

Brexit Essentials

Jurisdiction agreements: new developments

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Recently published changes to the draft Withdrawal Agreement would mean that the Recast Brussels Regulation will not apply to English exclusive jurisdiction agreements, even if they were entered into before Brexit. Absent further agreement, such clauses will likely only be upheld by EU27 courts post-Brexit if they are caught by the Hague Convention on Choice of Court Agreements. Corporates should be aware that there are small but important differences between the current EU regime and the Convention.

Why jurisdiction agreements are important and how they are upheld

Jurisdiction (or choice-of-court) agreements allow contractual counterparties to specify which country's courts they want to deal with disputes that arise between them. Where they have specified the courts of an EU member state, EU rules mean that the courts of other member states will defer to the specified court. That usually means that only one country's court - the one chosen by the parties - deals with disputes. That often saves time and money in litigation.

The relevant EU rules are in the Recast Brussels Regulation ("Brussels Recast"). They also provide that the judgment of an EU court nominated in a

Key points

A [Joint Statement](#) recently issued by EU and UK negotiators amends the draft Withdrawal Agreement. Jurisdiction agreements signed prior to 31 December 2020 would not, after that date, be treated by EU27 courts in accordance with the Recast Brussels Regulation.

In most circumstances, this will not mean any changes to English jurisdiction clauses.

The Hague Convention, which the UK has said it will sign up to in its own right, is in key respects similar to Brussels Recast - but there are some differences of which corporates should be aware.

jurisdiction agreement will be enforceable across the EU. Unless the UK and EU can agree otherwise, Brussels Recast will, after exit day on 29 March 2019, no longer require EU27 courts to uphold agreements submitting disputes to the English courts, nor provide a route for enforcing English judgments flowing from such agreements.

Brussels Recast, and the extent to which it will protect jurisdiction clause and judgments concluded before the end of the proposed transition period, is proposed to be addressed in the Withdrawal Agreement.

The UK is also pushing for a comprehensive new agreement which would replicate Brussels Recast as part of its agreement on a future relationship with the EU. As things stand (and assuming the Withdrawal Agreement is signed), the extent of this agreement is not likely to become clear until some point during the transition period.

Jurisdiction agreements were protected in early drafts of a Withdrawal Agreement

In earlier drafts of the Withdrawal Agreement, the EU had proposed that jurisdiction agreements signed before the end of the proposed transition period would be grandfathered, meaning they would be upheld by EU27 courts in accordance with Brussels Recast.

Until a new (final) draft excluded them

On 19 June 2018, the UK and EU issued a Joint Statement announcing agreement on the section of the draft Withdrawal Agreement which deals with Brussels Recast. The material change, an unexpected and unexplained development, is the deletion of the sub-clause relating to the grandfathering of jurisdiction agreements.

What are the implications of this?

Assuming the position set out in the Joint Statement is final, the effect of pre-December 2020 jurisdiction clauses will be the same whether or not a Withdrawal Agreement is signed: courts in the EU27 will not, post-exit (or after the end of transition), be required to uphold jurisdiction agreements in favour of the English courts in accordance with Brussels Recast.

This does not mean that jurisdiction agreements will not be upheld. The EU's member states (including the UK) are currently bound by the Hague Convention on Choice of Court Agreements ("Hague") by virtue of their membership of the Union. After exit, the UK can (and has confirmed it will) accede to Hague in its own right.

If a jurisdiction agreement falls within the scope of Hague - to which the UK will still be subject -

A continuing role for Brussels Recast in other areas

Unless the UK is able to make further progress in negotiations, Brussels Recast will not protect jurisdiction agreements in favour of English courts before EU27 courts. However, if the Withdrawal Agreement is signed in its current form, Brussels Recast will live on in certain important respects.

Legal proceedings begun in the UK and EU27 before 31 December 2020 will, after that date, continue to be treated in accordance with Brussels Recast.

Judgments of UK and EU27 courts handed down in proceedings begun before 31 December 2020 will, after that date, continue to be enforceable in accordance with Brussels Recast. It will not matter if the judgment itself is not given until after 31 December 2020.

EU27 courts should still uphold them and defer to the English courts.

Will the Hague Convention apply? How does it differ from Brussels Recast?

The Hague Convention mimics many of the most important features of Brussels Recast: as a general rule, the courts of contracting states are bound to uphold exclusive jurisdiction clauses which nominate one of those contracting states. The resulting judgments are then enforceable in all the contracting states.

For the most part, exclusive jurisdiction agreements which qualify for protection under Brussels Recast will also be caught by Hague. Four key areas are considered below.

- Subject matter scope: both Hague and Brussels Recast apply only to civil and commercial matters. Both exclude arbitration, insolvency and family law. However, Hague additionally excludes competition law claims, tort claims, consumer contracts and many insurance contracts.
- Exclusive jurisdiction: where an agreement confers jurisdiction on the courts of a particular Hague or Brussels Recast state, as the case may be, both instruments require other contracting states' courts to defer to the chosen court.
- Temporal scope: Hague applies only to agreements concluded after its entry into force in the state whose courts are, by the agreement, given exclusive jurisdiction - 1 October 2015 for the 28 EU member states. Under Brussels Recast the date of legal proceedings, not the date of the agreement is what matters; proceedings must have begun on or after 10 January 2015.
- Domicile of the parties: under both Hague and Brussels Recast the domicile of the parties to the agreement is irrelevant.

There are, however, risks in using Hague:

- Limited practical experience Hague is a new instrument which has not yet been tested in the courts.
- A gap in coverage? At the moment, Hague applies to the UK because it is an EU member state. Post-exit, the UK will accede in its own right. Will jurisdiction agreements that were signed during the UK's first period of accession to Hague still be protected when the UK re-accedes? The weight of opinion is that they will be, but the matter is not settled; a timely resolution must be a key objective for the UK Government.
- Asymmetric jurisdiction clauses: There is doubt as to whether asymmetric jurisdiction clauses of the kind common in financing documents (i.e. where one party is compelled to sue in one country while the other has a freedom to sue wherever it can) fall within the definition of exclusive jurisdiction agreements protected by Hague. Similar uncertainty exists in certain EU jurisdictions under Brussels Recast, although the current view of the English courts is that asymmetric clauses are within its scope.

Should I still use an English jurisdiction clause?

In many cases, the answer remains yes:

- **Is there a nexus with the EU27?** Are any of the parties likely to wish to begin proceedings or to enforce any resulting judgments in the EU27? If not, the issues discussed in this briefing may be of little relevance.
- **Take advantage of the Hague Convention.** Is Hague capable of applying to the subject matter of a potential dispute? In many civil and commercial cases it will.
- **Consider whether an arbitration clause would be appropriate.** Arbitration clauses, the arbitral process and arbitration awards will not be affected by Brexit. But corporates should assess the merits and demerits of arbitration according to their particular circumstances.

None of this affects a choice of English law as a governing law for contracts. Brexit will not alter the current rules, in the EU27 or the UK. English law governing law clauses will be upheld post-Brexit as they are today.

None of this affects the strengths of London as a centre for dispute resolution. The English courts provide reasoned, transparent, authoritative and timely decisions from a body of globally-respected, expert judges. A formidable ecosystem of lawyers and other professionals advises and supports users of English courts and English law more broadly.

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