

# CHOICE OF ENGLISH COURTS FOR COMPETITION DAMAGES CLAIMS

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An article considering how the parties' choice of court when bringing a claim for competition damages can have a decisive influence on the outcome of a case.

Anneli Howard, Monckton Chambers

## SPEEDREAD

As every experienced litigator knows, the parties' choice of court can have a decisive influence on the outcome of a case. This article examines the potential for clashes between competent courts for competition law damages claims and the risk of spawning multiple sets of proceedings with irreconcilable judgments. For competition law damages claims, a claimant currently has a choice of two courts in England and Wales (the Chancery Division of the High Court or the Commercial Court) and, from 1 October 2015 onwards, will also be able to start proceedings in the Competition Appeal Tribunal (CAT). The precise choice of court will depend on a number of strategic and practical considerations, including the type and degree of judicial or economic expertise required.

Claims involving the same, similar or related issues are likely to be commenced by parties at different levels at the supply chain before different courts, which will then need to be consolidated or heard together with proceedings in other courts, necessitating a move from the CAT to the High Court, or vice versa. However, the rules for transfers between the High Court and the CAT are currently deficient or overly-complex, introducing delay, uncertainty and higher costs.

The article, therefore, questions whether it may be time to consider whether there should be some form of domestic equivalent to the recast Brussels I Regulation, to ensure that justice is achieved expeditiously and economically, without the wasted costs of multiple litigation and the risk of irreconcilable judgments.

## WITHIN THE EU

At European Union level, there are complex rules, set out in the newly recast Brussels I Regulation 1215/2012 (the Recast Brussels Regulation), which determine which court from 28 EU member states should have jurisdiction over particular claims (see *OJ 2012 L351/1*). The Recast Brussels Regulation applies to all legal proceedings commenced on or after 10 January 2015.

The precise application of those provisions to competition damages claims still remains a hotly disputed topic between the parties. However, it is now fairly settled that claimants may bring proceedings in the courts in England and Wales against defendants domiciled in the UK (*Article 4*) or against an "anchor" UK resident defendant that is then used to pull in

multiple defendants domiciled in other member states (*Article 8(1)*). Claimants may also bring proceedings, amongst other routes, if they can show that the harmful events giving rise to the infringement took place in England and Wales or if they have suffered harm in this jurisdiction (*Article 7(3)*), although their damages may be limited to loss suffered within this jurisdiction.

The Recast Brussels Regulation also contains detailed provisions dealing with the situation where there are related actions pending in parallel proceedings between courts in different member states. So, if there are proceedings involving the same infringement between the same parties in different member states, the court "first seised" (i.e., where the claim is first issued) will have priority. Any other courts are obliged to stay their proceedings in favour of the court first in

## RESOURCE INFORMATION

### RESOURCE ID

2-613-2178

### RESOURCE TYPE

Article

### PUBLISHING DATE

22 May 2015

### JURISDICTION

United Kingdom



line with jurisdiction (*Article 27*), or at least until the time that such court declares that it has no jurisdiction under any contractual exclusivity jurisdiction clause (*Article 31(2)*).

Similarly, where related proceedings between different parties but involving the same issues are commenced in different member states, the courts later in line have a discretion to stay their proceedings and to wait until the court “first seised” has determined the issues in the “lead” case.

There are also new rules introduced by the Recast Brussels I Regulation for dealing with international related proceedings pending in courts outside of the EU (*Articles 33 and 34*).

### NATIONAL LEVEL

In the light of the complex rules at EU level, it is perhaps surprising that no real consideration has been given to potential clashes between competent courts at domestic level. The risk of spawning multiple sets of proceedings with irreconcilable judgments remains at large.

