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Brexit – legal consequences for commercial parties

English jurisdiction clauses – should commercial parties change their approach?

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Issue in focus

In our first Specialist paper on the legal consequences of Brexit for commercial parties, we considered the potential impact of Brexit on English governing law clauses. In this paper we assess whether a decision by the UK to leave the European Union would make English jurisdiction clauses less attractive to commercial parties.

The choice of court is of critical importance in commercial disputes. Where a party fights its battles can impact not only the length and cost of any proceedings but, more substantively, the reliability and enforceability of any resulting judgment.

The harmonisation of the rules applied by Member State courts in relation to jurisdiction and the enforcement of Member State court judgments in civil and commercial matters is widely considered to have been one of the most successful EU initiatives over the last 30 years. This assessment is arguably subject to one notable exception – the EU rules on related proceedings and associated "torpedo" litigation strategy – which we discuss further below (although following a revision to the relevant rules this tactic is now largely ineffective where there is an exclusive jurisdiction clause).

Under these harmonised rules (now set out in the Recast Brussels Regulation EU 1215/2015, (the **Recast**)) party autonomy in commercial contracts is generally respected. Further, under the Recast, Member State courts must recognise and enforce commercial judgments given in other Member States, subject to very limited exceptions. The application of these EU rules is overseen by the Court of Justice of the EU (**CJEU**) to ensure an autonomous interpretation of the instrument.

The certainty achieved by the harmonisation of these rules (and the rules on governing law) has enabled parties to assess litigation risk and price deals more accurately when negotiating commercial transactions. A commercial party can be confident that its English judgment is as likely as a local judgment to be recognised and enforced in the courts of 27 Member States. This harmonisation has also reduced the risk of having to litigate in multiple jurisdictions when disputes arise (although costly and time-consuming jurisdiction battles are still common).

There are, however, many other reasons why parties choose to litigate their disputes in the English courts which are entirely unconnected with the UK's membership of the EU, and these would be largely unaffected by any departure.

Overall, our view is that the possibility of Brexit should not lead parties to move away from including English jurisdiction clauses in their commercial contracts, save in a limited category of cases where enforcement is an issue (see further below). There are inevitably some nuances to this overall conclusion, however. There may also be circumstances when a dispute arises where parties may wish to adjust their litigation strategy. We discuss the reasons for our views below.

Analysis

Jurisdiction clauses – what is the current position?

English jurisdiction clauses are commonly included by commercial parties in cross-border contracts, often where parties have little or no connection with England. They are also included in industry standard documentation. There are many reasons why this is the case, including the fact that the English judiciary has a reputation for independence, commerciality, reliability and sophistication, the willingness of the English courts to uphold a choice of law made by commercial parties, the language and procedural certainty and, for parties transacting under English law, the fact that the courts will be applying their own national law to the dispute, such that there is no need to submit expert evidence as to English law and less risk that the law will be wrongly applied.

The current rules relating to the allocation of jurisdiction and the recognition and enforcement of judgments as between EU Member States are predicated on reciprocity. In relation to most civil and commercial matters, and where there is no insolvency, these rules are contained in the Recast. Under the Recast, party autonomy is front and centre. The recitals state expressly that, outside the insurance, consumer and employment contexts, party autonomy should be respected (subject only to very limited exceptions). Further, the substantive provisions of the Recast themselves require that, where parties to an agreement have included a jurisdiction clause in favour of a particular Member State court:

- that court will take jurisdiction over those proceedings; and
- the courts of the other Member States will respect that agreement and decline to hear those proceedings.

The Member States have also agreed that, if the same or related proceedings are commenced in more than one Member State court, any court other than the court "first seised" (ie the court where proceedings were commenced first in time) *must* stay those proceedings until the court first seised determines whether it has jurisdiction. These rules (or, more precisely, their application by the CJEU) have been fraught with controversy, resulting in the emergence of a popular litigation strategy for potential defendants known as "firing a torpedo". This tactic involves the initiation of proceedings in what is perceived to be a slow-moving jurisdiction before any proceedings are brought in the courts specified in the jurisdiction clause, effectively blocking progress of the claim on the merits in the contractually agreed court. However, the relevant rules are now subject to a helpful new proviso in the Recast which provides that if a court that is not first seised has jurisdiction pursuant to an exclusive jurisdiction clause, that court may continue to hear those proceedings.[1]

The Recast also requires Member State courts to recognise and enforce judgments given in the courts of other Member States (subject to very limited exceptions) via a simple administrative process.

