (such as the US courts).

a) Non-EU Choice of court clause

See above paragraph 19 (a).

b) Non-EU Parallel proceeding

In the event of parallel proceedings in a non EU state, the Irish courts may consider declining jurisdiction. Again this will involve a close consideration of the competing connecting factors, one of which will be the existence of parallel proceedings. However the fact that the competing forum is non EU is likely to enable the Irish court to more freely exercise what is a discretionary action.

c) Non-EU Exclusive jurisdiction

Where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign court, the Irish courts will stay proceedings instituted in Ireland in breach of such an agreement, in the absence of very serious reasons (fraud, public policy, etc) why it should not recognise the exclusive jurisdiction clause.

(F) The Adequate Protection (or lack thereof) of EU Nationals and/or Domiciliaries through the Application of Domestic Jurisdictional Rules

21. Use of National Jurisdictional Rules to Avoid an Inadequate Protection in Non-EU Courts

As far as we are aware, there are no known cases where the Irish Courts have exercised jurisdiction on the basis of national rules on the basis that the plaintiff would not get a fair hearing or adequate protection in the Courts of non EU states.

22. Lack of Jurisdiction Under National Rules Having the Effect to Deprive EU Plaintiffs of an Adequate Protection

As far as we are aware, there is no reported case or practice where the Irish Courts have been found not to have or have declined jurisdiction, in an action brought by an EU domiciliary either in a claim brought by a consumer against a professional domiciled in a non-EU state, an employer against an employer domiciled in a non-EU states or a claim brought by an EU domiciliary in a Community regulated matter.

23. Lack of Adequate Protection as a Consequence of Transfer of Domicile to or from a Third State

As far as we are aware there are no reported or known cases in Ireland where an Irish national has not been able to invoke the protection of Community legislation based only on the fact that the person(s) involved was/were no longer domiciled in the EU at the time the proceedings were instituted.

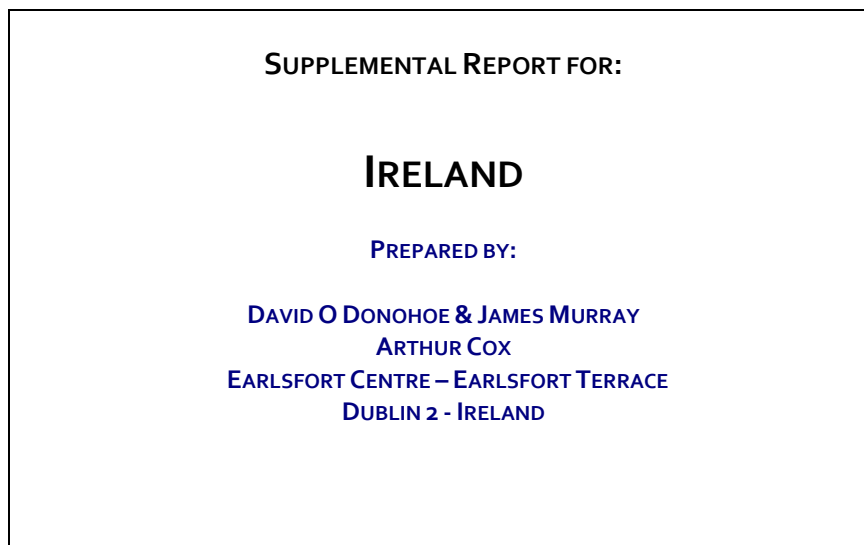
24. The Risk that EU Rules and Principles be Put in Jeopardy Because of the Application of National Jurisdictional Rules

As far as we are aware there is no known case or circumstance in Ireland where the application of domestic jurisdictional rules have led in practice or are likely to jeopardise the application of mandatory Community legislation, or the proper functioning of the internal market or the adequate judicial protection of EU nationals and domiciliaries.

