**Jurisdiction: the common law**

This element introduces you to the common law in relation to determining whether the courts of England and Wales have jurisdiction to determine a dispute.

**International aspects of a dispute**

In this element, we are concerned with the question of whether the courts of England and Wales have jurisdiction to determine a claim. Where proceedings are commenced on or after 1 January 2021, this question must be answered by reference to the Hague Convention on Choice of Court Agreements, if it applies, and otherwise by applying common law rules. This element addresses specifically the common law rules. The Hague Convention is addressed in a different element.

**The relevance of service**

When it comes to establishing the jurisdiction of the courts of England and Wales, the question of jurisdiction is linked to service of proceedings. Broadly, the court will have jurisdiction under the common law if:

a. it is possible to serve the proceedings on the defendant in the jurisdiction (in England and Wales) – the defendant is 'present' in the jurisdiction; or

b. the court gives permission to serve the proceedings on the defendant outside of the jurisdiction; or

c. the Courts of England and Wales are given jurisdiction by a clause in a contract.

We will consider each in turn.

**Serving the proceedings on the defendant in the jurisdiction**

A defendant will (in principle) be subject to the jurisdiction of the courts of England and Wales if proceedings are served on the defendant whilst that defendant is within the jurisdiction. This is true even if the defendant is a foreign defendant (in the sense that it is based in another jurisdiction), or if the subject matter of the proceedings is based in / took place in another jurisdiction.

For example, proceedings can be served by a variety of methods, including personal service (CPR 6.5) – actually leaving the proceedings with an individual defendant. Proceedings can be personally served on an individual defendant in England and Wales even if they live in another jurisdiction and are only very briefly in England and Wales.

Similarly, a company not incorporated in England and Wales can be served at any place of business of the company within England and Wales (CPR 6.9(2)).

In a similar vein, if a defendant appoints a solicitor in England and Wales to accept service on its behalf, and the proceedings can then be served on that solicitor within the jurisdiction.

**Serving the proceedings on the defendant in the jurisdiction – example**

A paper supplier in England entered into a contract with a printing company incorporated in Delaware USA. Pursuant to that contract, the printing company ordered 100,000 units of high quality paper at a cost of $35,000. It was agreed that the paper would be delivered to the printing company's storage facility in Newark, Delaware. Although the printing company has a branch office in London, England, the contract was negotiated by and completed via the printing company's office in the USA. The supplier duly delivered the paper. In breach of the contract, the printing company has failed to pay the purchase price for the paper.

**Would the courts of England and Wales have jurisdiction to hear a claim by the paper supplier in relation to the printing company's failure to pay?**

The paper supplier can serve proceedings on the printers at its branch in England. The very fact that the paper supplier serves proceedings on this branch within the jurisdiction is sufficient to (*prima facie*) give the courts of England and Wales jurisdiction to hear the dispute.

**Permission to serve the proceedings on the defendant outside of the jurisdiction**

If a party cannot (or for some reason does not want to) serve proceedings within the jurisdiction, it can apply to serve the proceedings on the defendant outside of the jurisdiction. If the court grants permission for this and the proceedings are duly served outside of the jurisdiction, then this gives the courts of England and Wales (in principle) the jurisdiction to determine the claim.

In order to obtain permission, three matters must be established (CPR 6.37):

1 The claimant needs to establish one of the grounds in 6B PD 3.1;

2 The claim must have reasonable prospects of success;

3 England and Wales must be the 'proper place' in which to bring the claim.

If these three matters are established, then the court **may** grant permission for service outside of the jurisdiction.

Let us look at each in turn.

**Permission – grounds in 6B PD 3.1**

There are many grounds in 6B PD 3.1 on which an application for permission to serve outside of the jurisdiction can be based. Amongst the most important are:

A claim is made for a remedy against a person **domiciled within the jurisdiction** (1).

A claim is made in respect of a contract where the **contract** (6) –

(a) was **made within the jurisdiction**;

(c) is **governed by English law**; or

(d) **contains a term to the effect that the court shall have jurisdiction** to determine any claim in respect of the contract.

A claim is made in respect of a **breach of contract committed within the jurisdiction** (7).

A claim is made in **tort** where (9)

(a) **damage** was sustained, or will be sustained, **within the jurisdiction**; or

(b) damage which has been or will be sustained results from an **act committed, or likely to be committed, within the jurisdiction**.

These grounds are sometimes referred to as 'jurisdictional gateways'.

**Permission – reasonable prospects of success**

The second matter that must be established is a reasonable prospect of success.

This is a relatively low threshold and has been equated to the prospect of success needed to resist an application for summary judgment: *De Molestina v Ponton* [2002] 1 Lloyd's Rep 271.

**Permission – England and Wales is the 'proper place'**

The third matter that must be established is that England or Wales is the proper place in which to bring the claim – sometimes referred to as the *forum conveniens* (convenient / appropriate forum).

England or Wales can be the proper place to bring the claim if it is the natural place to bring the proceedings, perhaps because the witnesses are based there, English law applies and/or the defendant is normally resident in England / Wales.

If England or Wales is not the natural place, but rather another jurisdiction is the natural place, the Courts of England and Wales can still be the proper place in which to bring the claim if justice nonetheless requires that the claim be tried in England – perhaps because there is a risk of improper government interference in a different jurisdiction, or some other reason why the trial will not be fair.

**Jurisdiction clauses**

Finally, the claimant can serve the claim form on a defendant outside the jurisdiction without the court's permission where a contract contains a term to the effect that the courts of England and/or Wales shall have jurisdiction to determine that claim (CPR 6.33(2B)).

This provides protection in the same area as the Hague Convention (addressed in a different element). However, the Hague Convention only applies to exclusive choice of court agreements concluded on or after 1 October 2015. If the agreement was concluded before this date, or does not give jurisdiction to the courts of England and Wales exclusively, then the Hague Convention does not apply, and this rule provides an alternative route to establishing jurisdiction (CPR 6.33(2B)).

**Example**

A woman is driving to a football match. On the motorway, a man drives into the back of her car. The woman suffers an injury and her car is rendered valueless. The woman wishes to commence proceedings against the man in England and Wales. The man permanently resides in Canada and has returned there.

There does not appear to be any way to serve proceedings on the man in the jurisdiction.

Accordingly, it will be necessary to apply for permission to serve proceedings on the man out of the jurisdiction.

As this is a tort claim (negligence), a ‘gateway’ (6B PD 3.1) can be shown on the basis that the damage was sustained within the jurisdiction and resulted from an act committed within the jurisdiction. The claim appears to have a reasonable prospect of success (you would need to consider the detail) and England appears to be the proper place given where the accident happened, where the losses have been suffered and English law is likely to apply. So the court may well grant permission.

**Summary in relation to jurisdiction under the common law**

- Under the common law, the Courts of England and Wales will have jurisdiction if

a. it is possible to serve the proceedings on the defendant in the jurisdiction;

b. the court gives permission to serve the proceedings on the defendant outside of the jurisdiction; or

c. the Courts of England and Wales are given jurisdiction by a clause in a contract.

- In order to obtain permission (the second of the three options above), three matters must be established:

a. the claimant needs to establish one of the grounds / 'jurisdictional gateways' (6B PD 3.1);

b. the claim must have a reasonable prospect of success;

c. England and Wales must be the 'proper place' in which to bring the claim.