

# Transfer Of Proceedings Within England And Wales: Is It Time To Take A Fresh Look At Jurisdiction Clauses?



*Jonathan Selby QC and Emma Healiss explore the benefits and challenges of regional transfer of proceedings, and consider how jurisdiction clauses may provide a solution.*



## **Introduction**

The introduction of the Business and Property Courts is intended to promote a stronger culture of a more unified court network – not just between the different specialist lists, but also between the courts in London and the regions.

There are many established specialist Technology and Construction Courts outside London, in Birmingham, Bristol, Cardiff, Exeter, Leeds, Liverpool, Newcastle, Nottingham and Manchester, all of which serve the important functions of dispensing justice in their local areas and of supporting the many firms in the regions that conduct specialist work.

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But what if you are a national company, headquartered in (say) Manchester, carrying out work, acting for clients and engaging sub-contractors all around the UK? In that scenario, it is very likely that you may be a defendant to proceedings which are commenced far away from your headquarters and perhaps also far away from where your preferred legal and expert advisers are based.

Those proceedings can therefore be very inconvenient for you, particularly if they go to trial. Not only will you have to incur travel and accommodation costs, which may not otherwise be incurred, but you may be exposed to a greater risk that important witnesses are reluctant to cooperate because (as can happen) they no longer work for your company and will not (or cannot) take the time off work to travel to a distant court to give evidence.

Contracts frequently contain arbitration clauses providing for the seat of arbitration to be in a particular city. It is also common for contracts to contain exclusive

jurisdiction clauses providing for disputes to be resolved in the courts of England and Wales. However, neither of us has ever seen a jurisdiction clause in a contract which provides for court disputes to be resolved in a particular city.

We consider that such clauses may need to be considered by parties in the future. As we will explain below, the law governing the transfer of proceedings from one court to another generally favours the claimant. Therefore, if you want control over the location of the court where your disputes are resolved, provision ought to be made for this in your contracts.

## **The Law on Transfer**

A party wishing to make an application for transfer must do so to the court in which the claim is proceeding (CPR 30.2(6)). The criteria that the court will apply in considering such an application are found at CPR 30.3. They include (a) the financial value of the claim and the amount in dispute, (b) whether it would be more convenient and fair for hearings (including the trial) to be held in some other court, (c) the availability of a judge specialising in the type of claim in question and in particular the availability of a specialist judge sitting in an appropriate regional specialist court, (d) the importance of the outcome of the claim to the public in general and (e) the facilities available to the court at which the claim is being dealt.

Further criteria are specified in the Business and Property Courts Advisory Note, including (a) whether there are significant links between the claim and the circuit in question, (b) whether court resources, deployment constraints or fairness require that the hearings (including the trial) be held in some other court than the court it was issued into, (c) the wishes of the parties, which bear special weight in the decision but may not be determinative, (d) the international nature of the case, with the understanding that international cases may be more suitable for trial in centres with international transport links and (e) the availability of a judge specialising in the type of claim in question to sit in the court to which the claim is being transferred.

There are two cases that are often cited on applications for the transfer of proceedings made in the TCC.

The first is *Neath Port Talbot v Currie & Brown Project Management Limited*<sup>1</sup> in which the defendants applied to the TCC in London for proceedings to be transferred from the Bristol District Registry. The court agreed to deal with the application even though it ought to have been made in Bristol in accordance with CPR 30.2(6). The defendants argued that an order for transfer was appropriate because they could not afford the cost of a hearing in Bristol in circumstances where the legal team and experts were based in or around London and would incur additional cost in having to travel to Bristol. Ramsay J refused the application on the basis that the defendants had provided no evidence in support of their position and they had so far managed to fund the litigation using London solicitors and counsel. The judge also set out the following general principles:

- In relation to TCC cases, the central factor will generally be whether it would be more convenient or fair for hearings (including the trial) to be held in London rather than in the regional centre;
- Generally, where there is a TCC judge at a regional centre which is convenient to the parties or which, on the balance of convenience, is the appropriate place for management and trial of the case to take place, the case should remain at that centre rather than being transferred to London. In those circumstances, cases issued at a regional centre will be case managed and tried by the full time or principal TCC judge or another TCC judge sitting at that centre; and
- When a TCC case at a regional centre merits case management or trial by a High Court judge it will generally be more appropriate for a High Court judge to case manage or try that case at a regional centre rather than for a case to be transferred to London.