Separately, the UK is also currently bound by the Lugano Convention 2007 (**Lugano Convention**). This Convention was entered into by the (then) European Community on behalf of Member States, with Denmark signing up separately. It imposes a similar (although not identical) regime in relation to jurisdiction and the recognition and enforcement of judgments as between EU Member States and Switzerland, Iceland and Norway.

There is also the Hague Convention on Choice of Court Agreements 2005 (**Hague Convention**), which was entered into by the EU on behalf of the Member States (other than Denmark) and which came into force as between those Member States and Mexico on 1 October 2015. For entirely intra-EU matters, the Recast prevails over the Convention. The Hague Convention provides a mechanism for the allocation of jurisdiction in cases where parties have agreed to an *exclusive* jurisdiction clause in favour of a Contracting State and for the recognition and enforcement of judgments rendered pursuant to such clauses as between Contracting States. It is anticipated that other states, including Singapore, will become Contracting States in the not-too-distant future and this Convention will become increasingly significant.

[1] It remains unclear whether the CJEU would construe an asymmetric clause binding one party to a chosen court as an "exclusive" jurisdiction clause for the purposes of the new proviso in the Recast.

What might change following Brexit?

It is theoretically possible that the UK and the EU will agree that the Recast will continue to apply on Brexit. If that happens, the current regime will continue and parties can continue to operate as they currently do when negotiating dispute resolution clauses and deciding where to commence proceedings (although see below in relation to the role of the CJEU).

In practice, however, it is unlikely that the status quo on jurisdiction and enforcement will remain entirely unchanged on Brexit. This is for three principal reasons:

- First, due to the reciprocity inherent in the Recast regime, it would not be possible for the UK to act unilaterally on Brexit to adopt legislation that has the same effect as the Recast. So, while the UK could, of course, impose obligations on its own courts to give effect to jurisdiction agreements in favour of courts within the Member States and to recognise and enforce judgments given in other Member States, the same obligations could not be imposed on other courts without their agreement.
- Secondly, even if one assumes a degree of co-operation on the part of Member States, it seems likely that agreeing to a reciprocal regime on jurisdiction and enforcement post-Brexit may be some way down their list of priorities (even if they are keen to ensure their local court judgments can be enforced easily against a defendant's UK assets). Moreover, it may not be in the interests of the other Member States to agree to such an approach. The economic benefit to a state of being the forum of choice for commercial parties has increasingly been recognised in recent years, leading to growth in competition between Member States seeking to attract litigants to their courts (for example, by introducing specialist commercial courts and/or permitting proceedings to be conducted in English). Post-Brexit, the courts of other Member States could seek to exploit any uncertainty to encourage parties to litigate in their courts rather than in England.
- Thirdly, assuming the UK would no longer be subject to the jurisdiction of the CJEU post-Brexit, there would be no mechanism for ensuring consistency of decision-making in relation to the terms of the Recast, even if it still applied (unless a special regime was put in place bringing the UK within the CJEU's jurisdiction in relation to matters covered by the Recast).

Assuming the Recast will not apply post-Brexit, the question that then arises is whether there is another regime that will apply and that could fill the gap in relation to jurisdiction clauses and enforcement of related judgments. The following points arise here:

