

**Service sub-committee**  
**Proposed amendments to PD6B**

**A. Introduction**

1. The sub-committee has been asked to consider whether changes are required to the jurisdiction gateways found in paragraph 3.1 of PD6B. Those gateways define the circumstances in which the Court may give permission for a claim to be served out of the jurisdiction. They therefore play a central role in defining the scope of the territorial jurisdiction of the Courts of England and Wales.
2. The existing gateways have been the subject of recent examination by Foxton J. in a lecture and subsequent paper, entitled “*The Jurisdictional Gateways – Some (Very) Modest Proposals*” which has been published in Lloyd’s Commercial and Maritime Quarterly in March 2022. That paper identified 10 possible amendments to the gateways which have been the starting point for our discussions, albeit the final form of these proposals has moved on some way from those initial discussion points and various other suggestions have been raised with us.
3. The principal purpose of the sub-committee’s work has been to seek to ensure that the scope of the gateways matches the policy objectives underpinning the existing gateways. That exercise necessarily requires careful consideration of each gateway and the changes proposed. We accept that there are limitations in the extent to which a series of legislative or rules committee enactments at different times can properly be said to be manifestations of a single policy. However, we do believe that there is utility in looking at those factors which the existing gateways have recognised as a sufficient connection with this jurisdiction to provide the starting point for an application for service out, and considering whether those factors ought to provide a sufficient connection for other causes of action. In addition, a number of recent applications have raised the issue of the Court’s territorial jurisdiction to grant orders against non-parties for the provision of information where assets have been removed from the jurisdiction. The issue has been particularly acute in cases where a party has needed to identify the destination of money or cryptoassets and so has required information from a bank or exchange.
4. Finally, there are other amendments which the sub-committee has suggested to address issues which have been raised in reported decisions or commentaries or which were brought to the sub-committee’s attention by members of the Lord Chancellor’s Advisory Committee on Private International Law (“the Mance Committee”) after they had reviewed earlier drafts of this report. We are grateful to the members of the Mance Committee for their input, which we have sought to take account of where possible in this revised version, while recognising that these proposals are unlikely to address all concerns raised.

5. The sub-committee is grateful to Thomas Raphael QC for his assistance, both in relation to the topic of gateways for anti-suit injunctions, and in relation to a number of other issues. We have also had the benefit of a number of consultation responses, which have helped to shape some of these proposals and for which we are also grateful.

**B. Should any amendments to the gateways await a wider review of the service out regime?**

6. It has been argued that the territorial jurisdiction of the Courts of England and Wales should be solely determined by the “proper case for service out” test (essentially addressing the issue of forum conveniens) and that the gateways should therefore be dispensed with<sup>1</sup>. There have also been suggestions (including by some members of the Mance Committee) that the requirement for permission for service out should be abolished, or at least heavily curtailed.

7. These issues are complex and have been the subject of detailed academic debate. We have been made aware of a significant project which is formulating proposals substantially to remodel the service out regime, which will clearly merit careful consideration. However, a full review of this issue by the sub-committee would require significant investigation and consultation, which is beyond the scope of the present review, and would be incompatible with the timescale within which the sub-committee’s work is to be completed. Some of the members of the Mance Committee and one group of consultation respondents have suggested that, in these circumstances, and because it is said that the proposals put forward by the sub-committee would involve a considerable extension to the service-out jurisdiction, the sub-committee’s work should be put on hold, pending such a wider review.

8. It will be for the CPRC to determine what course it wishes to follow, for which purpose it may well want to have a more detailed understanding than the sub-committee has at present about the likely timescale of such a review. Nonetheless, the sub-committee recognises that this proposal will merit serious consideration. In these circumstances, and in an effort to assist the CPRC, we have “triaged” our proposals:

- 8.1 The first group comprises proposed amendments which the sub-committee considers could clearly be implemented independently of any wider review.

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<sup>1</sup> A similar approach appears to have been introduced in the Singapore Supreme Court. Order 8, Rule 1 of their recently introduced rules permit service out “if it can be shown that the Court has the jurisdiction or is the appropriate court to hear the action”, which took effect from 1 April 2022. The equivalent of PD6B now appears to be a non-exhaustive list of examples of claims where service out may be permitted. The rules in New Zealand and in the federal and state jurisdictions of Australia permit service out without permission in a “gateway” case, but with a residual power to grant permission to serve out in an appropriate case even if no gateway applies.

## Proposed PD6B amendments

- 8.2 The second group comprises proposed amendments which involve some extension of existing principles or have met with some resistance in the pre-consultation process, but which the sub-committee believes are limited in their effect and fall within the spirit of the current gateways or for which (in the case of the proposed gateway for applications for information) there is an immediate and compelling justification.
- 8.3 The third group comprises proposed amendments of a more significant kind, both in their effects and in the strength of the differing views they may provoke.
9. The sub-committee recognises that as the CPRC progresses through these categories, and in particular when it comes to consider the reforms in the third category, the case for awaiting a more general review becomes stronger.
10. We have prepared three versions of an amended Practice Direction 6B. The numbering necessarily changes between the versions as new potential gateways are introduced.

### **C The first category of proposed amendments**

#### **C.1 Domicile**

11. It has been brought to our attention by members of the Mance Committee that the operation of gateway (1) may be open to uncertainty on the basis that it is not clear whether the common law test of domicile applies, or the statutory definition set out in ss.41/42 of the Civil Jurisdiction and Judgments Act 1982 (which is the better view).
12. While revising Practice Direction 6B, the Rules Committee may wish to put this debate to rest by amending paragraph (1). The sub-committee **proposes** amending this subparagraph as follows:
- (1) A claim is made for a remedy against a person domiciled within the jurisdiction within the meaning of sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982.
13. It has been pointed out to us that gateways (13) and (17), which do not relate to matters falling within the Brussels/Lugano gateway regime, also use the concept of domicile. We recommended that gateway (17) – which is intended to ensure service is not effected on defendants not domiciled in Scotland and Ireland – reflects essentially the same issue and should be similarly amended. The sub-committee **proposes** amending this subparagraph as follows:
- (17) A claim is made by the Commissioners for H.M. Revenue and Customs relating to duties or taxes against a defendant not domiciled in Scotland or Northern Ireland within the meaning of sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982.

14. By contrast, gateway (13) is concerned with proceedings for the administration of an estate of a person who died domiciled in the jurisdiction. This seems to the sub-committee to raise a different question to where someone can be served, and we do not recommend any change to this provision.

C.2 Branch, agency or other establishment.

15. The sub-committee **proposes** the introduction of a new gateway:

(1A) A claim is made against a person in respect of a dispute arising out of the operations of a branch, agency or other establishment of that person within the jurisdiction, but only if proceedings cannot be served on the branch, agency or establishment.