For competition law damages claims, the claimant currently has a choice of two courts in England and Wales and, from 1 October 2015 onwards, a further third court. The choices are:

- **Chancery Division of the High Court.** According to the *Competition Law Practice Direction* ([http://www.justice.gov.uk/courts/procedure-rules/civil/rules/competitionlaw\\_pd](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/competitionlaw_pd)), all claims relating to the application of Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) or their domestic counterparts in Chapter I or Chapter II of the Competition Act 1998 (CA98), are to be started in the Chancery Division.
- **Commercial Court.** There is an optional carve-out in Civil Procedure Rules (CPR) Rule 58.1(2) for commercial claims (that clearly cover competition law damages claims arising out of contractual arrangements), which are to be assigned to the specialist list in the Commercial Court of the Queen’s Bench Division.
- **Competition Appeal Tribunal.** With the adoption of the Consumer Rights Act 2015 on 26 March 2015, from 1 October 2015, damages actions in relation to the Chapter I and II prohibitions and Articles 101 and 102 of the TFEU may also be brought before the Competition Appeal Tribunal (CAT).

### HEIGHTENED RISK OF MULTIPLE RELATED PROCEEDINGS FOR COMPETITION LAW DAMAGES

Cartels have direct and indirect effects on a wide number of commercial operators that are active at different levels of the supply chain. Any one of them that has suffered harm as a result of the infringement is entitled to bring a claim regardless of whether they had a direct contractual relationship with the cartelists or purchased from an intermediary further down the supply chain. It is highly likely that different strings of wholesalers, retailers, consumers or other intermediaries in between may bring entirely separate actions against the cartelists in different courts within the English judicial system.

The risk of multiple proceedings relating to the same issues is also heightened by the range of potential defendants to sue. Under the new Damages Directive 2014/104 (OJ 2014 L349/1), participants in cartel arrangements generally bear joint and severable liability, which means that any one or more of the cartelists may be pursued for the entirety of the loss caused. That means the differing combinations of cartelists may be pursued by different parties for the entirety of the loss caused by the same infringement.

There is, therefore, a risk that individual cartelists or different combinations of them could face multiple sets of damages litigation claims, in the UK, potentially spread between the Commercial Court, Chancery Division and, from October 2015, the CAT.

That situation is complicated further by the advent of the new section 47(b) in the CA98, introduced by the Consumer Rights Act 2015, which provides for collective actions to be brought on behalf of a class of persons, represented by an authorised person before the CAT. Such class actions may be “opt-in” or “opt-out”. It is envisaged that such actions may be brought on behalf of wholesalers, retailers or end-consumers, but the precise way in which the classes are to be certified and managed is as yet uncertain. Operators at different levels of the market may not have sufficient communality of interest to form part of the same class so there may have to be multiple actions in respect of the same infringement.

Further, the right to bring a collective action does not affect the claimant’s right to bring any other proceedings in respect of the same claim so there could, in theory, be a duplication of claims across different courts.

### WHICH ENGLISH COURT?

Now that limitation periods and disclosure regimes have been unified across all three courts, it is to be expected that the CAT will no longer be the poorer cousin when it comes to competition damages actions. Notwithstanding the reforms, the precise choice of court will depend on a number of strategic and practical considerations, including the type and degree of judicial expertise required.

For example:

- Some claims may warrant a judge with specialist expertise in competition law or EU law where it may be considered by certain parties that a Chancery Judge or specialist competition law judge in the CAT would be more appropriate. Those claims are likely to include stand-alone damages actions, where there has been no prior infringement decision reached by the EU Commission or domestic regulator, such as the Competition and Markets Authority.
- Other claims, such as Article 102/Chapter II abuse of dominance claims, may involve complex economic analysis, which might merit the economic expertise of the tri-partite Panel in the CAT.
- For other claims, such as follow-on proceedings where the focus will be largely on quantum, pass-on and contribution issues, litigants may prefer the commercial acumen and pragmatism of the Commercial Court Judges.
- Lastly, parties may prefer the robust case management shown in the Commercial Court where the judges may be more interventionist or creative with their directions. Proactive case management can help to keep up momentum and can be used to pressure parties to resort to ADR or early resolution.

Defendants do not normally have much say in the initial choice of court process, particularly in respect of UK claims. Although contractual jurisdiction clauses may dictate the courts of England and Wales, they do not currently tend to specify the exact court where claims should be instituted. That may change if there is a real risk of defendants facing the added costs and resource demands of multiple litigation on several fronts at the same time.

