

Non-Domiciled Parties and the Brussels I Regulation: A Phantom Menace

The Judges and Advocates General adjourned for lunch to discuss matters of common concern. Just before service of coffee, a pallid apparition entered the room, silently but menacingly. It wore a full bottomed wig, respecting its former custom, but appeared to have changed for the occasion into more modern, red and black Betty Jackson robes. All eyes in the room gazed upon the spectre. It rose, rattling its gavel angrily, before expelling a single word into the air. It was one unfamiliar to some of the assembled crowd, but which others knew only too well. ‘Owuuuusuuuu ...’

✘ The Court of Appeal’s decision, delivered on 11 November 2009, in *Choudhary v Bhatler* [2009] EWCA Civ. 1176 will come as a surprise not only to some residents of Luxembourg but also to others familiar with the text of the Brussels I Regulation and recent jurisprudence of the Court of Justice. The Court decided that Art. 22 of the Regulation (specifically, Art. 22(2) concerning company disputes) does not apply to proceedings against persons not domiciled in a Member State, even if the relevant connection to a Member State is established. The Court also left open the question whether, even if Art. 22 were to apply, a Member State would retain the power to stay proceedings in favour of the courts of a non-Member State which it considered to be a more appropriate forum for the resolution of the parties’ dispute.

The case concerned a dispute between rival factions within a company, of a kind that is fairly commonplace in England. One group was alleged to have attempted a coup, and the other brought proceedings against the company and selected members of the rival group in England, having first secured an interim injunction against one of the company’s Indian directors, Mr Bhatler. What made the case unusual was that the company, although incorporated in 1872 in England, carried on its business exclusively in India and had been subject to (suspended) winding-up proceedings there. As Lord Justice Burnton noted:

The assets of the Company are in India; its affairs are subject to the jurisdiction of the courts in India; the events that gave rise to this litigation took place in India; and the individual parties, the witnesses and evidence are in India. It is obvious that the issues in these proceedings should be tried in India.

Obvious it may have been to the Court, but not obvious according to the scheme of the Brussels I Regulation. Under Art. 22(2), exclusive jurisdiction is given to the courts of the Member State in which a company has its seat “in proceedings which have as their object ... the validity of the decisions” of the company’s organs. In *Choudhary*, it could not be doubted that (applying English private international law rules, in the form of Sch. 1, para. 10 of the Civil Jurisdiction and Judgments Order 1991) the company had its seat in the United Kingdom (specifically, England). Moreover, the claims set out in the Claim Form and Particulars of Claim appeared to fall (at least in substantial part) squarely within Art. 22(2). The relief sought included (a) declaratory relief concerning (i) the purported forfeiture of certain shares in the company by a shareholders resolution, (ii) a purported allotment of shares in the company by a board resolution, and (iii) the purported resignation of two of the claimants and the appointment of new directors and a company secretary by board resolutions, (b) statutory compensation from Mr Bhattar for allotment in breach of pre-emption rights, and (c) rectification of the company’s register of members.

The appeal in *Choudhary*, however, concerned only the interim injunction granted against Mr Bhattar preventing him from taking certain steps with respect to the company’s affairs. No similar relief had been sought or granted against the company or the other defendant, one of its shareholders, and neither was a party to the appeal. Indeed, the claimants’ approach to the litigation may have been influential in their ultimate defeat. As another Court of Appeal judge noted at an earlier stage in the proceedings, in requiring that the claimants provide security for costs:

[T]here is a certain element of luxuriousness in the invocation of this jurisdiction by the claimants in this case. They may well be entitled to invoke it, but one asks oneself why it would not be sufficient for the injunctive relief that has so far been obtained to have been obtained in India, and indeed why the case as a whole could not more conveniently proceed in India. That is not of course an answer to the jurisdiction point because convenience, it is said by

[Counsel], and no doubt rightly, is irrelevant to any question of invocation of jurisdiction under the Regulation, but as I say it does seem to me that, if the claimants wish to have the luxury of litigating these matters in England, that there is a certain injustice in requiring Mr Bhatler, who has a legitimate appeal, to put money up front to secure the costs of the appeal.

This led the Court to question whether Art. 22(2) applied to a claim against a person not domiciled in a Member State. Again, the Regulation appears unambiguous on this point, as (1) Art. 22 is expressed to apply “regardless of domicile”, and (2) Art. 4 (the general rule regulating jurisdiction over persons not domiciled in a Member State) is expressed to be “subject to Articles 22 and 23”.