16. This is derived from Article 7(5) of the Brussels Regulation, save that it has been amended to address what appears to be an open question under the Brussels Regulation of whether this basis of jurisdiction applies when the branch, agency or establishment has ceased to operate by the time proceedings are commenced. We accept the point made to us by members of the Mance Committee that where the branch, agency or other establishment is still in operation, it will not be necessary to serve proceedings out of the jurisdiction at all (as service at that place will be possible under CPR 6.9).
17. In practice, there may be relatively few claims which fall within this proposed gateway, but which do not fall within any other gateway. However, there will be some, which it would be appropriate for the English and Welsh Courts to determine.
18. A number of points of interpretation have arisen. In particular:

18.1 What amounts to a “*branch, agency or other establishment*”?

18.2 What is required for a claim to “*arise out of the operations*” of such an entity?

These issues have been considered a number of times by the ECJ. We consider that it is best to keep the drafting of this gateway as close as possible to the Regulation, and for that reason also the sub-committee suggests retaining the connector “arising out of”. This will help to provide certainty as to what is intended. It will also benefit from greater international recognition.

C.3 Quia timet relief

19. Gateway (9) captures tort claims for tortious acts which will be committed in the future, as does gateway (21) so far as claims for breach of confidence or misuse of privacy are concerned. The other cause of action gateways do not expressly do so.

## Proposed PD6B amendments

20. We propose that the cause of action gateways are amended to capture future acts which will give rise to a cause of action generally. This will confer territorial jurisdiction over claims for *quia timet* injunctions to restrain anticipated wrongful acts of all sorts, an essential element of which occurs or will occur within the jurisdiction.
21. The sub-committee **proposes** amending the existing breach of contract gateway (7) as follows:
- (7) A claim is made in respect of a breach of contract committed, or likely to be committed, within the jurisdiction.

### C.4 Negative declarations

22. Gateway (8) expressly addresses claims for negative declaratory relief in relation to the existence of a qualifying contract. There are no other gateways addressing claims for negative declarations. While it might well be possible to fit such claims within the existing gateways, the sub-committee sees benefit in addressing claims of this type expressly. This would be in keeping with the significant change in the attitude of the English court to claims for negative declarations, which were commonplace under the Brussels Regulation (Recast) and the predecessor and associated regimes.
23. We propose that the gateways capture claims for negative declarations that no liability exists where, if liability were established, the claim would fall within certain heads of the Court's jurisdiction. With the benefit of observations provided by members of the Mance Committee, the sub-committee accepts that such a gateway should apply to negative declarations relating to claims which would have fallen within some, but not all, of the gateways. The sub-committee **proposes** that these are dealt with in a free-standing gateway as follows:
- (16A) A claim is made for a declaration that the claimant is not liable where, if a claim were brought against the claimant seeking to establish that liability, that claim would fall within another paragraph of this Practice Direction (excluding paragraphs (1) to (5), (8), (17) and (22)).

This formulation is intended to avoid what we accept would be the undesirable and unintended consequence of allowing a claimant to seek a negative declaration in the courts of its domicile simply because it could have been sued there. It also excludes paragraphs of Practice Direction 6B where the possibility of negative declarations would not seem to be engaged or which already address some other form of declaratory relief. In summary terms, the purpose of the formulation is to capture those cases where there is some objective feature tying the contemplated liability to the jurisdiction, but no others.

24. Certain of the second and third categories of proposed amendments suggest introducing new gateways to which we do not consider this gateway should extend. If those

## Proposed PD6B amendments

proposals are adopted, this new gateway (16A) will need to include those gateways in the list of exclusions:

- 24.1 For Category 2, gateway (23) would also need to be excluded (information orders);
- 24.2 For Category 3, gateways (12D) (declarations of no trust) (15D) (declarations of no fiduciary duty and 22 (declaration of no duty of confidentiality or right to privacy). In light of the renumbering necessary to accommodate other new gateways, the exclusions would be (1) to (5), (8), (12D), (15D), (22) and (24) to (25).

### C.5 Amendment to gateway (6)(c)

25. The sub-committee **proposes** that gateway (6)(c) be amended so as to refer to “the law of England and Wales” rather than to “English law”:

“is governed by ~~English~~ the law of England and Wales”

This will make the gateway consistent with the language used in the other gateways referring to English and Welsh law: trusts (12) and restitution (16).

### C.6 Amendments to gateway (4A) – same defendant and same or closely related facts

26. Gateway (4A) helps to confer jurisdiction over disputes which would be most efficiently decided together with another related dispute, over which the Court already has jurisdiction (“the anchor claim”). Where the two disputes arise between the same parties out of the same or closely connected facts, the two claims may be heard together even if, absent the anchor claim, the Courts could not have asserted any jurisdiction over the other claim(s).
27. Gateways (3) and (4) confer jurisdiction over claims against necessary or proper parties to claims and additional claims.
28. There is a degree of sensitivity about these gateways as they necessarily involve the Court taking jurisdiction over claims in respect of which, if the claims were heard by themselves, the Court could not exercise that jurisdiction. The gateways can therefore become targets for artificial attempts to invoke the Court’s jurisdiction.
29. Unlike gateways (3) and (4), (4A) only applies where the anchor claim is made “in reliance on” certain of the other gateways. The qualifying gateways for the anchor claim are, at present, (2), (6) to (16), (19) and (21). The sub-committee has considered two topics:

## Proposed PD6B amendments

- 29.1 whether any additions should be made to the identified gateways; and
- 29.2 whether the words “*in reliance on*” require amendment.
30. There are two notable omissions from this list of gateways to which cross-reference is made:
- 30.1 First, gateways (3) and (4) (necessary or proper party) are omitted. The result is that a party may be joined to existing proceedings as a necessary or proper party to a claim. However, further claims arising out of the same facts may not be advanced against that party under gateway (4A). In practice, it seems highly likely that the further claim would itself satisfy the requirements of gateways (3) and (4). As such, our view is that the issue does not justify a change. Given the sensitivity of the gateway, we consider there ought to be a real need for change before any amendment can be justified.
- 30.2 Second, gateway (4A) omits reference to gateway (20) (claims under various enactments). The result is that claims for a contribution under the Civil Liability (Contribution) Act 1978 and those under s.423 of the Insolvency Act 1986 (transactions defrauding creditors) cannot be anchor claims for the purposes of gateway (4A). This leads to some anomalous results. For example, there are good reasons why a party might want to raise the issue of whether assets have been transferred to a third party at all, as an alternative to a claim under s.423. At present, that cannot be justified by gateway (4A). The sub-committee therefore **propose** that a reference to gateway (20) be added to gateway (4A).
- 30.3 Finally, if the changes which are proposed to the other gateways are adopted, the sub-committee **proposes** that gateway (4A) should apply to claims relating to those gateways as well. These are:
- (a) Under Category 2, gateways (12B) (trusts administered in the jurisdiction), (12C) (breach of trust in the jurisdiction), (15A) (breach of fiduciary duty);
  - (b) Under Category 3 (also reflecting any re-numbering of Category 2 amendments), gateways (12D) (declaration of no qualifying trust), (12E) (breach of trust in the jurisdiction), (15A) (unlawfully causing or assisting a breach of trust), (15B) (breach of a qualifying fiduciary duty), (15C) (unlawfully causing or assisting in a breach of a qualifying fiduciary duty), (15D) (declaration of no qualifying fiduciary duty), (16A) (declarations of non-liability); (22) (declarations of no qualifying duty of confidence or right to privacy); (23) (unlawfully causing or assisting a qualifying breach of duty or right to privacy).