(G) Residual Jurisdiction under the new Brussels II Regulation

25. Applicable National Rules Pursuant to article 14 of the New Brussels II Regulation (Parental Responsibility)

There is no clear answer to this issue in our jurisdiction. In relation to custody and guardianship, the general grounds of jurisdiction which can apply relate to the child's citizenship/nationality, habitual residence and presence (or otherwise) in the jurisdiction.



26. NA

27. Conventions with Third States in Matters of Parental Responsibility (and maintenance of children)

What are the international (and in particular bilateral) conventions concluded between your country and non-EU countries that include rules of jurisdiction in matters of parental responsibility (and maintenance of children)?

The Hague Convention on the Civil Aspects of International Child Abduction, signed at the Hague on the 25th October 1980 (*the "Hague Convention"*)

The Hague Convention on the Protection of Children and Co-operation in respect of inter Country adoption, signed at the Hague on the 29th May 1993.

28. Jurisdiction as a Ground for Resisting the Enforcement of non-EU Judgment in Matters of Parental Responsibility

Can the judgment of a non-EU State relating to matters of parental responsibility (for instance, a judgment given the guardianship of a child to one of the parents) be denied recognition or enforcement in your country on the basis that the courts of your country are the only ones who have jurisdiction to entertain the matter? If so, what is (are) the ground(s) of these "exclusive" rules of jurisdiction (e.g., habitual residence of the child in your country, citizenship of one or several of the parties, etc.)

As a general rule the Court in Ireland recognise and enforce judgments of non EU States.

Prior to the introduction of the Hague and Luxemburg Conventions into Irish Law by the child Abduction and Enforcement of Custody Orders Act, 1991 the Irish Court recognised and enforced decisions made by Courts with comparable legal systems in accordance with the principle of the Comity of Courts.

In general the principles resulted in the Irish Courts recognising the validity of a foreign Court Order after a hearing, and returning children to the jurisdiction of their habitual residence except where it would result in a breach of rights guaranteed under the Irish Constitution.

The principle of Comity of Courts still apply in cases involving the abduction or wrongful retention in cases involving a non-EU State which is not a signatory to the Hague Conventions.

The Hague Convention

The Child Abduction and Enforcement of Custody Orders Act, 1991 gives the force of law in Ireland to the Hague and Luxembourg Conventions, and vests jurisdiction in the High Court in Ireland. The parents/child's habitual residence and citizenship is not a pre-condition to the exercise by the Irish High Court of its jurisdiction under the Act.

These Conventions facilitates speedy return of children taken against the wishes of the parents with custody rights in the contracting State in which they are *habitually resident*. The guiding principle under these Conventions is that the Court of the jurisdiction in which the child is habitually resident is the proper forum for the vindication of the rights of a child and the determination of the child's best interest.

Under the Hague Convention the focus is on a breach of rights of custody and it is not necessary to have a formal Court Order confirming these rights. The habitual residence of the child may determine the outcome of application under the Hague Convention. In respect of the Hague Convention the Irish Supreme Court has held that a judge in exercising jurisdiction under that Convention must consider the habitual residence of the child at the time of the removal. The Hague Convention also contain other "defences" such as consent and acquiescence to the removal, lack of custody rights at the time of removal, and grave risk.

The terms of the Hague Convention do not warrant the return of children and the custodial parent to the jurisdiction in which they were formerly habitually resident merely to enable the non-custodial parent exercise his/her rights of access. It is also important to note that under the Hague Convention, the Irish Courts will not decide on the merits of a custody dispute until it has been determined that the child is not to be returned under the Convention or unless an application has not been lodged within a reasonable time after receipt of the notice of the wrongful removal or retention.

Ireland enacted the Protection of Children (Hague Convention) Act, 2000 to ratify the Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, signed at the Hague on the 19th October, 1996. This legislation has not been brought into operation. I understand that a judgment given in a Court of a member State of the EU in respect of a matter relating to this Convention shall be recognised and enforced in Ireland by application of the relevant internal rules of Community Law.

*
* *
*