The Court begged to differ. It concluded, referring to references in the Recitals and in other Articles to domicile *in a Member State*, that:

- “the direction in the opening words of Art. 22 as to the courts which are to have ‘exclusive jurisdiction’ is a direction which was intended to apply only as between the courts of those Member States which are bound by the Regulation” (para. 34);
- the words “shall have exclusive jurisdiction” in Art. 22(2) displace Art. 2 and other rules in Sections 2 to 5 of the Regulation based upon domicile in a Member State (para. 35);
- the words “subject to Articles 22 and 23” in Art. 4(1) also prevent the exercise of jurisdiction over a person not domiciled in a Member State in cases where another Member State has exclusive jurisdiction under one of those Articles (para. 36);
- the words “regardless of domicile” in Art. 22 have no purpose, in the context of promoting the sound operation of the internal market, in a case where the person sued is not domiciled in a Member State (para. 37); and
- it is unnecessary – and wrong – to construe the words “regardless of domicile” in Art. 22 as having any application to a case where the person is not domiciled in a Member State (para. 38).

The Court suggested (para. 38) that no authority compelled a different conclusion. It did not, therefore, refer to the ECJ’s observation in para. 28 of its

judgment in *Owusu v Jackson* (Case C-281/02) that:

*[T]he rules of the Brussels Convention on exclusive jurisdiction or express prorogation of jurisdiction are also likely to be applicable to legal relationships involving only one Contracting State and one or more non-Contracting States. That is so, under Article 16 of the Brussels Convention **[the predecessor to Art. 22 of the Regulation]**, in the case of proceedings which have as their object rights in rem in immovable property or tenancies of immovable property between persons domiciled in a non-Contracting State and relating to an asset in a Contracting State.*

Nor did the Court refer to the ECJ's statement in para. 14 of its judgment in *Klein v Rhodos Management* (Case C-73/04) (a claim against a company not domiciled in a Member State) that:

As a preliminary point, it must be observed that Article 16(1) of the Convention provides for the exclusive jurisdiction of the courts of the Contracting State where the property is situated, in proceedings which have as their object rights in rem in, or tenancies of, immovable property, by way of derogation from the general principle laid down by the first paragraph of Article 4 of the Convention, which is that if the defendant is not domiciled in a Contracting State, each Contracting State is to apply its own rules of international jurisdiction.

Nor did the Court refer to the ECJ's statement in para. 21 of its judgment in *Land Oberösterreich v CEZ* (Case C-343/04) (a claim against a company not domiciled in a Member State where Art. 16 of the Brussels Convention was relied on to establish jurisdiction) that:

It must be observed, as a preliminary point, that, although the Czech Republic was not a party to the Brussels Convention at the date on which the Province of Upper Austria brought the action before the Austrian courts, and the defendant in the main proceedings was not therefore domiciled in a Contracting State at that date, such a circumstance does not prevent the application of Article 16 of the Brussels Convention, as is expressly stated in the first subparagraph of Article 4.

Finally, the Court did not refer to the ECJ's statement in para. 149 of its Opinion 1/03 on the Lugano Convention that:

As regards that reference to the national legislation in question, even if it could provide the basis for competence on the part of the Member States to conclude an international agreement, it is clear that, on the basis of the wording of Article 4(1), the only criterion which may be used is that of the domicile of the defendant, provided that there is no basis for applying Articles 22 and 23 of the Regulation.

Further, the Court's view (para. 36) that the words "subject to Articles 22 and 23" in Art. 4(1) prevent the exercise of jurisdiction by a Member State court applying local rules of jurisdiction against a non-domiciled person when the courts of *another* Member State have exclusive jurisdiction, but do not enable Arts. 22 and 23 to be relied on as a positive basis for establishing jurisdiction against such a person and (apparently) do not prevent reliance on Art. 4(1) by a court in the Member State designated under Art. 22 and 23 as having "exclusive jurisdiction" is baffling. Art. 22(2) either applies to claims against non-domiciled parties or it does not. The half-way house reached by the Court is unattractive and, it is submitted, indefensible.

In light of the wording of Art. 22 and earlier ECJ authority, the Court of Appeal's interpretation of the Brussels I Regulation appears untenable, and unlikely to survive a further appeal should the matter proceed. The Court, however, gave two other reasons for allowing the appeal of the Indian director, and discharging the order.