## Proposed PD6B amendments

31. As to the second issue, the words “in reliance on” would appear to presuppose an application has been or is being made to serve the anchor claim out of the jurisdiction under one or more of those gateways. As to this, there are the following circumstances in which the anchor claim might have been brought against a defendant and reliance is sought to be placed on gateway (4A):
  - 31.1 The anchor claim was served on the defendant, who agreed to accept service in the jurisdiction even though service could not have been effected out of the jurisdiction.
  - 31.2 The anchor claim may have been served on the defendant in the jurisdiction, but the additional claim cannot be served on the defendant in the jurisdiction (perhaps because the defendant was only in the jurisdiction temporarily, or because the anchor claim was served on an agent for service whose authority was limited or has been revoked, or because the defendant has moved).
  - 31.3 The anchor claim was served on the defendant out of the jurisdiction without leave under CPR 6.33, but the new claim cannot similarly be so served (although in cases where CPR 6.33 applies because of an agreement conferring jurisdiction on the English court, this should be a rare occurrence).
  - 31.4 The anchor claim fell within either CPR 6.33 or one of the Practice Direction 6B gateways, but (perhaps for that reason) the defendant accepts service of the anchor claim within the jurisdiction.
  - 31.5 The anchor claim was served following the granting of permission under one of the Practice Direction 6B gateways.
32. At the moment, it appears to the sub-committee that gateway (4A) only unambiguously applies to the last of these scenarios – paragraph [31.531.5](#). We see strong grounds for extending gateway (4A) to the scenarios described in paragraphs [31.331.3](#) and [31.431.4](#). We have found the question of whether gateway (4A) should apply in the first and second scenarios more difficult.
33. So far as the necessary or proper party gateway is concerned, the anchor defendant must be someone who is either duly served within the jurisdiction, or who falls within either CPR 6.33 or a service out gateway: see *ID v LU* [2021] EWHC 1851 (Comm).
34. Not without some hesitation, the sub-committee has concluded that gateway (4A) should not apply where the court has jurisdiction over the anchor claim only because a defendant who was out of the jurisdiction agreed to accept service. We think it can fairly be said that the agreement to accept service of the anchor claim in these circumstances is limited in its effect to the claim served.



## Proposed PD6B amendments

35. So far as the defendant who is served with the anchor claim in England on the basis of temporary (or perhaps a then-fixed) presence here, the position is different because the service of the anchor claim was effected as of right. The sub-committee has decided to recommend an amendment of gateway (4A) which would cover cases in which the claimant was entitled to serve the anchor claim within the jurisdiction for reasons other than a voluntary agreement on the defendant's part to accept such service.
36. Accordingly, the sub-committee **proposes** the amendment of gateway (4A) as follows:
- (4A) A claim is made against the defendant (i) which was served on the defendant within the jurisdiction without the need for<sup>2</sup> the defendant's agreement to accept such service; or (ii) which falls within CPR 6.33; or (iii) which falls within ~~in reliance on~~ one or more of paragraphs (2), (6) to (16), (19) ~~or to~~ (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts.
37. Adoption of the Category 2 proposals will increase the gateways to be included as set out in paragraph ~~30.330.3~~ above. However, this would not alter the drafting as those additional gateways would fall within the existing ranges.
38. Adoption of the Category 3 proposals would require amendment as follows:
- (4A) A claim is made against the defendant (i) which was served on the defendant within the jurisdiction otherwise than by reason of the defendant's agreement to accept such service; or (ii) which falls within CPR 6.33; or (iii) which falls within ~~in reliance on~~ one or more of paragraphs ~~(2), (6) to (16), (19) or (21)~~ (2), (6) to (16A) or (19) to (23), and a further claim is made against the same defendant which arises out of the same or closely connected facts.

### C.7 Contempt applications

39. Difficulties have arisen where it is necessary to serve a non-party out of the jurisdiction in order to engage the Court's prescriptive powers. In particular, there is no express gateway for service out of an application for contempt.
40. This has caused particular difficulties where a party wishes to serve out a contempt application on a director of a company which is subject to the jurisdiction of the court. In many cases, contempt may be alleged against both the company and the directors. A director who is outside the jurisdiction may then be served as a necessary or proper party to the proceedings against the company. However, that is not always the case.

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<sup>2</sup> This proposed amendment has been slightly adjusted since consultation in light of comments received from the Law Society. The new draft makes clear that the fact of a defendant's agreement to service will not prevent service out of a related claim if the original claim could have been served without the defendant's agreement.

41. In *Deutsche Bank AG v Sebastian Holdings Inc (Nos 1 and 2)* [2018] EWCA Civ 2011, an order under CPR 71.2 had been made against a director personally, requiring that he attend for examination on the company's assets. The original application and order requiring his attendance had been served while the director was in the jurisdiction. The Court of Appeal found that the contempt application was incidental to that order. There was therefore no requirement to seek permission to serve the contempt application out of the jurisdiction.
42. Gross LJ noted (at [87]) the "*clear public interest*" in having a gateway for contempt and recommended that the CPRC consider the position. The sub-committee agrees that it is desirable to have a clear statement of the Court's jurisdiction in this regard.
43. In the circumstances, the sub-committee **proposes** the creation of an additional gateway, which is adapted from the Singapore Rules of Court:

**Contempt applications**

(22) Contempt applications, whether or not, apart from this paragraph, a claim form or application notice containing such an application can be served out of the jurisdiction.

C8 Arbitration Claims

44. So far as arbitration claims are concerned, service out is governed by CPR 62.5. There are issues with regard to serving arbitration applications out of the jurisdiction against non-parties to the arbitration agreement, which are closely related to the debate as to how far s.44 of the Arbitration Act 1996 is capable of applying to such non-parties (see *A, B and C v D and E* [2020] EWCA Civ 409). We anticipate these issues will feature in the recently announced Law Commission review of the Arbitration Act 1996,<sup>3</sup> and are best addressed in that context.
45. However, one issue has been raised with us which the CPRC may wish to address at this stage. CPR 6.33(2B) provides that the claimant may serve the claim form on a defendant outside the jurisdiction where each claim made against the relevant defendant is (a) one the court has power to determine under an exclusive choice of court agreement within the meaning of Article 3 of the 2005 Hague Convention or (b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim. Arbitration agreements are excluded from the scope of the 2005 Hague Convention and hence from CPR 6.33(2B)(a), but an arbitration claim which the English Court has power to determine because the arbitration agreement involves the choice of the courts of England and Wales as the curial court is potentially capable of falling within CPR

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<sup>3</sup> <https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/>

## Proposed PD6B amendments

6.33(2B)(b), and the 11<sup>th</sup> edition of the *Commercial Court Guide* invites parties to consider that question (Appendix 9 para 18).<sup>4</sup>

46. The provisions of the Arbitration Act 1996 which raise the issue of service out may apply because:

46.1 the parties have chosen England and Wales as the seat of the arbitration (either directly or because they have entered into an arbitration agreement giving someone else the power to designate the seat, and England and Wales is then designated);

46.2 the English court is willing to act in circumstances in which no seat of the arbitration has been designated or determined, but by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so; or

46.3 the provisions in question apply whether or not the seat is in England and Wales.  
(s.2 of the Act).

47. Arbitration proceedings can be brought against a respondent who is alleged to be a party to the arbitration agreement, or against a non-party.