### ACTIVE CASE MANAGEMENT OF MULTIPLE PROCEEDINGS

Increasingly, it can be expected that defendants will start to push back and take control of case management issues to co-ordinate different proceedings. This has occurred recently in the *Interchange Fees litigation*, where the credit card companies have faced a barrage of claims instituted by different high street retailers across the Commercial Court and Chancery Division, using virtually identical pleadings. Whereas MasterCard has decided to fight each front individually, Visa has made use of the new transfer mechanisms in CPR Part 30.5 to co-ordinate the case management of the related proceedings so that they will all be heard and case managed together.

#### Transfer mechanism in CPR Part 30.5

CPR Part 30.5 provides for the transfer of claims between different divisions of the High Court or between specialist lists, such as the Commercial Court. It provides that any application for the transfer of proceedings “to” or “from” a specialist list must be made to the judge dealing with the claims in that list.

With effect from October 2014, there is a new subparagraph (4) providing for the transfer of proceedings between the Chancery Division and a Queen’s Bench Division specialist list, whereby transfer can only be made with the consent of the Chancellor of the High Court.

Interestingly, unlike the provisions for transfer between the High Court and the County Court, there is no reference to any criteria for the transfer order nor is there any clarification as to the order in which the transfer application should be made. On a literal reading of CPR 30.5, it would appear that the application has to be made twice over; once to the Judge in charge of the Commercial Court list and, again, to the Chancellor of the High Court.

This uncertainty came to a head in the Visa litigation, where the defendants’ application for transfer from Chancery to Commercial was resisted by the claimant, Sainsbury’s. The High Court clarified that the application for transfer should be made first to the Judge in charge of the Commercial Court List, who would then make a provisional order for transfer, subject to the Chancellor’s consent. This meant that the orders for transfer had to be drafted using conditional language to enable the Chancellor to reach his own separate decision. In fact, the process was

conducted efficiently via email between the two courts, and a final order was sealed once both the presiding judge and the Chancellor had exchanged views and provided the necessary consent.

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### HERDING CATS

The inclusion of the new paragraph Part 30.5(4) makes the absence of a similar provision all the more glaring in respect of transfers between the High Court and the CAT. There is provision in CPR Part 30.8 for transfer of competition law claims from the County Court or a District Registry to the Chancery Division, but there is no similar provision for transfer to or from the CAT.

It is foreseeable that claims involving the same or related issues may be commenced in different courts, which will then need to be case managed and/or heard together with claims in other courts, necessitating a move from the CAT to the High Court. Conversely, it may be that there are common issues raised in multiple claims brought at different levels at the supply chain that might be better to be included and resolved before the CAT along with similar points raised in any collective actions.

The CAT's *draft rules* ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/401972/bis-15-76-draft-competition-appeal-tribunal-rules-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401972/bis-15-76-draft-competition-appeal-tribunal-rules-2015.pdf)) are currently out to consultation and are expected to be adopted in time for its new powers which commence on 1 October 2015.

Transfer forms part of the CAT's wide powers of case management under Rule 19, whereby it may give any directions that it considers necessary to secure the just, expeditious and economical conduct of the proceedings. There are specific provisions for the

transfer of claims to and from the CAT in Rules 70 and 71 but there appears to be a clash between those provisions and CPR Part 30.5.

That means that, unless some pragmatic engineering is put in place between the divisions, the application will need to be made in duplicate to both the CAT and the appropriate Division of the High Court.

Similarly, there are no criteria set out for determining the considerations that will be taken into account in determining whether a transfer should be made. In practice, the parties are likely to rely on the criteria set out in CPR Part 30.3, which includes the financial value and importance of the claim, the convenience and fairness of hearing the claim in another court and the availability of a specialist judge as well as considerations relating to the overriding objective in CPR Part 1.1 (with particular regard to the effective use of judicial resources and proportionality).

Lastly, these provisions seem to be invoked at the initiative of one or more of the parties, but there is no provision for the judge to examine its own jurisdiction and consider whether it would be a more effective use of judicial resources (at least) for the claim to be heard in whole or part jointly with other related proceedings.

Perhaps, as competition law damages become more complex and more frequent under the new regime, it is time to consider whether there should be some form of domestic equivalent to the Brussels Regulation to ensure that justice is achieved expeditiously and economically, without the wasted costs of multiple proceedings and the risk of irreconcilable judgments.

*Anneli Howard, MA, BCL is a Barrister at Monckton Chambers.*