First, in the Court's view, the only claim against Mr Bhattar was the claim for statutory compensation, which as a personal claim which did not depend on a finding of validity fell outside Art. 22(2) (paras. 46-47). The claims for declaratory relief (see above) were, in the Court's view, brought only against the company and the defendant shareholder (paras. 31-32). Although that conclusion may have reflected the presentation of the claimants' written case, the separation of one defendant from the others seems questionable, as the issues concerning the validity of decisions relating to the identity of the shareholders and directors of the company were equally pertinent to relations between two of the claimants, claiming to be directors in the company, and Mr Bhattar, who (on any view)

continued to act as a director. The claimants, therefore, had a legitimate interest in claiming a declaratory relief against Mr Bhattar, at least with respect to the board decisions.

Moreover, even if the Court of Appeal's view of the limited nature of the claims advanced against Mr Bhattar is correct, it may be questioned whether Art. 22 should to be applied on a fragmented basis to individual claims in complex proceedings based on company law, where all claims are closely linked to a series of contested decisions of the company's organs. Although a claim by claim approach has been supported by the ECJ in relation to the *lis alibi pendens* rules (Case C-406/92, *The Tatry*), it does not follow that the same approach is appropriate in the context of Art. 22. The ECJ's decision in *GAT v Lamellen* (Case C-4/03) might suggest a more rounded approach, looking at the proceedings as a whole.

Secondly, the Court (paras. 56-64) thought that the interim order should not have been granted, as it served no proper purpose in view of the strong connection to India and the existing arrangements there for management of the company's affairs. On this point, the Court appears to have been on stronger ground, but the grant or refusal of injunctive relief should have no impact on the Court's jurisdiction to determine the substance of the case. Unless, however, the decision on the Art. 22 issue is reversed by the Supreme Court or the Court of Justice, it appears unlikely that the claim will progress any further. To add to the claimants' woes, the Court (paras. 66-70) refused permission to serve the claim form on the defendants other than the company in India (the company appeared powerless to act in its defence - see para. 21), and refused to make any interim order against the company directly.

Finally, the Court considered (but, in light of its interpretation of Art. 22(2), did not resolve), the question whether a court having jurisdiction under Art. 22 could decline it on *forum conveniens* grounds.

From an EU law perspective, the answer to this question may appear obvious - Art. 22 ranks, in the hierarchy of rules in the Brussels I Regulation, above (and operates as a limited exception to) Art. 2. Like the former provision, Art. 22 is expressed in mandatory terms ("shall have exclusive jurisdiction") and serves the purpose of conferring jurisdiction on the courts of the Member State which is best placed to determine specific disputes (see, e.g., Case C-372/07, *Hassett v South*

Eastern Health Board). Art. 2, famously, has mandatory effect, excluding the power to decline jurisdiction on *forum conveniens* grounds. If the same conclusion were not reached with respect to Art. 22, then a claimant may (in a case such as *Choudhary*) find himself in a more precarious position in terms of establishing and maintaining jurisdiction under the Regulation if his claim fell within Art. 22 (exclusive jurisdiction) than if he sued in the defendant's Member State of domicile under Art. 2.

The Court, however, declined to express a view either way, suggesting that the Court of Justice might take the opportunity to resolve that question on the reference made to it by the Supreme Court of Ireland in *Goshawk Dedicated v Life Receivables* [2009] IESC 7. As that reference has not yet made it out of Dublin, and does not in any event concern the issue raised in *Choudhary*, we should not perhaps hold our collective breath.

Choudhary v Bhatler is undoubtedly an unusual case, and one which may not easily be replicated for the other grounds of jurisdiction in Art. 22. Nevertheless, the Court of Appeal's conclusion that Art. 22 of the Brussels I Regulation does not apply to claims against persons not domiciled in a Member State could be seen as a defiant stance against the tide of EU regulation of matters of private international law. Unfortunately, the fight that it chose to pick seems unwinnable, for the reasons given. Further, the Court's approach to Art. 4(1) and its relationship to Arts. 22 and 23 (choice of court agreements, creates uncertainty in practice as to whether those Articles are capable of conferring jurisdiction against non-domiciliaries or whether a jurisdictional basis must be found in local rules (imposing on claimants the requirement to serve proceedings out of the jurisdiction). It is to be hoped that the Supreme Court will be given the opportunity to clear up.