48. CPR 62.5(1) provides for service out with permission in three circumstances:

48.1 Where the claimant seeks to challenge (under ss.67 and 68 of the Arbitration Act 1996) or appeal on a question of law (under s.69 of the Arbitration Act 1996) an award made in the jurisdiction.

Save in cases in which a party wishes to challenge an award holding that the arbitration tribunal does have jurisdiction, these applications involve cases in which there is no dispute that the parties have agreed to England and Wales as the seat of their arbitration, and thereby to the courts of England and Wales as the curial court, or where the applicant is positively asserting that this is the case. Where the claimant seeks to challenge the arbitration tribunal's finding that it does have jurisdiction, it will be the respondent's position that the courts of England and Wales have curial jurisdiction, such that one of the purposes which the permission requirement is intended to serve (of preventing the respondent being forced to engage with English court proceedings unless certain requirements are satisfied) would not appear to be engaged.

48.2 Where the claim is brought under section 44 of the Arbitration Act 1996.

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<sup>4</sup> <https://www.judiciary.uk/wp-content/uploads/2022/02/Commercial-Court-Guide-11th-edition.pdf>

On the basis of current authority, applications under this section can (in the main) only be brought against putative parties to the arbitration, the one exception being claims for an order requiring a non-party to give evidence. As noted above, the position where injunctive relief is sought against a non-party (for example under the *Chabra* jurisdiction) is not settled at appellate level. Where it is the claimant's case that the respondent is party to the arbitration agreement, and this can be established to the requisite standard, we see a strong argument that permission to serve out should not be required.

- 48.3 Where the claimant seeks some other remedy or requires a question to be decided by the court affecting an arbitration, and the seat of the arbitration is or will be in England and Wales, or the conditions in section 2(4) are satisfied.

We think that in most cases, such an application will be brought against someone alleged to be a party to an arbitration agreement, but this will not always be the case.

49. In those cases in which both:

49.1 the application concerns an arbitration the seat of which is, or will be, in England and Wales; and

49.2 the respondent is a party to the arbitration agreement;

we think that the case for permitting service out of arbitration applications without permission is particularly strong, given what has been recognised as the policy of “speedy finality” which applies to arbitration-related court applications. Where, however, England and Wales is not or will not be the legal seat, or the application is brought against a non-party, the requirement for permission should remain.

50. We therefore **propose** amending CPR 62.5 as follows:

- (1) Subject to (2A) below, the court may give permission to serve an arbitration claim form out of the jurisdiction if –
- (a) the claimant seeks to –
    - (i) challenge; or
    - (ii) appeal on a question of law arising out of, an arbitration award made within the jurisdiction;  
(The place where an award is treated as made is determined by section 53 of the 1996 Act.)
  - (b) the claim is for an order under section 44 of the 1996 Act; or
  - (c) the claimant –
    - (i) seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and

## Proposed PD6B amendments

- (ii) the seat of the arbitration is or will be within the jurisdiction or the conditions in section 2(4) of the 1996 Act are satisfied.
- (2) An application for permission under paragraph (1) must be supported by written evidence –
  - (a) stating the grounds on which the application is made; and
  - (b) showing in what place or country the person to be served is, or probably may be found.
- (2A) An arbitration claim form falling within (1)(a) to (c) above may be served out of the jurisdiction without permission if-
  - (a) the seat of the arbitration is or will be in England and Wales; and
  - (b) the respondent is party to the arbitration agreement in question.
- (3) Rules 6.34, 6.35, 6.40 to 6.46 apply to the service of an arbitration claim form under paragraph (1) or (2A).
- (4) An order giving permission to serve an arbitration claim form out of the jurisdiction must specify the period within which the defendant may file an acknowledgment of service.”

### **D** Category 2

D1 Claims made in relation to contracts where the contract contains a term to the effect that the court shall have jurisdiction to determine a claim in respect of a contract

51. PD6B para. 3.1(6) was amended by the deletion of (d):

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

52. This change was made as part of the package on 6 April 2021 introduced by the Civil Procedure (Amendment) Rules 2021, SI 2021/117 which introduced a new service provision permitting service out of the jurisdiction without permission:

*(2B) The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form: -*

- (a) the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention; or*
- (b) The contract contains a term to the effect that the Court shall have jurisdiction to determine the claim”.*

## Proposed PD6B amendments

53. However, it has been pointed out to us that the differing terms of the old gateway (6)(d) and CPR 6.33(B) may have opened up a potential lacuna in cases where the claimant disputes that it (or the defendant) is party to the relevant contract, but contends that if the defendant is to bring a claim arising under the contract, it should comply with the contractual jurisdiction agreement. The nexus required between the claim and the contract under the former PD6B para 3.1(6)(d) – “in respect of” – was wide language which could be read as extending to those so-called “para-contractual” claims.
54. However, CPR 6.33(2B)(a) refers to the position where “*the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention*”. That would seem to preclude its operation in this context.
55. So far as CPR 6.33(2B)(b) is concerned, the words “in respect of” have been replaced by “where, for each claim made against the defendant to be served and included in the claim form ... a contract contains a term to the effect that the court shall have jurisdiction to determine that claim”. That wording does not naturally lend itself to the case where the claimant does not contend that the defendant is party to the contract, and the injunction is sought on the basis that if the defendant wishes to assert it is, it must comply with the English jurisdiction clause.
56. To address this issue, the sub-committee **proposes** amending CPR 6.33(2B) to add the underlined passages:

(2B) *The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form: -*

- (a) *the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention; or*
- (b) *a contract contains a term to the effect that the court shall have jurisdiction to determine the claim; or*
- (c) *the claim is in respect of a contract falling within (b).*”

### D.2 Causes of action a substantial part of which occurs within the jurisdiction

57. A number of the current gateways are premised on events which are relevant to the cause of action, or at least the claim, occurring in the jurisdiction: breach of contract (7), the tort gateway (9), the constructive /resulting trust gateway (15), the restitution gateway (16)(a) and (b) and the breach of confidence/right of privacy gateways (21).

## Proposed PD6B amendments

58. The sub-committee has considered whether PD6B should be amended to capture the underlying rationale of these gateways in a general gateway which would apply to all claims for a cause of action, a substantial part of which has occurred or is likely to occur in the jurisdiction. That would also address what appears to be a lacuna in the current gateways so far as this jurisdictional nexus is concerned, there being no equivalent gateways for claims for breach of trust or breach of fiduciary duty. We note that a similar proposal appears to have been suggested to the Mance Committee at one point (minutes of a meeting of 1 December 2014 noting “it was suggested that a new general gateway be developed taking into account the concept of acts committed within the jurisdiction or under English law”), although we have not been able to trace through the outcome of the proposal.
59. The sub-committee considered and rejected an approach which would involve replacing those existing gateways (or parts of them) which would be subsumed within a new general gateway on these lines. We were concerned that such extensive revisions might be interpreted as intended to effect more change than the sub-committee is in fact recommending. It might also raise uncertainty as to whether the new gateways were intended to capture all of the claims which would otherwise have fallen within the existing gateways.
60. The sub-committee gave serious consideration to two approaches:
- 60.1 Retaining the existing gateways, but adding a fresh gateway for claims a substantial part of which occurs within the jurisdiction along the following lines:
- A claim is made for a cause of action which does not fall within any other paragraph of this Practice Direction and where a significant element of the cause of action arises from acts committed, or likely to be committed, or events occurring, or likely to occur, in the jurisdiction .
- 60.2 Retaining the existing gateways, and adding in new provisions to address the lacunae identified for breach of trust and breach of fiduciary duty.
61. The sub-committee tested the benefits of both approaches with rival drafts, and has decided to recommend the second (lacunae-filling) approach rather than a general gateway for causes of action where the defendant’s alleged liability arises out of acts committed, or likely to be committed, or events occurring, or likely to occur, in the jurisdiction:
- 61.1 The general gateway approach raised potentially complex issues of how such a gateway should apply to acts or events which were not a required element of the cause of action, but might be thought to be an important element of the claim: in particular, events which formed part of the loss or damage. This has proved a complex issue in the tort gateway (9) as considered by the Court of Appeal and

the Supreme Court in *FS Cairo (Nile Plaza) LLC v Lady Brownlie (2)* [2020] EWCA Civ 996, [2021] UKSC 45.