- It is possible that the Brussels Convention, a predecessor to the Recast which the UK acceded to when it joined the EEC, may apply. Alternatively (or in addition) the Lugano Convention may be applied (although the UK may need to accede to the treaty formally and this would require consent).
- If neither of the above regimes applies, then the UK could fall back on the Hague Convention. However, as the reciprocity here applies only in cases where parties have agreed to an *exclusive* jurisdiction clause, it would not completely fill the gap left by the Recast's rules on jurisdiction clauses and judgments.[2] It seems the UK itself may have to sign the Hague Convention post-Brexit to ensure that the Convention will continue to apply.[3]
- Even absent a formal treaty-based regime requiring Member State courts to respect English jurisdiction clauses, it is not necessarily the case that Member States will refuse to recognise such clauses. Indeed, the Recast itself expressly permits Member State courts to decline jurisdiction in favour of non-Member State courts in certain limited circumstances (see Articles 33 and 34). Further, based on responses to Allen & Overy's 2015 Global Litigation Survey (**Survey**),[4] it seems likely that many Member States will continue to respect English jurisdiction clauses under their national law (in France and Germany for example).
- Post-Brexit we may also see the re-emergence of the anti-suit injunction, declared contrary to the principles of mutual trust between Member State courts by the CJEU in 2004. Where the courts of other Member States fail to respect an English jurisdiction clause, the English courts may feel uninhibited from issuing an anti-suit injunction

2 It would also presumably not deal with the position of Denmark, currently outside the Hague Convention.

3 It is currently party to the Hague Convention by virtue of the EU ratifying on behalf of all the Member States.

4 In 2015 we published an updated an expanded edition of the Global Litigation Survey: a survey of 161 jurisdictions, produced by the Allen & Overy Global Law Intelligence Unit and carried out by Allen & Overy's Litigation Department, together with global relationship firms. Click here to read our "taster" brochure.

against any party that commences proceedings in a Member State court in breach of an exclusive English jurisdiction clause, restraining the party in question from continuing those proceedings.

– The anti-suit injunction in the European context may also be revived in the arbitration sphere (the CJEU having ruled that the English courts must not issue such an order to protect a London arbitration in the infamous 2009 *West Tankers* decision).
– Service of process may become more complex. Litigants may not be able to take advantage of the provisions in the EU Service Regulation and may be required more regularly to get permission to serve proceedings out of the jurisdiction. These potential practical difficulties could be sidestepped by the inclusion of a process agent clause for non-English parties. Indeed this may have very limited impact given these clause are commonly included in most international commercial contracts.

Many Member States may also remain willing to enforce English judgments, albeit the process for doing so is likely to be less streamlined[5]. Responses to our Survey suggest this is likely to be the case in France, for example, but the Survey also suggests complexities may arise in other jurisdictions such as Slovenia, where reciprocity is required to enforce a foreign judgment.

What does this mean for you?

Negotiation of contracts

The fact that English jurisdiction clauses are (usually) respected throughout the EU and that judgments pursuant to such clauses are similarly easily recognised and enforced in all EU Member States increases the attractiveness of English jurisdiction clauses to commercial parties.

However, as indicated above, even if the Recast no longer applies post-Brexit, these factors do not necessarily fall away. It seems likely that many EU Member State courts will continue to respect English jurisdiction clauses and enforce English judgments, even in the worst case scenario where there is no formal reciprocal regime in place at all (a scenario which is unlikely to arise in practice, at least where *exclusive* jurisdiction clauses are concerned, given the effect of the Hague Convention). And many of the other reasons why commercial parties commonly choose to litigate in the English courts will be as compelling post-Brexit as they are today; the judiciary will continue to be commercial and reliable, and the linguistic advantages, procedural certainty and efficiencies of a choice of the English courts for parties transacting under English law will all remain, post-Brexit. Further, the approach of the English courts to determining governing law is unlikely to change significantly post-Brexit (see Specialist Paper No. 1).[6]

Post-Brexit, parties to asymmetric jurisdiction clauses may take comfort from English authorities upholding such clauses and worry less about the possibility that the CJEU might follow a series of decisions by the French Supreme Court to the effect that asymmetric jurisdiction clauses are unenforceable as a matter of European law.[7]

It is worth bearing in mind that some parties may need to revisit the drafting of their jurisdiction clauses where those clauses are drafted by reference to European legislation, such as the 1992 and 2002 ISDA Master Agreements.

As such, in the majority of cases, in our view parties do not need to revise their English jurisdiction clauses. A possible exception is where parties do not have an exclusive jurisdiction clause and are concerned about enforcement in certain Member States. In these circumstances parties may wish to include *exclusive* English jurisdiction clauses (so as to take advantage of the Hague Convention) or seek local law advice about whether enforcement is in fact likely to be possible in the relevant jurisdiction.

