

Brexit Essentials: Update on dispute resolution clauses

September 2017

This briefing is an update to our paper of November 2016. At that time we were guardedly optimistic about the prospects of preserving key elements of what is by common consent a valuable framework for the handling of cross-border disputes and the enforcement of judgments.

This is still our view. Although risks remain, more recent developments have brought greater certainty (or at least clarity) in key areas.

In this briefing

- A reminder of the key issues
- A summary of the UK and EU27's current negotiating positions
- Where do we go from here?
- What are the practical implications for business?

Key points

Until it leaves the EU, the UK is subject to pan-European rules which: (i) determine the law applicable to contractual and non-contractual obligations; (ii) determine which country's courts have jurisdiction over disputes; and (iii) provide for the reciprocal enforcement of judgments.

These rules will cease to apply to the UK on exit day. At the moment, this is 29 March 2019, although if the EU responds positively to the Prime Minister's 22 September 2017 proposal that, for the duration of a transitional period after that date, "access ... should continue on current terms", exit day could be pushed forward to the end of any such transitional period.¹

Both sides agree in principle on the terms of a transitional arrangement in this area which, if it can be formalised, would preserve the current regime for claims, jurisdiction agreements and judgments provided they were started, signed or made before exit day. The UK wants to go further and agree with the EU27, as soon as possible, a post-exit relationship which will mimic to a large extent the current regime.

The timing of discussions regarding any post-exit day agreement remains unclear. Currently, it remains possible that an agreement cannot be agreed in time for exit day. However, there are steps the UK has said it will take unilaterally; although these steps cannot replicate the current system, they will preserve important aspects of it.

Our assessment of the implications of this for commercial dispute resolution clauses is as follows:

- The current regime on **governing law** will be preserved post-exit. Contractual governing law clauses will continue to be upheld in the UK courts and in EU27 national courts as they are today.
- **Pre-exit jurisdiction agreements** in favour of the English courts (or the courts of EU27 states) are likely to be upheld post-exit in English (and EU27) courts as they are today, in accordance with the Recast Brussels Regulation.
- **Post-exit exclusive jurisdiction agreements** in favour of the English courts (or the courts of EU27 states) are likely to be upheld post-exit in English (and EU27) courts so long as they are compliant with the rules in the Hague Convention on Choice of Court Agreements.
- The position on **post-exit jurisdiction agreements** outside the scope of the Hague Convention is more complex and may form part of the ongoing negotiations under Article 50 of the Treaty on European Union (“TEU”).
- **Pre-exit judgments** of the English courts are likely to be capable of enforcement in the EU27 post-exit (and vice versa), probably in accordance with the current, straightforward process in the Recast Brussels Regulation.
- **Post-exit judgments** of the English courts on claims arising from exclusive jurisdiction agreements within the scope of the Hague Convention will be enforceable pursuant to the Convention across the EU27 (and vice versa). The scope for reciprocal enforcement of other post-exit judgments is narrower and may be expected to form part of the ongoing Article 50 negotiations.
- The rules on **arbitration** will not be affected by Brexit and, to the extent that issues of governing law arise in the context of an arbitration, the current regime will (as noted above) continue in force.

Introduction

As part of our Brexit Essentials series, in November 2016 we published a briefing on dispute resolution clauses.² Our view then was, subject to certain important reservations, optimistic.

Starting from the premise that the current EU regime on governing law, jurisdiction and enforcement is, broadly, a good thing for commercial parties, we considered that important parts of it could be preserved post-Brexit.

In some areas, maintenance of the status quo would require agreement between the UK and the EU27. While there were strong and mutually

applicable reasons for such an agreement, we also noted that there were steps which the UK could take unilaterally to preserve some important elements of the current regime.

Developments since last year mean that our view today is largely unchanged; if anything, we can be more certain in some areas.

The parties’ positions in the negotiations

Some eight months after the referendum result, the UK gave formal notice of its intention to leave the EU, triggering the two-year period anticipated by Article 50, TEU. Terms of reference for a first phase of negotiations, focusing on the details of

the divorce rather than a new relationship, were settled in June and the first of five negotiating rounds began in Brussels.