- 61.2 The gap-filling approach fitted better with other potential gateways which we discuss below, in particular those where the jurisdictional connection is provided by the application of the law of England and Wales or the fact that the claims relate to a legal relationship which arose within the jurisdiction.
- 61.3 We were unable to identify any claims which would not be caught by the existing gateways with the benefit of our two recommended additions.
62. Some members of the Mance Committee raised concerns that the formulation initially proposed did not require the act or event within the jurisdiction to have any significant or substantial quality, and expressed concern that this might provide too tenuous a jurisdictional link. We have sought to address those concerns in our revised proposals. We are also aware of objections to gateways which are dependent on the location of acts or omissions because of the difficulties of determining where acts or omissions occur. However, we note that this has been a consistent theme of the jurisdictional gateways, most recently reflected in the privacy and breach of confidence and in the amendments to the restitution gateways.
63. Accordingly the sub-committee **proposes** adding additional gateways as follows:
- (12C) A claim is made for a breach of trust where the breach is committed, or likely to be committed, within the jurisdiction.
- (15A) A claim is made for breach of fiduciary duty, where the breach is committed, or is likely to be committed, within the jurisdiction.
64. By way of further explanation:
- 64.1 The sub-committee considers it arguable that certain duties of trustees are not, strictly speaking, fiduciary duties (for examples duties in relation to diversification of investments). For that reason, the sub-committee recommends addressing both categories of claim.
- 64.2 The additional gateways provide for *quia timet* relief, for the reasons set out above.
- D.3 Causes of action governed by the law of England and Wales
65. Under the present gateways, the Courts have territorial jurisdiction over certain types of claim, where the claim is governed by the law of England and Wales, or relates to a relationship governed by the law of England and Wales. The relevant gateways are



(6)(c) (contract governed by the law of England and Wales), (12) (trust governed by the law of England and Wales) and (16)(c) (restitution claim governed by the law of England and Wales).

66. The sub-committee considers that the same rationale underpinning those gateways supports their extension to all claims governed by the law of England and Wales. The sub-committee accepts that this might be thought to be one of the more controversial proposals. It is normally necessary to know whether the Court has jurisdiction first, in order to know what conflicts of laws provisions to apply in determining the applicable law. On the basis of this proposal, the English courts will be applying their own conflicts of law principles before deciding whether they have jurisdiction. This has been (gently) criticised as the Courts taking jurisdiction whenever they decide that they have jurisdiction.
67. However the sub-committee does not consider this to be a problem in principle (although we are aware that others disagree). The issue arises already in respect of the existing gateways which depend on the application of the law of England and Wales. The question of whether, for example, the law of England and Wales applies to a contract requires the application of conflicts rules under the law of England and Wales. The conclusion is often simple as the applicable law is often agreed in advance by the parties to the contract. However, that is not always the case. Conflicts rules may require a particular approach to questions of, for example, whether a concluded agreement was reached, which may affect the applicable law. Even where the existence of an agreement is clear, its effectiveness remains an application of a conflicts rule of the law of England and Wales. Not every jurisdiction will respect what an English or Welsh court would regard as the manifestation of the parties' choice (for example where the choice arises through the incorporation of provisions from another contract, such as where a bill of lading incorporates the terms of a charterparty). The issue also arises in respect of restitution claims (gateway (16)(c)), where there may be substantial controversy about the applicable law and the answer may differ in other jurisdictions.
68. Nor do we consider that the proposed approach can be accused of parochialism. The English Courts apply international treaties in determining the law applicable both to contractual and non-contractual disputes. That determination *may* lend itself to more controversy than the determination of the law governing a contract, for example. However, that is not necessarily the case and, in any event, the English Courts would be deciding the issue in accordance with internationally recognised principles. In addition, an assessment of the applicable law which results in the application of the law of England and Wales will frequently be based on factors connecting the dispute with the jurisdiction.
69. The proposal has also been criticised on the basis that extending the role of applicable law beyond contract and trusts, where there is likely to be an express choice of law clause in most cases, to claims where there is likely to be more dispute as to applicable

law, risks a proliferation in disputes at the jurisdiction stage. We note, however, that the restitution gateway was enlarged in 2015 to encompass claims governed by the law of England and Wales because of a perception that a formulation limited to the location of relevant acts was an overly restrictive connecting factor, and that another more suitable factor which could be used was governing law. We also know from experience that there are, in any event, frequently governing law debates for non-contractual claims at the discretionary stage of the service out decision framework or for the purpose of showing that the merits test is met.

70. Once again, although the sub-committee considers that the principle is justified, there is room for debate about its implementation. The available approaches are essentially those discussed when considering the cause of action jurisdictional-nexus in Section D.2 above, and the sub-committee prepared rival drafts in order to determine what approach to recommend.
71. Once again, the sub-committee recommends that this issue should be addressed by filling those gaps where the application of the law of England and Wales is not presently identified as a jurisdictionally-significant factor. The sub-committee recommends the same approach, both for the reasons given in relation to the cause of action gateway at paragraph 58 above, and because the sub-committee identified real difficulty in formulating a general “cause of action governed by the law of England and Wales” gateway which would include substantive private law obligations governed by the law of England and Wales, but exclude cases where the law of England and Wales might apply by reason of the court’s prescriptive jurisdiction (for example applications for anti-suit injunctions) or the application of English procedural rules (for example applications relating to disclosure).
72. The sub-committee **proposes** the following further amendments:
- 72.1 The tort gateway (9) should be amended to make the following addition:
- (9) A claim is made in tort where:
    - (a) damage was sustained, or will be sustained, within the jurisdiction;
    - (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or
    - (c) the claim is governed by the law of England and Wales.
- 72.2 Gateway (15) should be amended as follows:
- (15) A claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim;

## Proposed PD6B amendments

- (a) arises out of acts committed or events occurring within the jurisdiction; ~~or~~
- (b) relates to assets within the jurisdiction; or
- (c) is governed by the law of England and Wales.

72.3 The breach of confidence and misuse of private information gateway (21) should be amended to make the following addition:

(21) A claim is made for a breach of confidence or misuse of private information where –

- (a) detriment was suffered, or will be suffered, within the jurisdiction;
- (b) detriment which has been, or will be, suffered results from an act committed, or likely to be committed, within the jurisdiction; or
- (c) the obligation of confidence or right of privacy is governed by the law of England and Wales.