Litigation strategy

If, following Brexit, the UK was no longer party to the Recast, this could affect the litigation strategy followed by commercial parties when a dispute arises.

5 The UK had historically been party to a number of bilateral reciprocal enforcement arrangements with a number of Member States – see Foreign Judgments (Reciprocal Enforcement) Act 1933.

6 Although over time a degree of divergence may develop in the interpretation of those provisions, as the English courts would presumably not be required to construe the relevant principles autonomously or be bound by CJEU authority.

7 *Mme X v Rothschild* (2012) No 11-26.022 and *ICH v Credit Suisse* (2015) No.13-27264. The French Supreme Court did uphold an asymmetric clause, albeit one with a different formulation in *eBizcuss v Apple Sales International* (2015) No14-16.898.

Post-Brexit, if the Lugano Convention or the old Brussels Convention were to apply to the UK, and its rules were to take precedence over the Hague Convention intra EU, the need to commence proceedings quickly in the chosen court may re-emerge as a vital issue in the context of exclusive jurisdiction clauses in order to avoid a "torpedo" thwarting the progress of any litigation in the chosen court. This is because the helpful new proviso in the Recast that allows a court chosen in an exclusive jurisdiction clause to continue to hear proceedings, even if it is second seised, does not appear in either Convention, and the UK would presumably therefore be bound by the unreformed related action rules. There will also remain a need to move quickly where there is a non-exclusive and even an asymmetric jurisdiction clause.

However, if only the Hague Convention applies, then the need to commence proceedings quickly is reduced as the Convention does not require the chosen court to be first seised. It follows that if the English court is the chosen court there would be no impediment to it continuing to determine the dispute, even if related proceedings were already pending before a Member State court. As noted, for the Hague Convention to apply, however, a jurisdiction clause must be exclusive.

In cases where no formal reciprocal regime applies, the English courts are likely to decide whether to take jurisdiction based on common-law *forum conveniens* principles, and while the question of when proceedings were commenced will be a relevant factor in the English court's assessment of whether it is the appropriate forum, it will certainly not be determinative. As such, the "torpedo" would not be an issue in this scenario either.

Finally, as discussed above, on Brexit, anti-suit relief may be available to protect exclusive jurisdiction clauses. Such an order (or the prospect of such an order) may exert significant pressure on a party to comply with its contractual bargain on jurisdiction.

Postscript

For parties who are domiciled in the UK and who have not agreed a jurisdiction clause with a counterparty (either because their contract is silent or because there is no contract in place), the analysis as to where proceedings can be brought by or against the other party is likely to change post-Brexit.[8] The Recast rules on jurisdiction that apply where there is no jurisdiction clause are for the most part applicable only to parties domiciled in a Member State. The default rule is that, subject to exceptions, Member State parties are sued in the jurisdiction of their domicile. This is potentially an area where we will see significant divergence and fragmentation between regimes if, post-Brexit, no formal reciprocal jurisdiction regime is put in place between the UK and Member States. It may be that in these circumstances the English courts will simply revert to the common-law rules on jurisdiction, which vary in some material respects from the European regime.

Perhaps the message about the impact of Brexit is a familiar one, but the stakes are just higher – commercial parties should always include a jurisdiction clause in their contracts to reduce uncertainty. As to which courts should be specified in any jurisdiction clause, for the reasons outlined above, in our view there would not appear to be compelling reasons for parties to move away from a choice of English courts save where there is an enforcement risk. One way to address that enforcement risk may be to include *exclusive* English jurisdiction clauses (rather than say, asymmetric clauses) to allow enforcement under the Hague Convention. If this approach is not possible, local law advice may be helpful to assess the relevant enforcement risk in respect of an English judgment, and consideration of other options such as arbitration may be appropriate.

This article is one of a series of specialist Allen & Overy papers on Brexit. To read these papers as they become available, please visit: www.allenovery.com/brexit.

[8] The potential implications of Brexit on the planned Unified Patent Court is considered in a separate A&O Specialist Paper. Please get in touch with your usual A&O contact if you would like a copy.

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