<sup>1</sup> [2008] EWHC 1508 (TCC)





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The second is *Tai Ping Carpets UK Limited v Arora Heathrow T5 Limited*<sup>2</sup> in which proceedings had been commenced in the Birmingham District Registry. The defendant in this case also applied for an order for transfer to the London TCC on the ground that the balance of convenience favoured the transfer to London. It relied upon a number of points in support of that proposition including that (a) the defendant company was based just outside London, (b) the subject matter of the contract was at Heathrow, (c) the defendant’s witnesses, solicitors and counsel were based in or around London and (d) any question of increased costs could be offset by the discount which the defendant company (a hotel chain) was prepared to offer to the claimant’s advisers and witnesses if they stayed in their hotels in London. The claimant conversely argued that the balance of convenience favoured a trial in Birmingham, relying on the fact that (a) the claimant was a small company based very close to Birmingham, (b) its witnesses and solicitors were based in or around Birmingham and (c) it would be more expensive and more inconvenient to transfer the case to London.

In dismissing the application, Coulson J determined that the factors raised by each party effectively cancelled each other out and stated that, in the absence

of any significant factors favouring the transfer to London, the case should remain in Birmingham because that is what the claimant had requested. It was the claimant who had gone to the trouble and expense of starting the proceedings, and it was the claimant who ran the costs risk, to the extent that its claim may ultimately have been unsuccessful. The judge further stated that it was inevitable that proceedings in London would be more expensive and, given the relatively modest sums in dispute (£600,000), it was appropriate to ensure that costs were kept down.

These cases demonstrate that the TCC has a preference for retaining cases in the court at which the claimant issued the proceedings unless there is good evidence that the balance of convenience lies in favour of ordering the transfer. It seems that a defendant applying for an order for transfer will have to provide evidence that the burden to it of continuing the proceedings in the existing court outweighs that to the claimant of the transfer. A defendant is also unlikely to be able to rely on factors such as the need for a High Court judge to hear the case, for example due to the financial value or complexity of the proceedings, as TCC High Court judges are now available to hear cases in the regional centres.

**Would a clause providing for the resolution of Court disputes in a particular city or District Registry be enforceable?**

“Exclusive jurisdiction” clauses are commonplace in commercial contracts, often specifying that the courts of England and Wales have exclusive jurisdiction to determine any dispute or claim arising out of or in connection with a contract. These clauses are usually valid and enforceable. However, the meaning of “jurisdiction” in the context of such clauses is that of the courts of England and Wales collectively rather than that of an individual court within England and Wales.

Parties to a contract may wish to agree a clause specifying, for example, that the London TCC has exclusive jurisdiction or that any claims must be commenced in the London TCC. However, there does not presently appear to be any authority considering whether such a provision is enforceable.

The arguments in support of such a clause being enforceable include (a) that the clause reflects the parties’ agreement and should be enforced as would any other term of their contract and (b) that it would allow the parties a degree of certainty about where any proceedings are to be conducted.

On the other hand, there are certain practical difficulties that could arise if such a clause were enforceable. For example, if a simple dispute of a low financial value arose between the parties to the relevant contract, the London TCC would likely be considered an inappropriate forum for those proceedings and may decline to deal with them. Further, it may be the case that the court named in the clause does not, for whatever reason, have the resources available at the time to deal with the dispute. There is also potentially a public policy argument against the enforceability of such a clause as it would curtail the courts’ case management abilities.

But even if a clause of this nature were unenforceable, it may still be of assistance to a party making an application for an order for transfer of proceedings. As stated above, the Business and Property Courts Advisory Note provides that “special weight” is to be given to the parties’ wishes. Such a clause ought to provide clear and strong evidence of the parties’ collective wishes. It may particularly be of assistance in circumstances where the question of convenience is finely balanced.

**Conclusion**

It can be seen that a local court does not require much of a link to that court for proceedings commenced there to remain there. Conversely, it will require a clear case to justify the transfer of proceedings from one court to another, particularly now that the Business and Property Courts throughout England and Wales are all “one Court”. Therefore, if you do want greater control over the location of the court in which your disputes are resolved, you should seek to provide for this in your contracts. Whether such a clause would be directly enforceable is not yet clear, but it is arguable that it should at least provide clear evidence of the parties’ intentions and wishes and ought therefore to be a relevant consideration on an application for transfer.

<sup>2</sup> [2009] EWHC 2305 (TCC)