73. We have also reflected this language in our proposed breach of fiduciary duty gateway. When combined with the proposal at paragraph ~~6363~~ above, the proposed wording becomes (with the proposal relating to the law of England and Wales in italics):

(15A) A claim is made for breach of fiduciary duty, where (a) the breach is committed or is likely to be committed within the jurisdiction or (b) the fiduciary duty is governed by the law of England and Wales.

74. We acknowledge that if the CPRC has concerns about the complexities of identifying applicable law for some of these types of claim, it may feel that the claims relating to tort and breach of fiduciary duty provide a more straightforward basis for an English law gateway than those relating to, say, constructive trusts, confidence and privacy.

### D.4 Contracts entered into within the jurisdiction

75. Gateway (6)(a) currently permits service out of claims in respect of contracts made within the jurisdiction. This gateway has been the subject of criticism. Where interactions leading to the conclusion of a contract take place between parties in different jurisdictions, the location where the contract is finally concluded may be a matter of chance which depends on where acceptance of the last of a number of offers and counter-offers is received.

76. Some have argued that the gateway should be narrowed as a consequence, so as strictly to confine it to the situation where the contract is concluded at a face to face meeting at the place of residence or business of one of the parties. We accept that it would be possible to address the anomalies by reducing the scope of this gateway, and that the Rules Committee may favour this course. The sub-committee’s view, however, is that the arbitrariness inherent in the issue of whether the final, as opposed to an essential, step in the formation of the contract occurs within the jurisdiction can be addressed by broadening the gateway. This approach has been adopted in Singapore. A broadened gateway also has some support from the Supreme Court: *Four Seasons Hotel Inc v Brownlie* [2017] UKSC 80, [34].
77. The sub-committee had initially proposed that gateway (6)(a) be amended to refer to a contract which was made as a result of an essential step being taken in the jurisdiction (which picks up wording from the current Singapore Rules of Court). However, concern was expressed by members of the Mance Committee that this might lead to arguments that (for example) a board resolution of a contracting party authorising the making of an offer or acceptance might be sufficient. We accept that this would fall outside the spirit of the current gateway (6)(a). Accordingly, the sub-committee **proposes** amending gateway (6)(a) as follows:

- (a) was (i) made within the jurisdiction, or (ii) concluded by the acceptance of an offer which offer was received ~~made~~ within the jurisdiction;

#### D.5 Place of administration of a trust

78. One of the members of the Mance Committee identified as a potential gateway the fact that the claim concerned a trust and the principal place of administration of the trust was England and Wales.
79. By way of background, the Hague Judgments Convention (the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019), Art 5(k)(ii) permits enforcement of a judgment where:
- “the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and ...
- (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.”
80. The Hague Trusts Convention (The Hague Convention on the Law Applicable to Trusts and on their Recognition 1985), Art 7 deals with applicable law. It states:
- “Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected. In ascertaining the law with which a

trust is most closely connected reference shall be made in particular to – a) the place of administration of the trust designated by the settlor...”

81. The other factors identified are location of assets, location of the trustee and the place where the trust objects are to be fulfilled. Both tests are jurisdictionally significant. The former directly so, given it sets out the circumstances in which foreign courts will recognise and enforce an English judgment. It seems to the sub-committee that it would be appropriate to craft a gateway which mirrors that test.

82. The sub-committee therefore proposes a new gateway (12B):

(12B) A claim is made in respect of a trust which is created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, and which expressly or impliedly designates England and Wales as the principal place of administration.

#### D.6 Norwich Pharmacal and Bankers' Trust orders

83. The increasing prevalence of digital transactions has brought into sharp relief the limitations of the current gateways in facilitating service out of applications for information orders. The issue arises frequently where money or cryptoassets are stolen and then spirited away by the wrongdoer.

84. Third parties very often hold valuable information which might assist the innocent party in tracking and recovering the asset or in identifying the wrongdoers. Banks and exchanges will be able to determine the destination of the asset and may be able to provide information about the identity of the parties who have facilitated the transaction. Where those parties are within the jurisdiction, applications may be brought for disclosure of information on a variety of bases, including Norwich Pharmacal or *Bankers Trust* principles and pursuant to CPR r. 25(1)(g) (order for information about assets which are or may be the subject of a freezing order).

85. Greater difficulty arises where the respondents to such applications are outside the jurisdiction. There is some tension on the authorities as to what is possible. In an early case, *AB Bank v ADCB* [2017] 1 WLR 810, Teare J. held that a claim for Norwich Pharmacal relief cannot be served out using the necessary or proper party gateway. In subsequent cases, the Courts have been willing to permit service out on third parties of *Bankers' Trust* applications, where there is a substantive proprietary claim against a wrongdoer. This has required the commencement of a claim against “*Persons Unknown*”, an application for service out of that claim and an allied *Bankers' Trust* application against the bank or exchange.

86. This situation has prompted a short paper by Paul Lowenstein QC and Sam Goodman. Their view – and we agree – is that the current position is unsatisfactory and there is a need for a discrete gateway directed at applications for information of the relevant sort. Such a gateway would be consistent with the approach which (it appears) is developing

in other parts of the common law world to international digital frauds. Shortly before this paper was finalised we became aware of a judgment of the Singapore High Court in which disclosure orders were made against parties: (i) incorporated outside of the jurisdiction and; (ii) against whom no substantive cause of action was advanced<sup>5</sup>. We are also aware of such an order being made by the Isle of Man Court.

87. There is some difficulty in defining the parameters of such a gateway without making them too wide. To avoid this, the sub-committee recommends limiting the gateway to applications for information regarding the identity of a potential defendant, or what has become of the claimant's property, where the information is required for the purposes of proceedings which have been or are to be brought in England and Wales.
88. Accordingly the sub-committee **proposes** a new gateway (23) as follows:

**Information orders against non-parties**

(23) A claim or application is made for disclosure in order to obtain information:

(a) regarding:

(i) the true identity of a defendant or a potential defendant; and/or

(ii) what has become of the property of a claimant or applicant;

and

(b) the claim or application is made for the purpose of proceedings already commenced or which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or pursuant to CPR 6.32, CPR 6.33 or CPR 6.36.

**E Category 3**

**E.1 Claims for unlawful interference with qualifying legal relationships**

89. This category of amendments takes those legal relationships which the Practice Direction treats as jurisdictionally significant, and provides gateways for claims against third parties against whom there is a cause of action for unlawfully interfering with those jurisdictionally significant legal relationships. The sub-committee accepts that this category of proposals involves a significant extension of the letter and spirit of the

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<sup>5</sup> See *CLM v CLN & Ors* [2022] SGHC 46 in which disclosure orders were made against the second and third defendants (companies incorporated outside the jurisdiction but with “operations” in Singapore). See [8] and [59]. The basis for the orders appears to be that the second and third defendants could be named as defendants to the proceedings solely for the purpose of providing disclosure.

current gateways. These are also a set of amendments where the drafting process has proved particularly challenging.