Most importantly for present purposes, the parties agreed that issues relating to civil justice co-operation would be included in the agenda for these initial negotiations. The centrality of these issues is welcome (even if it has also showcased the differing approaches of the UK and the EU27 to the negotiations):

- The EU27's paper, sent to the UK in July 2017, was confined to matters which would need to be dealt with in any Withdrawal Agreement. To that end, the EU proposed a long tail for the current regime: legal claims begun, judgments handed down, or jurisdiction agreements signed before the day of exit would continue to be treated, in the UK and the EU27, in accordance with EU law as it stands at exit day.
- The UK's paper, published in August 2017, proposed a new relationship in terms similar to the present one. To the extent that required agreement, the UK called on the EU27 to negotiate now. If no agreement was possible, the UK accepted in principle the EU27's July divorce proposal. But in any event, where the status quo could be maintained or approximated unilaterally, the UK confirmed that this would be done.

Where do we go from here?

Many in business will share the UK's desire for an early agreement on a future civil justice framework. If the UK's vision of a transitional period is accepted, there may be more time than originally anticipated to reach agreement on the EU and the UK's future relationship in this area. As we go into the fourth round of negotiations, there are a number of reasons to be optimistic:

- The parties are, in principle, agreed on the shape of a theoretical transitional arrangement that would preserve the

application of the Recast Brussels Regulation in claims issued before exit day, judgments handed down before exit day, and - perhaps most importantly - jurisdiction agreements entered into before exit day. These provisions would assure the Recast Brussels Regulation a long future in English-litigated claims.³

- The UK has confirmed that it will take all the steps open to it unilaterally to preserve key aspects of the current regime. While not unexpected, this gives welcome clarity and certainty.
- Some important stumbling blocks to a comprehensive new agreement have been removed. Most notably, the UK government has signalled that its commitment to ending the jurisdiction of the European Court of Justice ("CJEU") in the UK would not prevent it from accepting an alternative model for the harmonious interpretation of international instruments. Specifically, the UK says it wants to continue to participate in the Lugano Convention, pursuant to which the courts of non-EU contracting states are bound to "pay due account" to the rulings of the CJEU.

What are the practical implications for business?

Governing law clauses will continue to be upheld as they are today

Although the current law is a product of the EU, the way that law works means it is possible for the UK to convert it into UK domestic law and for it to continue to have the same effect, both in the UK and the EU27, even after exit day. The UK government has confirmed that this is what it proposes to do. This news will be welcomed by business: the mere fact of Brexit will not necessitate the adoption of new governing law clauses in contracts agreed going forward.

Exclusive jurisdiction agreements, both pre- and post-exit, are likely to be upheld post-exit in the UK and the EU27...

There are at least two means by which jurisdiction agreements in favour of the English courts are likely to be upheld post-exit, both in England and in the courts of the EU27:

First, agreements giving the English courts exclusive jurisdiction in civil and commercial matters will be capable of falling within the Hague Convention on Choice of Court Agreements. All the member states of the EU are, virtue of their EU membership, bound by this Convention and the UK will become a party in its own right on or before exit day. The Convention provides that courts of contracting states are bound to uphold qualifying exclusive jurisdiction agreements when claims based on such agreements come before them. In this respect it mirrors the effect of the Recast Brussels Regulation. Because the UK has confirmed it will accede to the Convention in its own right, exclusive jurisdiction agreements entered into both before and after exit should benefit from its provisions.

Second, it is likely that any Withdrawal Agreement will provide that jurisdiction agreements (exclusive or not) that are entered into before exit day will, when they come before EU27 and UK courts after exit day, be treated in accordance with EU law as it stands at exit day - i.e. the Recast Brussels Regulation.

The upshot is that English jurisdiction clauses can and will remain a viable choice for commercial parties in the run up to, and after, exit day. The wider legal changes wrought by Brexit will not, on their own, constitute a reason to avoid or alter a choice of English jurisdiction. However, as explained below, it is necessary to think now about the formulation of jurisdiction clauses to maximise their chances of being respected.

...but businesses need to consider whether their jurisdiction clauses are fit for purpose

While any Withdrawal Agreement is likely to protect jurisdiction clauses included in agreements made up until exit day, there is no certainty that the UK and the EU27 will be able to agree a new relationship which continues the essence of the current arrangement for post-exit jurisdiction agreements.

Hence the importance of the Hague Convention on Choice of Court Agreements. Because it applies to the UK and the EU27 now and will continue to do so after exit day (in the case of the UK, by virtue of its accession in its own right), jurisdiction agreements that fall within its scope will continue to be upheld reciprocally, even if they are made after exit day.

So what falls within the Convention's scope? The answer is (in summary) written agreements in civil and commercial matters by which the parties designate the court(s) of one of the contracting states, to the exclusion of all other states' courts, to hear disputes arising from their legal relationship.⁴ There are two particular points to highlight.