E.1.1 Unlawful interference with qualifying contracts

90. By way of further introduction to this issue, it is helpful first to consider contract claims. Gateway (6) permits service out of claims “*in respect of*” qualifying contracts. In his paper, Foxton J. identified several examples of claims which, while connected in some way to qualifying contracts, have been held not to fall within this gateway. Some of these issues have been addressed by the introduction of gateway (4A) (“*claims arising out of the same or closely connected facts as a claim falling within certain of the other gateways*”).
91. At present, however, jurisdiction is not extended to claims for what would be (in broad terms) unlawful interference with qualifying contracts. The sub-committee believes that there is a respectable case for the view that where there is an actionable interference with a jurisdictionally significant contract, then there should be a gateway not simply for claims to enforce the contract itself, but also for the actionable interference with the contract.
92. The sub-committee had originally proposed addressing this issue by extending gateway (6) to claims “*which relate to*” such a contract. However, concern was expressed by members of the Mance Committee that this broad connector might have a series of unintended consequences. We have, therefore, sought to address this issue more directly.
93. If the CPRC wishes to address this issue, the sub-committee would suggest the following wording:
- (8A) A claim for unlawfully causing or assisting in:
- (a) a breach of a contract where the contract falls within one of paragraphs (6)(a) to (6)(c) above or within Rule 6.33(2B); or
- (b) a breach of contract falling within (7) above.
94. The gateway has been framed with a view to capturing causes of action for what (in broad terms) might be termed the unlawful interference with a qualifying contract (or other relevant relationship), whatever their governing law. For that reason, we have sought to use neutral language, rather than language too closely tied to the ingredients of English law causes of action of this kind.
95. So far as this proposed gateway (8A)(a) is concerned, a stronger case can be made for contracts which contain an English jurisdiction clause (on the basis that the jurisdiction

clause might be said to determine the situs of the obligation interfered with) than, say, gateway (6)(a) and (b), and it would be possible to limit this aspect of the unlawful interference gateway to interference with contracts governed by the law of England and Wales or which are subject to an English jurisdiction clause.

E.1.2 Unlawful assistance in breach of a qualifying trust, obligation of confidence or right of privacy and claims for accessory liability in relation to qualifying breaches

96. Similar issues could arise in respect of other gateways which depend on the claimant establishing (to the requisite standard of arguability) the existence of other jurisdictionally significant legal relationships.

97. If the CPRC wishes to address this issue, the sub-committee would suggest the following wording:

(15B) A claim for unlawfully causing or assisting in:

(a) a breach of a trust where the trust falls within one of paragraphs (12) to (12C) above;

(b) a breach of trust falling within (12E) above; or

(c) a breach of a constructive or resulting trust where the trustee's liability would fall within (15) above.

98. Second, breach of fiduciary duty. Again if the CPRC wish to address this issue, the sub-committee would suggest the following wording:

(15C) A claim for unlawfully causing or assisting in:

(a) a breach of fiduciary duty where the fiduciary duty falls within one of paragraphs (15B)(b) or (c) above;

(b) a breach of fiduciary duty falling within (15B)(a) above.

99. Gateway (21) refers to a claim “*for breach of confidence or misuse of private information*”. In most cases, a defendant who is involved in another party's breach of confidence or misuse of private information may themselves fall under a direct liability for breach of confidence or misuse of private information (for example where the nature of their involvement is to induce someone holding such information to provide it to them for impermissible purposes). It is also possible that the language of gateway (21) would be interpreted so as to cover claims for accessory liability on the part of persons who did not themselves obtain the confidential information or misuse the private



information. However, the sub-committee does not feel able to rule out the possibility that there may be claims for actionable interference with an obligation of confidence or a right of privacy which would not fall within gateway (21) as presently drafted. In these circumstances, if the CPRC wishes to address these sorts of cause of action then, to ensure consistency in the drafting across the gateways, the sub-committee would suggest a similar amendment to this gateway as to the contract and trust gateways.

100. Again, if the CPRC wish to address this issue, the sub-committee would suggest the following wording:

(23) A claim for unlawfully causing or assisting in:

- (a) a breach of confidence or misuse of private information where the obligation or right in question falls within paragraph (21)(c) or (d) above;
- (b) a breach of confidence or misuse of private information falling within (21)(a) or (b) above.

101. Once again, it would be possible to limit these gateways to claims where the obligation interfered with (trust, fiduciary duty, right of confidence or right of privacy) is either governed by the law of England and Wales or in the case of a trust, where jurisdiction in respect of the trust has been conferred on the courts of England and Wales or where that is the principal place of its administration.

E.2 Other legal relationships entered into within the jurisdiction or as a result of an essential step being taken in the jurisdiction

102. Gateway (6) confers jurisdiction over contracts made in the jurisdiction. It does not however extend to other obligations voluntarily assumed within the jurisdiction.
103. It can be argued that the same rationale for gateway (6) favours extending the gateways to claims relating to certain other legal relationships arising in the jurisdiction. This would include trusts, fiduciary duties and obligations of confidence and rights of privacy. In principle, the same might be said of other forms of obligation which are voluntarily assumed (for example duties of care in tort). However, any attempt to define a broader gateway along those lines would be extremely difficult. In any event, the sub-committee does not believe any amendments are necessary for the tort or restitution gateways, which do not concern legal relationships the existence of which may be significant independently of the issue of whether a cause of action has, or is likely to, arise.
104. The sub-committee recognises that this proposal might be said to seek to extend jurisdiction by reference to an analogy (the place of contracting gateway) which is in

itself controversial. We recognise, therefore, that the CPRC may take the view that the place in which the relevant obligation came into existence should remain a gateway for contract claims only. However, we have formulated proposals which would provide a gateway on the same rationale for breach of fiduciary duty, trust, privacy and confidence claims. We had originally proposed using the “essential step” language in these gateways. However, given the concern expressed by members of the Mance Committee as to the possible width of that formulation, and the greater difficulty of breaking the legal facts which bring non-contractual obligations into being into their constituent parts than distinguishing between offer and acceptance in the conclusion of contracts, we have sought to limit these additional gateways to obligations arising in the jurisdiction.

105. So far as fiduciary duties are concerned, this would necessitate an additional amendment in italics to the proposed breach of fiduciary duty gateway:

A claim is made for breach of fiduciary duty, where:

- (a) the breach occurs or is likely to occur, or arises out of acts committed, or likely to be committed, or events occurring, or likely to occur, within the jurisdiction;
- (b) *the fiduciary duty arose in the jurisdiction; or*
- (c) the fiduciary duty is governed by the law of England and Wales.

106. It would also require a new trusts gateway (12C)

(12C) A claim is made in respect of a trust created in the jurisdiction.

107. An amendment would be required to gateway (21) (in italics):

(21) A claim is made for breach of confidence or misuse of private information where –

- (a) detriment was suffered, or will be suffered, within the jurisdiction;
- (b) detriment which has been, or will be, suffered results from an act committed, or likely to be committed, within the jurisdiction;
- (c) the obligation of confidence or right to privacy arose in the jurisdiction; or
- (d) the obligation of confidence or right to privacy is governed by the law of England and Wales.

E.3 Claims for declarations that no jurisdictionally-significant legal relationship has arisen.

108. At present, this is a gateway only for claims that a qualifying contract does not exist. It would be possible to extend this category from the existing gateway (8) relating to the existence of qualifying contracts to include other jurisdictionally-significant legal relationships so as to cover claims for declarations that no qualifying trust exists, that no qualifying fiduciary duty has arisen and that no qualifying duty of confidence or right to privacy has arisen.
109. If the CPRC wishes to follow this course, the sub-committee would suggest the following wording:

*Trusts*

(12D) A claim is made for a declaration that no trust has arisen where, if the trust was found to have arisen, it would comply with one of the conditions set out in paragraph (12), (12A), (12B) or (12C).

*Fiduciary duties*

(15D) A claim is made for a declaration that no fiduciary duty has arisen where, if the fiduciary duty was found to have arisen, it would comply with one of the conditions set out in paragraphs (15B)(b) or (c).

*Confidentiality and privacy*

(22) A claim is made for a declaration that no duty of confidentiality or right to privacy has arisen where, if the duty or right was found to have arisen, it would comply with one of the conditions set out in paragraph (21)(c) or (d).

**F Other issues**

F.1 Service of applications and orders

110. Thomas Raphael QC has also raised with the sub-committee the question of whether there needs to be a clearer and more comprehensive provision addressing service of applications and orders out of the jurisdiction.
111. Under the Rules of the Supreme Court, RSC Order 11 Rule 9(4) provided:
- Any application notice issued or order made in any proceedings may be served out of the jurisdiction with the permission of the Court but permission shall not be required for such service in any proceedings in which the claim form may by these rules or under any Act be served out of the jurisdiction without permission.*
112. This was deleted with effect from 2 May 2000 by the Civil Procedures Rules 2000/221.

## Proposed PD6B amendments

113. Where a defendant has acknowledged service and maintains an address for service within the jurisdiction, applications and orders will be served on that address (usually a solicitor). But what happens where the application or order is to be made before the time for acknowledgement of service, or the defendant does not acknowledge service but the claimant wishes to proceed to a trial on the merits, or the defendant disinstructs its solicitor and fails to appoint a replacement while proceedings continue?
114. This topic is currently addressed by the CPR in the following provisions:
- 114.1 Where proceedings are served out with permission, CPR 6.37(5)(b)(ii) allows the court to “*give permission for other documents in the proceedings to be served out of the jurisdiction*”.
- 114.2 Where proceedings are served out of the jurisdiction without permission, CPR 6.38 provides that “*where the permission of the court is required for the claimant to serve the claim form out of the jurisdiction, the claimant must obtain permission to serve any other document in the proceedings out of the jurisdiction.*” Implicitly, this seems to suggest that no such permission is required where proceedings are to be served out of the jurisdiction without permission.
115. The position where proceedings are served within the jurisdiction but subsequent applications have to be served out of the jurisdiction, or where the defendant submits to the jurisdiction, are not expressly addressed.
116. In our report for consultation, we proposed the introduction of a rule intended to replicate the regime of RSC Order 11 Rule 9(4) and apply it to all documents in the claim. The result of that would be to permit service of orders, applications and other documents on a defendant with permission, where permission was required to serve the claim form and without permission, where permission to serve out was not required.
117. In their response, the Law Society suggested that, instead, the right to serve such documents out of the jurisdiction on a defendant should follow automatically from permission to serve the claim being granted. On reflection, we agree.
118. The feature which justifies service of applications, orders and associated documents on a defendant out of the jurisdiction is the connection between those documents and the claim. That connection exists regardless of the circumstances in which the right to serve the claim form arose. Once a claim meets the legal test for service out, it is treated like any other claim, whether or not permission was required. It is therefore very difficult to envisage circumstances in which it would not be appropriate to serve associated documents where permission was required (and granted) to serve out the claim form. In those circumstances, we do not consider that the need for permission to serve out the claim form should result in an additional requirement for permission in respect of other documents. The right to serve out on the defendant orders, applications and other documents in proceedings should stand and fall with the right to serve out the claim form.

119. Dispensing with this requirement will also have considerable practical advantages. The number of cases requiring permission to serve out has risen sharply as a result of the UK's withdrawal from the EU. We therefore consider it would be sensible to streamline this aspect of civil procedure.
120. While this topic may fall outside the sub-committee's terms of reference, the sub-committee **proposes** the replacement of CPR rule 6.38 with a provision along the following lines:

“Any application notice issued or order made in any proceedings or other document which is required to be served in the proceedings may be served on a defendant out of the jurisdiction without permission where the claim form has been served on the defendant out of the jurisdiction with permission, or where permission is or was not required to serve the claim form (whether within or out of the jurisdiction).”

121. In addition, the sub-committee **proposes** the deletion of CPR rule 6.37(5)(b)(ii), which will require amendment of 6.37(5)(b) to read:

“it may give directions about the method of service.”

#### F.2 A cryptoasset gateway?

122. Given the sharp rise in cases related to cryptoassets, the sub-committee has considered whether the Rules would benefit from the introduction of a new gateway for claims relating to cryptoassets.
123. The Law Commission has recently announced its intention to consider the conflicts of law issues raised by cryptoassets,<sup>6</sup> and we understand that this review will include consideration of the jurisdictional issues raised by claims relating to such assets. In these circumstances, we have concluded that proposals for reform in this area are best addressed once the Law Commission has completed its work. We are, of course, happy to offer any assistance we can give to help them develop or implement their conclusions in this area.

#### F.3 A general gateway for applications against non-parties

124. In its consultation response, the Law Society suggested that there may be a case for a new gateway permitting service out of applications on non-parties. This would provide a solution to a problem which arises in particular in applications for charging orders. Rule 73.7 requires service of the interim charging order on various non-parties, some of whom may be situated outside the jurisdiction. There is no clear machinery permitting service out of such documents. The Courts have considered various solutions, none of which have been satisfactory.

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<sup>6</sup> <https://www.lawcom.gov.uk/project/conflict-of-laws-and-emerging-technology/>

125. We do not consider that a general rule permitting service of associated applications on non-parties can be justified, at least without significant further thought and consultation. The scope of such a rule would be very broad indeed. It would have the effect of reversing the House of Lords decision in *Masri v CCIC* [2009] UKHL 43, to the effect that CPR rule 6.30(2) (the then equivalent of rule 6.38) only permitted service out on parties and not on non-parties. The opposite conclusion was described by Lord Mance as “*a surprising result*”: [29].
126. In our view, the particular problem identified with charging orders could be addressed by a more targeted amendment to add the following provision to CPR Part 73:

“73(8) Where paragraphs (1) or (5) require service of the application notice, interim charging order and any documents filed in support of the application on a person who is outside of the jurisdiction, the permission of the court is not required for service.”

## **G Consultation**

127. The sub-committee has consulted with:
- 127.1 the Mance Committee;
  - 127.2 the Bar Council;
  - 127.3 the Law Society;
  - 127.4 the Association of High Court Judges;
  - 127.5 the Association of High Court Masters;
  - 127.6 the Council of Circuit Judges; and
  - 127.7 the Association of District Judges.
128. All of the feedback received has been carefully considered and, where appropriate, we have made changes to the proposals as a result. We are grateful for the careful and considered submissions of the consultation respondents.

### **Sub-Committee Members**

Tom Montagu-Smith QC      Chair, barrister member, Civil Procedure Rules Committee.  
Mr Justice Chamberlain  
Mr Justice Foxton  
Mr Justice Miles

Proposed PD6B amendments

John McQuater

Paul Lowenstein QC

Sam Goodman

Solicitor member, Civil Procedure Rules Committee.

Barrister

Barrister