First, the Convention's definition of an exclusive jurisdiction agreement is, on the face of it, narrow. Perhaps most notably, it may not include asymmetric, or one-sided, jurisdiction clauses.⁵ This type of clause, common in financing transactions, requires one party to bring proceedings exclusively in the courts of one state but allows the other a flexibility to bring proceedings in any court of competent jurisdiction. As yet, there is no case law, at least in England, on the question of whether the Convention applies to such clauses (although in the one decision that touched tangentially on the point, the judge left open the possibility that the Convention could, in fact, apply to asymmetric clauses⁶).

This uncertainty is not helpful, but it is worth remembering that the situation is not new: the same question arises in respect of the Recast Brussels Regulation. English courts have held that asymmetric clauses can be exclusive jurisdiction agreements under the Regulation, and commercial parties may derive some comfort for the future from this hitherto pragmatic approach.

It is worth noting, though, that the matter could ultimately come before the CJEU, sometimes perceived as a less commercial forum. That will be relevant to parties in the UK even after exit and even in the absence of any continued application in the UK of the Recast Brussels Regulation. This is because, in the EU, the CJEU is the ultimate arbiter on the interpretation not only of the Regulation, but of the Hague Convention too. Because the UK will be a signatory to the Convention, its courts will be bound to consider relevant decisions of the courts of other signatories and “the need to promote uniformity in [the Convention’s] application”.⁷

Second, the state whose courts are given exclusive jurisdiction must have been a contracting party to the Convention at the time the jurisdiction agreement was made. The contracting states are the (current) member states of the EU, Singapore and Mexico. The Convention came into force in the EU and Mexico on 1 October 2015 and in Singapore on 1 October 2016. So it is clear that agreements which predate 1 October 2015 will not be capable of falling within the Convention where the nominated court is in the EU (including the UK). The UK government will also be keen to take steps to avoid the existence or perception of a temporal “gap” in the Convention’s application to the UK as it moves from adhesion by virtue of EU membership to adhesion in its own right.

English judgments handed down pre-exit will likely be enforceable in the EU27 post-exit as they are today (and vice versa)

The UK agrees with the EU27’s position that any Withdrawal Agreement should provide for the Recast Brussels Regulation to continue to apply post-exit to judgments given pre-exit. So, although the UK would like a more comprehensive agreement with the EU27, there is at least the likelihood of a safety net for pre-exit-day judgments in the event that such an agreement is not immediately possible.

And there are means by which judgments handed down post-exit will also continue to be enforceable across the EU27 (and vice versa)

The Hague Convention is again important. Judgments in claims flowing from exclusive jurisdiction agreements within the scope of the Convention are enforceable in all other contracting states. The bases on which recognition and enforcement can be resisted are broader than under the Recast Brussels Regulation, but the process is valuable nonetheless.

In addition, there remains a network of bilateral treaties for the enforcement of judgments. These pre-date the UK’s membership of the EU and are likely to survive it (at least where enforcement is sought of a relevant foreign judgment in the UK). But there are significant limitations: the number of countries with whom treaties exist is small⁸; enforcement extends only to money judgments; there are various means by which enforcement can be resisted; and it is not clear how or whether Brexit will affect the implementation of the treaties in the other countries concerned.

¹ Mrs May indicated that, during the transitional period, citizens and businesses should enjoy a “double-lock” guarantee that existing arrangements will continue and that they will do so for a time-limited period. A two-year transitional period is currently envisaged, but Mrs May also noted that the transitional arrangement could end earlier in particular areas if agreement is reached.

² <http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/newsletters-and-briefings/brexit-essentials/brexit-essentials-dispute-resolution-clauses/>

³ In a welcome comment on the EU27 position, the UK proposes in its August 2017 paper that post-exit judgments given in proceedings arising from pre-exit jurisdiction agreements should also be enforceable pursuant to the Recast Brussels Regulation.

⁴ Note also the list of matters in Article 2 to which the Convention does not apply - e.g. insolvency, anti-trust or arbitration matters.

⁵ The authors of the explanatory report which accompanies the Convention conclude that the Diplomatic Session did not intend that asymmetric clauses should be exclusive jurisdiction clauses for the purposes of the Convention.

⁶ Commerzbank AG v Liquimar Tankers Management Inc [2017] EWHC 161 (Comm) at [74]. This decision has been appealed.

⁷ Article 23, Hague Convention on Choice of Court Agreements.

⁸ Austria, Belgium, France, Germany, Italy, the Netherlands and Norway.

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